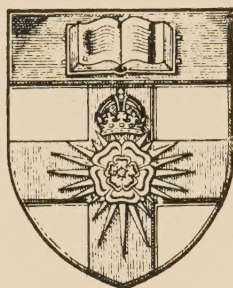


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Editor

G. F. L. BRIDGMAN, Esq.
of the Middle Temple, Barrister-at-Law

Assistant Editors

O. M. W. SWINGLAND, Esq.
of Gray's Inn, Barrister-at-Law

HENRY SUMMERFIELD, Esq.
of Gray's Inn, Barrister-at-Law

G. A. KIDNER, Esq.
of the Middle Temple, Barrister-at-Law

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THE ALL ENGLAND LAW REPORTS REPRINT

RECKITT v. BARNETT, PEMBROKE AND SLATER, LTD.

[HOUSE OF LORDS (Lord Hailsham, L.C., Viscount Dunedin, Viscount Sumner, Lord Carson and Lord Warrington), October 15, 16, November 12, 1928]

[Reported [1929] A.C. 176; 98 L.J.K.B. 136; 140 L.T. 208; 45 T.L.R.36;
34 Com. Cas. 126]

Power of Attorney—Exercise for agent's own purposes—Authority to draw cheques "without restriction"—Cheque drawn by agent, as attorney, to pay private debt—Notice to agent's creditors—Right of principal to recover amount of cheque.

On Feb. 9, 1915, the plaintiff gave a power of attorney in favour of T., as his attorney, "to do all or any of the following things in my name and on my behalf." Then followed a long list of kinds of business which might be transacted under that power. The list given did not include the power to draw cheques on the plaintiff's banking account, and on Aug. 17, 1915, the plaintiff wrote a letter to his bankers stating that, referring to the power of attorney which he had given in favour of T., and which had been inspected by the bank, he, the plaintiff, wished the power to cover the drawing of cheques upon the bank by T. "without restriction." In Jan., 1926, T. bought a motor car, in his own name, from the defendants, on a hire-purchase agreement, and, without the knowledge of the plaintiff, paid the second instalment on it by a cheque for £200 dated Feb. 6, 1926, and signed "Sir Harold Reckitt, Bt., by Terrington, his attorney." All the words except "Terrington" were impressed by a rather faint rubber stamp.

Held: on construction, the letter must be read in conjunction with the power of attorney, and, when it was so read, the whole authority was seen to be expressly limited to acts done for the appellant in the management of his affairs, the words "without restriction" (which meant without limit of amount, or that the bank should have no concern with what the cheques were drawn for, or that the cheques should be free from the restrictions in the power of attorney, or could be drawn in an unrestricted form so far as possible) not entitling T. to draw on the appellant's account for any purpose outside that limitation, e.g., for his own purposes; the respondents knew that the debt which was being paid was that of T. and not of the appellant, and, by the form of the cheque, had notice that T. was signing the cheque as an attorney; and, therefore, the appellant was entitled to recover the £200 from the respondents.

Hambro & Son v. Burnand (1), [1904] 2 K.B. 10, distinguished.

Decision of Court of Appeal, [1928] 2 K.B. 244, reversed.

Notes. Applied: *Midland Bank, Ltd. v. Reckitt*, [1932] All E.R. Rep. 90. Referred to: *Lloyds Bank v. Chartered Bank of India, Australia and China*, [1929] 1 K.B. 40; *Slingsby v. District Bank, Ltd.*, [1931] All E.R. Rep. 143; *Nelson v. Larkholt*, [1947] 2 All E.R. 751.

As to the liability of a principal for the acts of his agent, see 1 HALSBURY'S LAWS (3rd Edn.), 160 et seq., 208 et seq.; and for cases see 1 DIGEST 295 et seq., 562 et seq.

Cases referred to:

- (1) *Hambro & Son v. Burnand*, [1904] 2 K.B. 10; 73 L.J.K.B. 669; 90 L.T. 803; 52 W.R. 583; 20 T.L.R. 398; 48 Sol. Jo. 369; 9 Com. Cas. 251, C.A.; Digest Supp.
- (2) *John v. Dodwell & Co., Ltd.*, [1918] A.C. 563; 87 L.J.P.C. 92; 118 L.T. 661; 34 T.L.R. 261, P.C.; 43 Digest 535, 705.
- (3) *A. L. Underwood, Ltd. v. Bank of Liverpool and Martin's, Same v. Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 40 T.L.R. 302; 68 Sol. Jo. 716; 29 Com. Cas. 182, C.A.; Digest Supp.
- (4) *Corpn. Agencies, Ltd. v. Home Bank of Canada*, [1927] A.C. 318; 96 L.J.P.C. 63; 136 L.T. 643, P.C.; Digest Supp.

Appeal from an order of the Court of Appeal (SCRUTTON and SANKEY, L.JJ.; RUSSELL, J., dissenting) (reported [1928] 2 K.B. 244).

The plaintiff, Sir Harold J. Reckitt, claimed a declaration that he was entitled to recover from the defendants the sum of £200, being the proceeds of a cheque dated Feb. 5, 1926, drawn by Lord Terrington as the plaintiff's attorney to the order of the defendants on the plaintiff's account at Barclays Bank at Hull and wrongfully and fraudulently paid by Lord Terrington to the defendants in respect of a personal transaction between the defendants and Lord Terrington, and damages for conversion. The defendants contended that Lord Terrington had authority to draw the cheque in question, that they gave value for it in good faith and became holders in due course and that they were not guilty of any conversion.

On Feb. 9, 1915, the plaintiff being minded to go to France, gave a power of attorney to Lord Terrington (then Mr. Harold Woodhouse), which was in the following terms:

"1. To endorse or sign my name to any cheque dividend or interest warrants or other instruments payable to me. 2. To give renew or withdraw authorities or directions to any bankers or other persons or corporations which I would myself give renew or withdraw. 3. To demand sue and receive or prove for in any proceedings whatsoever any money or other property now or hereafter belonging to me and to take and defend all other legal proceedings in which I may be interested. 4. To let and manage all property now or hereafter belonging to me and receive and enforce payment of the rents thereof and make any arrangements with tenants. 5. To settle or compromise or otherwise deal with all actions claims proceedings accounts and disputes relating to my property or affairs and to pay any money and execute any documents in respect thereof which my attorney shall think fit. 6. To invest any money belonging to me in such investments as my attorney shall think fit. 7. To enter into any contract for sale or mortgage or letting or leasing of any part of my estate and to deal with any moneys received on account of such contract in such manner as my attorney shall think best for my benefit. 8. To engage and dismiss any servants agents or other persons employed by me whether in or about any or either of my dwelling-houses or otherwise in relation to any of my estates and to increase or alter the wages or remuneration of all or any such servants agents or other persons and vary the terms and conditions of their employment as my attorney shall think fit. 9. To enter into any contracts or arrangements which my attorney shall think fit and to vary and put an end to any contracts or arrangements. 10. Generally to act in all respects in relation to my estate or affairs and also in relation to the estate or affairs of other persons for whom I am and may become a trustee executor administrator or agent or have to act in any fiduciary capacity so far as my duties in relation to such last mentioned estates or affairs can be deputed to an attorney with as full and ample powers and in the same manner as I could myself act. 11. For any of the purposes aforesaid to sign and execute all documents papers books and

A accounts which shall be necessary or my attorney shall think fit. 12. And in particular and without limiting any of the powers hereinbefore given to execute conveyances of any of my property at Brigg in the county of Lincoln. And I declare that this power of attorney shall be irrevocable for twelve calendar months from the date hereof."

B In the following August, the plaintiff's bankers, Barclays Bank at Hull, pointed out that the power of attorney did not authorise the attorney to draw cheques on the plaintiff's account. This was brought to the knowledge of the plaintiff, who thereupon wrote a letter dated Aug. 17, 1915, to Barclays Bank, which was as follows:

C "Dear Sirs,—Referring to the power of attorney which I have given in favour of Mr. Harold James Selborne Woodhouse and which you have inspected, please note that I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse without restriction.—Yours faithfully, (signed) Harold J. Reckitt."

On Jan. 4, 1926, Lord Terrington entered into a hire-purchase agreement with the defendants for the purchase of a motor car for his own use. On Feb. 5, 1926, Lord Terrington drew a cheque upon the plaintiff's bank payable to the order of the defendants for £200 signed "Sir Harold J. Reckitt, Bt., by Terrington, his attorney," in payment of an instalment of the purchase price. That cheque was drawn without the knowledge or sanction of the plaintiff, and it was in respect of that cheque that the action was brought. In June, 1926, the defendants regained possession of the motor car on payment of £100 to Lord Terrington.

E The Court of Appeal held, reversing the decision of ROWLATT, J. (RUSSELL, J., dissenting), that, as the act done by Lord Terrington of drawing a cheque on the plaintiff's banking account was warranted by the terms of the power of attorney, as extended by the letter of Aug. 17, 1915, it was immaterial that in fact he was abusing the power by using it for his own purposes. The apparent authority was the real authority. The expression "without restriction" did not mean merely without restriction as to amount, nor was the power of drawing cheques limited to cheques drawn in relation to the plaintiff's affairs. The person to suffer from the plaintiff's misplaced confidence in Lord Terrington must be the plaintiff himself, who allowed Lord Terrington to sign cheques without restriction, and not innocent third parties who took the cheques. The plaintiff appealed.

Schiller, K.C., and *H. G. Robertson* for the appellant.

W. A. Greene, K.C., and *Austin Farleigh* for the respondents.

G The House took time for consideration.

Nov. 12. The following opinions were read:

LORD HAILSHAM, L.C.—This is one of that unfortunate class of cases in which the courts have to decide which of two innocent parties is to suffer for the fraud of a third party.

H For many years past the appellant, Sir Harold Reckitt, appears to have known and trusted a solicitor, originally known as Woodhouse, but who later succeeded to the title of Lord Terrington, by which name I shall refer to him in this judgment. In the year 1915 the appellant was going to France to assist in Red Cross work and gave to Lord Terrington a power of attorney dated Feb. 9, 1915, to enable the latter to manage the appellant's affairs while he was in France. Lord Terrington lodged this power of attorney with the appellant's bank in order that he might draw cheques upon the appellant's account, but on July 31, 1915, the bank wrote to Lord Terrington pointing out that the power of attorney did not in their view authorise the drawing of such cheques and suggesting that the appellant should write to them stating that he wished the power to cover the drawing of cheques upon them by Lord Terrington "without restriction." In response to that letter Lord Terrington obtained for the bank a letter addressed to the bank and signed by the appellant in these terms:

"Dear Sirs,—Referring to the power of attorney which I have given in favour of Mr. Harold James Selborne Woodhouse and which you have inspected, please note

that I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse without restriction." A

This letter was dated Aug. 17, 1915, and ever since that date it has remained in the possession of the bank. In December, 1925, the appellant went to India and again desired Lord Terrington to act as his attorney. A further power was prepared and executed, but apparently was never used, and it is common ground between the parties that this case must be decided on the footing that it is governed by the authority conferred by the documents of 1915. B

The respondents are a firm of motor car dealers, from whom Lord Terrington had bought a Daimler motor car some time before the transaction giving rise to the present dispute, and with whom he had an account for garage and for incidental supplies for that car. The respondents had never dealt with the appellant and knew nothing of him. C
On Jan. 4, 1926, an arrangement was made between the respondents and Lord Terrington for the purchase by the latter of a Rolls-Royce car on hire-purchase terms under which the respondents took the Daimler car in part payment of the purchase price, and Lord Terrington agreed to pay £350 down, and thereafter to pay £2000 by monthly instalments of £175 each. By the agreement Lord Terrington undertook to retain the car in his own possession; it was provided that if Lord Terrington made default in any monthly payment, or if he died, or had a receiving order made against him, or made any arrangement or composition with his creditors, the respondents should have the right to re-take possession of the car; when all the instalments had been paid Lord Terrington had the option of purchasing the car for 10s., and it was expressly provided that the agreement was personal to Lord Terrington and not assignable by him. The agreement was obviously drawn up on the footing that Lord Terrington and no one else was interested in the transaction, and it is common ground that the transaction was one made by Lord Terrington personally as principal, and that the respondents always so regarded it. D
On Feb. 5, 1926, Lord Terrington drew and issued to the respondents a cheque of £200, of which £175 was the first monthly instalment of hire under the agreement and £25 was on account of the running account for garage and petrol for the Daimler car for the preceding eight months. The cheque was made payable to the respondents or order and was signed: "Sir Harold J. Reckitt, Bart., by Terrington his attorney." All the signature except the word "Terrington" was affixed by a rubber stamp, the word "Terrington" being written in ink by Lord Terrington. The cheque was endorsed and paid in by the respondents to their own banking account and was duly honoured by the appellant's bank. The respondents made no inquiry as to the authority of Lord Terrington to draw a cheque on the appellant's banking account. They appear not to have noticed the rubber stamp impress and to have treated the cheque as if drawn by Lord Terrington on his own account. E
On June 9, 1926, the respondents agreed with Lord Terrington to cancel the hire-purchase agreement and to take back the Rolls-Royce car and to pay him £100, and this transaction was duly carried out on the same day. Early in July the appellant ascertained that frauds had been committed by Lord Terrington, and this action was commenced to recover from the respondents the £200 which they had received as the proceeds of the cheque. The action was tried before ROWLATT, J., and the appellant recovered judgment, but the Court of Appeal by a majority (RUSSELL, J., dissenting) reversed the decision of the trial judge; from that reversal this appeal is brought. F
G
H

It is common ground that nothing turns upon the fact that the cheque was a negotiable instrument, since the respondents were the original payees. It is common ground also that the fact that the respondents made no inquiries as to Lord Terrington's authority and that they overlooked the form of the signature makes no difference in their position; they had on the cheque plain notice that they were receiving the appellant's money, and they can be in no better position than if they had then asked to see and had been shown the authority under which Lord Terrington was acting. Nor is there in this case any question of ostensible authority or any holding out by the appellant of Lord Terrington, since the respondents do not profess to have acted upon any such holding out. It is a simple case of receipt by the respondents of the appellant's money, with the knowledge I

A that it was the appellant's money, in payment of Lord Terrington's debt. In order to succeed the respondents must show that Lord Terrington had in fact authority to use the appellant's money in payment of his, Lord Terrington's, private debts. I assume for the purpose of my judgment that the letter of Aug. 17 must be treated as a general extension of the power of attorney and not merely as an instruction to the bank. The question, then, is whether the power of attorney plus the letter did give Lord Terrington authority to use the appellant's money for the purpose of paying his private debts. This is purely a question of construction. It is plain that the letter has to be read in conjunction with the power of attorney to which it expressly refers; when so read it seems to me that the whole authority is expressly limited to acting for the appellant and in the management of his affairs; and I cannot construe the addition of the words "without restriction" as entitling Lord Terrington, when he is drawing cheques on the appellant's account, to do so for any other purpose except for the discharge of the appellant's debts or in the conduct of his business.

C Reliance was placed before your Lordships on *Hambro & Son v. Burnand* (1). In my judgment, that case is plainly distinguishable. In that case Mr. Burnand had been given a power of attorney to enable him to underwrite at Lloyd's certain risks for his principals; it was expressly found that the risks which he did in fact underwrite were those which it was in the ordinary course of the business of an underwriter at Lloyd's to underwrite. Burnand in fact underwrote the particular risks in question in the action in order to assist a company in which he was financially interested. In these circumstances the Court of Appeal held that the act done by Burnand was within the actual authority conferred upon him, although his motive in doing the act was to benefit himself and not his principals; and, accordingly, they held that the principals were bound by Mr. Burnand's act. In the present case the act which is challenged was the issue to the respondents of a cheque drawn on the appellant's account in payment of Lord Terrington's private debt; in my view this was not within the authority conferred upon Lord Terrington by the power of attorney and the appellant is not bound by it. The case is really on all fours with *John v. Dodwell & Co., Ltd.* (2), and, in my judgment, ROWLATT, J., was right in following that case. The judgment of RUSSELL, J., appears to me quite accurate in its reasoning and in its conclusions; but for the fact that I am differing from the majority of the Court of Appeal I should have been content to adopt it as my own. I am of opinion that this appeal succeeds. I move accordingly.

G **VISCOUNT DUNEDIN.**—I concur. There are a large number of cases dealing with the same sort of question as is raised here, namely, whether a principal is bound by the act of his agent. I do not, however, think it would be of service to examine and analyse them. Various propositions could be collected from them, but whether a general formula applicable to all circumstances could be hit on I rather doubt. Each case, after all, does depend on its own circumstances and that is how I prefer to deal with this one. The facts have been stated by the Lord Chancellor and I do not recapitulate them.

H Two leading facts, to my mind, are these. First, that the respondents knew perfectly well that the debt for the car was for a car which had been purchased by Terrington on his own behalf—part of the price being met by the surrender of an old car of his own; and, second, that on the face of the cheque which they received they saw two things, (i) that it was Reckitt's account which was being drawn on, not Terrington's; (ii) that Terrington ascribed his power to draw on that account to his position as Reckitt's attorney. The respondents made no further inquiry. They took the cheque for what it was worth. After all, that is what everyone does when he takes a cheque; for all he knows the cheque may come back again with "no assets" written on the face of it. That is why extra prudent tradesmen often put as a receipt for an account "paid by cheque." The respondents, not having made any inquiry, cannot be in a better position than if they had made inquiry. The inquiry would necessarily be whether the drawing and handing over of a cheque on Reckitt's account for a debt of Terrington's was within the power of attorney. Now the power of attorney is clear. It only authorises Terrington to conduct Reckitt's business, not to pay accounts of his own. Then comes the letter to the bank. The genesis of it is plain in the correspondence. The power of

attorney was silent as to the question of drawing cheques and the bank wanted to be A
 certiorated on this point. The letter refers to the power of attorney "which you have
 inspected" and then says: "I wish the power to cover the drawing of cheques upon you
 by Mr. Woodhouse (i.e., Terrington) without restriction." That seems to me to be
 exactly the same as if the original power of attorney had had a clause at the end, "and B
 for the purposes aforesaid I wish that Terrington be allowed to draw cheques without
 restriction." "Without restriction" applies primarily to amount, but I do not so
 confine it. I think it meant, when addressed to the bank, as it was, that the bank
 should have no concern with what the cheques were for, but should cash them; and,
 accordingly, no one in the case has doubted that the appellant could not have sued the
 bank. But the drawing of a cheque is one thing, the handing over of that cheque to
 another person is another. If there had been no knowledge on the part of the respon- C
 dents that the debt being paid was not Reckitt's, but Terrington's debt, and no indication
 on the face of the cheque that the cheque was being signed by an attorney, I have no
 doubt that the payment would have been good. But to read the letter to the bank as
 equivalent to an enlargement of the power of attorney to power to draw on Reckitt's
 account and do what he liked with the sums so drawn is, I think, to misread the letter.

The distinction between this case and such cases as *Hambro & Son v. Burnand* (1) is D
 obvious. In that case the agent was doing the very business he was authorised to do,
 to issue letters of guarantee. He was doing very bad business and he was doing it from
 an improper motive. The company guaranteed, had they asked for all documents,
 would have found that the agent who issued the guarantee was empowered to write the
 names of his principals to such class of business. Here, unless you can read the letter in
 the extreme sense I have just mentioned, which I think is absurd, the respondents can
 find nothing equivalent to that. It follows, in my opinion, that the respondents cannot E
 keep Reckitt's money which was paid them to their knowledge to liquidate Terrington's
 debt.

VISCOUNT SUMNER.—A discussion of the acute difference of judicial opinion which
 has arisen in this case may, I think, best be approached by first stating four cardinal F
 facts. (i) When Lord Terrington issued the cheque to the respondents, it was given and
 taken in part payment of an account, for which he was personally liable. (ii) No
 circumstance was known to the respondents, and none has been proved to have existed,
 to show that the motor car was either bought on Sir Harold Reckitt's instructions or
 was required for or used in the conduct of any of his affairs. (iii) So far as appears, Sir
 Harold Reckitt's name then first became known to the respondents in any connection G
 with Lord Terrington. (iv) The cheque bore on its face, for those who chose to read it,
 a statement that the drawer was Sir Harold J. Reckitt, Bart., directing payment of his
 money to the respondents, and doing so by his attorney, Lord Terrington, who signed it.
 Upon such facts I think it is settled law that the respondents could only hold the pro-
 ceeds of the cheque as against Sir Harold Reckitt if Lord Terrington had actual authority
 enabling him to utilise his principal's money to discharge his own indebtedness to
 them. H

I will amplify shortly the second and third of these statements. Lord Terrington had
 been the respondents' customer for several years. They had sold him a Daimler car
 before the transaction in question, which was taken back in part satisfaction of the price
 of this car. His name appeared alike in the purchase contract and in their books. The
 contract, which is a hire-purchase agreement, is dated Jan. 4, 1926. The price and in addi- I
 tion to the surrender of the Daimler car, £2,350 or in all £2,450. Lord Terrington paid
 £350 on that date, mainly, if not wholly, by cheques, which certainly were not drawn on
 the appellant's account. The debts, for which the cheque in question was given, were,
 in part for a continuous garage account in London, which had been commenced at any
 rate as early as June, 1925, and included on Jan. 6, 1926, the cost of A.A. and R.A.C.
 badges and affixing two baron's coronets on the panels of the new car. In March, April
 and May, 1926, Lord Terrington is credited with payments of monthly instalments,
 which again do not seem to have had any connection with the appellant's bank account;
 and in July, under an arrangement to which the appellant was not a party, the car was

A taken back and an allowance of £1,500 made. Lord Terrington was then released. Under the terms of the hire-purchase agreement, the hirer undertook to retain the car in his own possession during its continuance and was entitled on notice to return the car to the respondents, who retained the property. If Lord Terrington made default in payment of any instalment, or died, or had a receiving order made against him, the respondents could re-take possession at once; and the agreement was declared to be personal to Lord Terrington and not assignable by him. The respondents would appear to have first come into contact with Sir Harold Reckitt about July 11, 1926, when he called at their showrooms, produced the cheque, and, without giving his name, which they had to ask for, put the question whether they had ever seen it before.

B These details appear to be worth noticing because of a contention, which was pressed on your Lordships that, as between Lord Terrington and the respondents, non constat that the Rolls-Royce car was not purchased for the appellant and on his instructions, say as a birthday present to Lord Terrington, or to enable him to perform his duties as attorney with comfort, dignity and dispatch. This suggestion would not seem to have been made at the trial, but something of the kind was probably thrown out in the Court of Appeal, for SCRUTTON, L.J., says: "there are, as suggested, also several honest explanations of the transaction without assuming or suspecting fraud." Several authorities were cited in support of this contention. This case, however, goes very far beyond the mere directorship in the company guaranteed, which was held insufficient to affect Hambro with notice in *Burnand's Case* (1), and is stronger even than the case of an agent paying his principal's cheques into his own account, which was held to put bankers on notice in *A. L. Underwood, Ltd. v. Bank of Liverpool and Martin's* (3).

C These details appear to be worth noticing because of a contention, which was pressed on your Lordships that, as between Lord Terrington and the respondents, non constat that the Rolls-Royce car was not purchased for the appellant and on his instructions, say as a birthday present to Lord Terrington, or to enable him to perform his duties as attorney with comfort, dignity and dispatch. This suggestion would not seem to have been made at the trial, but something of the kind was probably thrown out in the Court of Appeal, for SCRUTTON, L.J., says: "there are, as suggested, also several honest explanations of the transaction without assuming or suspecting fraud." Several authorities were cited in support of this contention. This case, however, goes very far beyond the mere directorship in the company guaranteed, which was held insufficient to affect Hambro with notice in *Burnand's Case* (1), and is stronger even than the case of an agent paying his principal's cheques into his own account, which was held to put bankers on notice in *A. L. Underwood, Ltd. v. Bank of Liverpool and Martin's* (3).

D This contention does not mean that there is now any doubt of Lord Terrington's fraud or any possibility of assuming his honesty in this matter, but that, even if the respondents were to put upon inquiry by the form of the cheque, they might have been justified by these explanations, if any such had occurred to their minds, in assuming the actual authority to extend to the issue of the cheque to themselves, though they knew Lord Terrington was their customer, and was paying his own debt. If, however, they had inquired for and had seen the terms of the power of attorney, they would have found nothing in it to suggest that the attorney required a motor car—and such a motor car—for the proper exercise of the power. There was indeed a paragraph giving power to "let and manage" Sir Harold Reckitt's property in Sussex, but the context showed that this referred not to the duties of a bailiff but to those of a solicitor, which would be performed through the post or by the occasional dispatch of a clerk. It was not put to Sir Harold Reckitt in cross-examination or elicited from any of the witnesses from the respondent company's business, that the car either was in part required or even was imagined to be required for any purposes of Sir Harold Reckitt's affairs. ROWLATT, J., says:

E "The question here all turns upon the effect of the circumstance, that it was taken by the defendants . . . knowing that it was being used to liquidate the private debt of the agent. That this was to all appearances for the private debt of the agent, as it turned out to be in substance, I think cannot be doubted for a moment."

F In my opinion, no other conclusion could have been supported by the evidence. I understood, however, that it was further contended to be sufficient for the respondents if the appellant should fail to establish that no hypothesis was possible except that of an application of the appellant's money to Lord Terrington's own purposes without his consent or authority. No authority for so extensive a proposition was cited, and I do not think it can be accepted. If the respondents could show that the purpose for which Lord Terrington issued the cheque to them, as they knew, was really and substantially consistent with the exercise of his powers as attorney, they might rebut the liability which arises *primâ facie* from its having been taken in discharge of his own debt, but the burden is on them and is a real one, for no mere academic hypothesis will serve. In fact, before this argument was launched, nobody had ever thought that proof of such consistency was possible.

I There remains the question of the actual authority conferred on Lord Terrington. For this purpose Sir Harold Reckitt's letter to his bank of Aug. 17, 1915, is admissible in

evidence against him as being his own statement of the authority he had given to Lord Terrington, though it is in form a letter to his bankers stating what he has done, and is not a deed addressed to "all men," but it must be read with the power of attorney, to which it refers, in order correctly to ascertain its meaning. The words "without restriction" (which are not said to be terms of art or to have any special meaning among bankers) may either mean cheques free from the restrictions contained in the power of attorney which the letter supplements, or cheques drawn in an unrestricted form as far as possible. I do not see how a third meaning is grammatically possible, namely, that it is Lord Terrington and not his cheque that is without restriction, or that there is to be an unrestricted power of drawing cheques, and also of utilising them honestly or dishonestly. Assuming that the express power to draw carries with it an implied power to issue cheques, when drawn, still, what is unrestricted is only the drawing of cheques, and the subsequent issue must be subject, as the general power itself is, to the exercise of the power being for the purposes of the principal. It is unreasonable so to interpret the words that, although he can only use the power of attorney for the principal's benefit, he can under the letter, by drawing enough cheques on the appellant's account, transfer all the principal's property into his own pocket or apply it to his own use. We know that in fact nothing of this sort could have been meant by the parties to the power, for such self-sacrificing trust would be beyond the limits even of romance; and it would be wrong to attach to words, which at most are ambiguous, a meaning which bears no relation to the realities of life. It was admitted at the trial, as I think rightly, that Lord Terrington had no power to draw cheques for his own purposes under either document. Now, as the power did not extend to drawing cheques at all, the letter does not remove any restrictions imposed by it on Lord Terrington's cheques, and as ample effect is given to the words by referring them to the form of the cheques themselves, I think we should press them no further. It was at the bank's instance and for the purpose of enabling it to honour cheques that this particular power was asked and given. Under its protection they could pay without being called upon (as *MATHEW, L.J.*, puts it in *Hambro & Son v. Burnand* (1)) to investigate Lord Terrington's motives and ask what he was going to do with the money. If Lord Terrington should draw a cheque on Sir Harold Reckitt's account to a named payee, or to none, with restricted negotiability or without it, whether open or crossed, the bank was to the extent of the available balance entitled and bound to meet it, but a person who took such a cheque with notice that Lord Terrington was an attorney only, and knowing from the transaction itself or otherwise that he was being paid for Lord Terrington's benefit and not in pursuance of the affairs of Sir Harold Reckitt, would take nothing by the transaction. It is worth while to add that, if the letter is considered as ambiguous, that only assists persons who, having seen it, take it in a sense which it is reasonably capable of bearing and act accordingly, whether that sense be the right one or not. The respondents were not in such a position. They had not acted on or even seen the letter, though as it was part of Lord Terrington's authorisation they had general notice of it by the form of the cheque, which they did not follow up by any inquiry.

As to the authorities cited, I think that *John v. Dodwell & Co., Ltd.* (2) is in point, but the others are either distinguishable or are beside the mark. The knowledge and the notice, which the respondents had of Lord Terrington's limited power and of the purpose to which he was actually putting it, are sufficient to fix them with liability to the appellant: see *Corpn. Agencies, Ltd. v. Home Bank of Canada* (4). There was no holding out and no estoppel: no mere appearance of authority, but an actual written expressive of it; no series of acts done by the agent, such as would constitute a genus, or class of acts, which the principal had put the agent in his place to do; no general terms descriptive of an employment exercised by him. On its true construction the power did not cover the thing which Lord Terrington did, and as the respondents have no better title than he purported to give them, and cannot improve their own position by failing to ascertain Lord Terrington's, they cannot hold the proceeds against Sir Harold Reckitt, and his appeal must succeed.

LORD CARSON concurred in the opinion delivered by the **LORD CHANCELLOR**.

A LORD WARRINGTON.—The question in this case is whether the appellant is entitled to recover from the respondents the sum of £200, the proceeds of a cheque for that amount drawn and signed by Lord Terrington as attorney for the appellant upon the appellant's bank at Hull and delivered by Lord Terrington to the respondents in payment of a debt owing to them by Lord Terrington personally. The cheque was presented to the bank by the respondents and duly honoured. On Nov. 11, 1927, ROWLATT, J., pronounced judgment in favour of the appellant. The Court of Appeal by a majority, SCRUTTON and SANKEY, L.JJ. (RUSSELL, J., dissenting), reversed this judgment and directed judgment to be entered for the respondents with costs.

By a power of attorney under seal dated Feb. 9, 1915, and filed on May 29, 1916, the appellant appointed Lord Terrington (then Harold James Selborne Woodhouse) of 49, St. James Street, London, in his name and on his behalf to do all or any of the things therein specified, including in cl. 11 power for any of the purposes therein before mentioned to sign all documents which should be necessary or the attorney should think fit. The purposes specified were all purposes connected with the property and affairs of the appellant. In July, 1915, the power of attorney was presented to the appellant's bank by Lord Terrington for registration, and on July 31, 1915, the bank wrote a letter of that date to Lord Terrington stating that they could not find in it any authority for him to draw cheques upon the appellant's account and suggesting that the appellant should write to them stating that he wished the power to cover the drawing of cheques upon them by Lord Terrington without restriction. Accordingly, on Aug. 17, 1915, the appellant wrote a letter to the bank stating that he wished the power to cover the drawing of cheques upon them by Lord Terrington without restriction. This letter was retained by the bank. Under the authority conferred by the power of attorney and the letter numerous cheques on the appellant's account were drawn by Lord Terrington, the form used for the signature being "Sir Harold J. Reckitt, Bart., by Terrington, his attorney." In this form the words except the signature "Terrington" were impressed by a rubber stamp, the signature being written with a pen and ink. In the case of the actual cheque in question the words impressed by the rubber stamp are somewhat faint but are quite legible. On Nov. 19, 1925, the appellant executed a further power of attorney in favour of Lord Terrington which included (cl. 17) a power to draw cheques deemed necessary or proper in relation to the business or affairs of the appellant. It does not appear that this power was ever communicated to the bank, and it is common ground that the power of February, 1915, and the letter of August, 1915, are alone material to the case.

On Jan. 4, 1926, Lord Terrington signed a hire-purchase agreement for the purchase from the respondents, who carried on business in London as garage proprietors and agents for the sale of motor cars, of a Rolls-Royce car for the sum of £2,350 in addition to his present Daimler car taken in part payment, payable £350 and the Daimler car down, and the balance plus 5 per cent. interest in monthly instalments of £175 on the fourth day of each month. The Daimler car had been bought by Lord Terrington some years before from the respondents. There is no question that in fact this transaction was purely personal to Lord Terrington, and was in no way connected with the business or property of the appellant. The £350 was paid by Lord Terrington out of his own moneys, and the Daimler car was his own property. The first monthly instalment of £175 became due on Feb. 4, 1926, together with a sum of £25 for sundry garage expenses. It was this sum of £200 which Lord Terrington fraudulently paid out of the appellant's money. The respondents clearly had notice by the cheque itself that the money was money of the appellant. It is true they say they did not observe the form of the signature, but, in my opinion, they cannot be heard to rely on their own carelessness or that of their clerks in this respect.

On this state of facts it seems to me quite plain that the respondents would be held both at law and in equity to be liable to repay the money in question to the appellant unless they could establish that Lord Terrington had either actual or apparent authority to pay his own debts with his principal's money. Had he then such authority? In my opinion, he had not, and, but for the difference of opinion in the Court of Appeal, I should have thought that the case was a very plain one. In this case there is no difference between the "actual" authority and "apparent" authority. The authority and the

only authority was contained in the power of attorney and the letter to the bank. The power of attorney is clearly confined to the affairs of the principal and the letter merely informs the bank that such authority extends to the drawing of cheques. This letter was required by the bank for their own protection and was retained by them. The words "without restriction" seem to me to mean only "without limit of amount." But even if they have a wider meaning they were clearly intended only to afford protection to the bank inasmuch as they have no means of knowing, and have no liability in the ordinary way of business of inquiring into, the purpose for which cheques are drawn; and I cannot follow the majority in the Court of Appeal in the view that third parties and the bank are in the same position as regards the authority given by the letter. We have, therefore, if I am right in the view I have expressed as to the authority of Lord Terrington, the simple case of a man who receives money, which he is told when it is paid to him, is money of another, and notwithstanding this fact insists on retaining it. This, in my judgment, he cannot do, and, therefore, the appeal ought to be allowed and the judgment, of ROWLATT, J., in favour of the appellant restored with costs here and below.

So far I have dealt with the matter on principle without reference to authorities. Is there any authority which compels me to refrain from giving effect to the conclusions at which I have come? I can find none in those that have been cited to us. The one most relied upon by the respondents was *Hambro & Son v. Burnand* (1). In that case the agent in question had authority to sign underwriting contracts at Lloyd's on behalf of his principals. Among the contracts which he was entitled to sign were guarantee policies. He signed a number of such policies in cases in which he had a strong personal interest in the guarantee being given. The insured took the policies in good faith and without notice of any impropriety. It was held that as the contracts were within the authority of the agent, the principals were bound by them, the motive of the agent being immaterial. In the present case to sign and deliver cheques in payment of his own debts was not within the authority of Lord Terrington as an attorney acting in the affairs of another, and the payees had notice by the cheque itself that he was dealing for his own private benefit with money of his principal. The two cases are, in my opinion, plainly distinguishable. If an authority in favour of the views I have expressed were wanted it is to be found in the decision of the Judicial Committee in *John v. Dodwell & Co., Ltd.* (2). The principle on which I think such questions as the present ought to be decided is expressed in terms applicable to this case in the judgment of VISCOUNT HALDANE, and with all respect to SCRUTTON and SANKEY, L.JJ., I can find no grounds of distinction. I think the very clear judgment of RUSSELL, J., ought to prevail, and I, therefore, concur in the motion proposed by the LORD CHANCELLOR.

Appeal allowed.

Solicitors: *Nicholl, Manisty & Co.*; *Charles Humphries & Co.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

A

TREDEGAR v. HARWOOD

[HOUSE OF LORDS (Viscount Dunedin, Lord Shaw, Lord Phillimore and Lord Blanesburgh), May 17, 18, July 25, 1928]

B

[Reported [1929] A.C. 72; 97 L.J.Ch. 392; 139 L.T. 642;
44 T.L.R. 790]

Landlord & Tenant—Insurance—Covenant to insure against fire—Insurance “in L.F. office or in some other responsible insurance office to be approved by the lessor”—Right of lessor to refuse approval without giving reasons—Reasonableness of ground for refusal.

C

By a lease dated July 7, 1924, the lessee covenanted to insure the property against loss or danger by fire “in the joint names of the lessor and lessee in the L.F. office or in some other responsible insurance office to be approved of by the lessor . . .” The demised premises formed part of large freehold estates of which the lessor was the owner. The lessee insured with the A. Assurance Co., and contended that, it being a “responsible office,” the lessor was not entitled to withhold his approval of it. The lessor refused to approve of the A. office on the ground that, from the point of view of the management of his estate as a whole, it was impracticable for houses thereon to be insured with more than one office and he found it convenient that that office should be the L.F. office for reasons connected with checking the due payment of premiums by lessees.

D

Held (LORD BLANESBURGH dissenting): the lessor’s consent was a condition precedent to the insurance being effected with an insurance office alternative to the L.F. office, and the lessor could refuse his consent without giving any reason for doing so.

E

Per Curiam: If it had been necessary to decide the question, the refusal of the appellant was reasonable in the circumstances of the present case.

Per LORD PHILLIMORE and LORD BLANESBURGH: The lessee would perform his covenant if he insured in the L.F. office, even though the lessor did not wish it.

F

Re Gibbs and Houlder Bros.’ Lease, (1) [1925] 1 Ch. 575, distinguished and doubted.

Barrow v. Isaacs & Son (2), [1891] 1 Q.B. 417, distinguished.

Decision of Court of Appeal, [1928] 1 Ch. 59 reversed.

Notes. Considered: *Re Town Investments, Ltd. Underlease, McLaughlin v. Town Investments, Ltd.*, [1954] 1 All E.R. 585. Referred to: *Re Swanson’s Agreement, Hill v. Swanson*, [1946] 2 All E.R. 628; *Wilson v. Fynn*, [1948] 2 All E.R. 40; *Lee v. K. Carter, Ltd.*, [1948] 2 All E.R. 690; *Swanson v. Forton*, [1949] 1 All E.R. 135.

G

As to covenants to insure, see 23 HALSBURY’S LAWS (3rd Edn.) 617 et seq.; and for cases see 31 DIGEST (Repl.) 400 et seq.

Cases referred to:

(1) *Re Gibbs and Houlder Bros. & Co., Ltd.’s. Lease, Houlder Bros. & Co., Ltd. v. Gibbs*, [1925] Ch. 575; 94 L.J.Ch. 312; 133 L.T. 322; 41 T.L.R. 487; 69 Sol. Jo. 541, C.A.; 31 Digest (Repl.) 425, 5523.

H

(2) *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 55 J.P. 517; 39 W.R. 338; 7 T.L.R. 175, C.A.; 31 Digest (Repl.) 547, 6696.

(3) *Dallman v. King* (1837), 4 Bing. N.C. 105; 3 Hodg. 283; 5 Scott, 382; 7 L.J.C.P. 6; 132 E.R. 729; 31 Digest (Repl.) 269, 4032.

I

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., SARGANT and LAWRENCE, L.JJ.) (reported [1928] 1 Ch. 59).

By a lease dated July 7, 1924, the plaintiff demised a house known as Kerswell, 27, Axminster Road, in the city of Cardiff, to Henry Beavis for a term of ninety-nine years from Mar. 25, 1924, subject to a covenant by the lessee, his executors, administrators and assigns,

“that the lessee shall and will immediately after the roof of the intended messuage shall have been laid on insure and ever afterwards during the said term keep insured the said messuage together with all erections and buildings for the time being

erected on the piece or parcel of the land hereby demised against loss or damage by fire in the full value of the said erections and buildings in the joint names of the lessor and lessee in the Law Fire Office or in some other responsible insurance office to be approved of by the lessor and shall upon his request produce to the lessor or his agents for the time being the policy of such insurance and the receipts for the annual payments and that in default of the lessee so doing it shall be lawful for the lessor to insure the said premises and erections and buildings as the lessor may think fit and that the costs and charges of effecting such insurance or keeping the same on foot shall be repaid to the lessor on demand or be recovered in like manner as the rent hereby reserved is recoverable."

The lease contained the usual proviso for re-entry on breach of covenants by the lessee. The demised premises formed part of freehold estates in Newport and Cardiff of which the plaintiff was, and at all material times had been, the owner. Large areas of these estates were let on building leases similar in form to the lease dated July 7, 1924, to Henry Beavis, and each containing a covenant to insure similar in terms to that set out in the lease to Beavis. J. Storrar was the agent of the plaintiff in the management of the estates. The lessee effected a policy of insurance in the Law Fire Office insuring the demised premises for £800 for one year from Mar. 25, 1924, and the renewal premium became due on Mar. 25, 1925. By deed dated July 29, 1924, the premises were assigned for the residue of the term of ninety-nine years by Henry Beavis to the defendant Annie Harwood. The defendants, the Principality Building Society, were interested in the premises under a mortgage thereof to them by Annie Harwood.

On May 8, 1925, J. Storrar, the plaintiff's agent, wrote to the defendant, Annie Harwood, asking her to forward the renewal receipt for the policy of insurance in accordance with the covenant, and stated that the only office approved for the insurance was the Law Fire Office. On May 14, 1925, the defendant replied that the house had been insured through the defendant society, and on July 21, 1925, Storrar served notice on Annie Harwood requesting the production of the policy in the Law Fire Office and the receipt for the last annual payment of the premium. Annie Harwood not having produced them, Storrar, on April 16, 1926, served notice on her, calling attention to the covenant by the lessee to insure and to the proviso for re-entry, and to the breach of the covenant, requiring her to remedy the breach and make compensation, and stating that on failure to comply the plaintiff would exercise his power of re-entry. The defendant did not comply with the notice, but insured the premises in the Atlas Assurance Co. for £625 in the joint names of the plaintiff and the defendants, and on May 27, 1926, applied to the plaintiff for his approval of the Atlas Assurance Co. On June 12, 1926, Storrar on behalf of the plaintiff, in reply, informed the defendants that for estate management reasons the lessor would not approve of an insurance in any other office than the Law Fire. The plaintiff issued a writ claiming possession of the premises and mesne profits. By their defence the defendants, while denying that any breach of the covenant to insure had been committed, pleaded that they were entitled to be relieved from the forfeiture on such terms and conditions as the court might think fit. The Court of Appeal held, reversing the decision of TOMLIN, J., that the covenant conferred upon the lessee a real alternative to be exercised at his volition, and, provided that the office he submitted to the lessor was a responsible one, the lessor must come to a reasonable, not a capricious, decision, nor one which could be used by him to secure a personal end, such as refusing approval of any office other than the Law Fire Office for reasons connected with the management of his estate. The plaintiff lessor appealed.

W. A. Greene, K.C., Gavin T. Simonds, K.C., and C. R. R. Romer for the appellant.
F. K. Archer, K.C., and Edgar Foa for the respondents.

The House took time for consideration.

July 25. The following opinions were read.

VISCOUNT DUNEDIN.—The appellant, Lord Tredegar, is the ground landlord of certain premises known as Kerswell, 27, Axminster Road, Cardiff. By lease dated July 7, 1924, the appellant demised the said premises to one Henry Beavis and his assigns

A for ninety-nine years from Mar. 25, 1924, under certain covenants and conditions. One of the covenants is as follows:

B "That the lessee shall and will immediately after the roof of the intended messuage shall have been laid on insure and ever afterwards during the said term keep insured the said messuage together with all erections and buildings for the time being erected on the piece or parcel of land hereby demised against loss or damage by fire to the full value of the said erections and buildings in the joint names of the lessee and the lessor in the Law Fire Office or in some other responsible insurance office to be approved of by the lessor and shall upon his request produce to the lessor or his agents for the time being the policy for such insurance and the receipts for the annual payments and that in default of the lessee so doing it shall be lawful for the lessor to insure the said premises and erections and buildings as the lessor may think fit and that the costs and charges of effecting such insurance or keeping the same on foot shall be repaid to the lessor on demand or be recovered in like manner as the rent hereby reserved is recoverable."

C The lease contains the usual proviso for re-entry for breach of covenant. By an assignment dated July 29, 1924, the respondent, Mrs. Harwood, became lessee of the premises D for the remainder of the term from that date. Henry Beavis duly performed the above quoted covenant and insured the premises with the Law Fire Office for £800. The policy was for one year from Mar. 25, 1924, and the renewal premium became due on Mar. 25, 1925. On Mar. 25, 1925, the respondent, Mrs. Harwood, failed to renew. By an indenture dated July 30, 1924, the respondent, Mrs. Harwood, had mortgaged the premises E for the remainder of the term in her, excepting the last day thereof, to the respondents, the Principality Building Society. The mortgage contained a condition that the mortgagee should insure the premises with such offices as the society should appoint. The appellant through his agents applied to the respondent, Mrs. Harwood, F either to renew the policy issued to Beavis or take out a fresh policy with the Law Fire Office for £800, at the same time intimating that he insisted on the policy being with the Law Fire Office, and would not approve of any other office. The reason for this intimation was this: Lord Tredegar being the ground landlord of some thousands of houses in Cardiff found it almost impossible, if they were insured in many various offices, to check the due renewals of the premiums, whereas, if they were all insured in the Law Fire, then by arrangement with that office, they kept his agents informed of any default so that he might apply for the due renewal of the premium. The reply of the respondent, Mrs. G Harwood, was that by order of the respondents, the building society, she had insured with the Atlas company. The appellant pointed out that he had not approved of the Atlas. As the respondent at the instigation of the other respondents persisted in her attitude, the appellant raised the present action to forfeit the lease in respect of a breach of covenant. It depended before TOMLIN, J., and it was explained that there was no intention of really forfeiting the lease if the respondent would insure with the Law Fire for £800. TOMLIN, J., made a declaration in the appellant's favour, but suspended the H decree if within twenty-one days the insurance was effected for £800 with the Law Fire. His view was that, if not the Law Fire, then any other office could only be accepted under the double condition, first that it was responsible, and, second, that it was approved by the appellant. He found that the Atlas had not been approved by the appellant and that that ended the matter. On appeal being taken, the Court of Appeal reversed that judgment. They held that the clause gave an option to the respondent; that on proposing an office which was responsible—no question having been raised as to the responsibility of the Atlas—the appellant had no right to refuse his approval on any I ground which did not directly affect the contract between him and the respondent.

I am quite unable to concur with the learned judges of the Court of Appeal. It seems to me that they introduce complication and inference into an expression where there is no room for one or the other. It was admitted by the learned counsel for the respondent that if the word "responsible" had been omitted, it would have been impossible to say that any office could be properly tendered which had not been approved by the appellant. I think it is a quite impossible burden to put on the word "responsible" to change all

this. The reason for the existence of the word is simplicity itself. It was necessary to put in some alternative to the Law Fire because this was a ninety-nine years' lease, and before the end of it, it might be that the Law Fire did business no longer. It might be liquidated or bought up. Then some other office had to be selected. No office that is not responsible is to be entertained, but, however responsible, it is to be approved by the appellant. The learned judges relied on *Re Gibbs and Houlder Bros.' Lease Houlder Bros. & Co. Ltd. v. Gibbs* (1). But in that case, as is pointed out by TOMLIN, J., there was the special proviso that consent to the assignment was not to be withheld in the case of a responsible person. Further, I would like to say that, although it is unnecessary to consider whether that case was well decided, I am not inclined to adhere to the pronouncement that reasonableness was only to be referred to something which touched both parties to the lease. I should read reasonableness in the general sense and if it was necessary—it is not so in the view already expressed—I would hold here that the appellant's reasons are eminently reasonable. I move that the appeal be allowed, that the judgment of TOMLIN, J., be restored with the variation that the twenty-one days therein mentioned do run from the date of this judgment instead of the date of the judgment of TOMLIN, J., and that the appellant should have his costs in this House and in the Court of Appeal.

LORD SHAW¹—The facts of this case are not in dispute. The respondent, Mrs. Harwood, by assignment became lessee of these premises—a plot of land with some buildings on it, for the remainder of the term of a ninety-nine years' lease by the appellant in favour of one Henry Beavis. The indenture of the lease to Beavis and his executors, administrators and assigns contains a covenant for insurance and re-building in the case of fire. The insurance was to be "in the joint names of the lessee and the lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor." There follow the ordinary clauses about production of the policy and the annual receipts for premiums, and there was later in the indenture a proviso for re-entry in case of breach of covenant. The main obligation upon the lessee or his assignee was to insure in the Law Fire Office, or, in the alternative, in some other responsible insurance office to be approved of by the lessor. No conditions or provisions are attached to the granting or withholding of this approval. In particular, the case is in that respect completely distinguished from various cases as to assignment or sub-letting which have been cited. These contain, for example, the not unusual clause as in *Re Gibbs and Houlder Bros.' Lease, Houlder Bros. & Co. Ltd. v. Gibbs* (1), that the consent of the landlord was "not to be withheld unreasonably" in the case of "a respectable and responsible person or corporation," being put forward as assignee, or the other not unfamiliar clause applicable also to assignment or sub-letting, as in *Barrow v. Isaacs & Son* (2) to the effect that the consent of the landlord "should not be arbitrarily withheld." In the present case no such restriction or condition upon the right of approval or disapproval by the landlord is imposed. The case is the simple one of one sound office being named, with the alternative given of another responsible office approved by the lessor. If the lessee will not insure in the Law Fire Office nor in any other responsible office which the lessor has approved, the covenant is broken. It is a condition precedent to the alternative being resorted to that the lessor's consent has been given to the other office suggested. I am of opinion in these circumstances that this condition precedent cannot be removed or held as satisfied because in the opinion of a court of law the lessor's refusal was unreasonable. The court's opinion upon that subject cannot be allowed to supply the want of the lessor's consent in fact. The forms of contract, under which the reasonableness of withholding consent is made a term, are perfectly familiar, and they were not adopted in the present case; and the condition of the lessor's consent is a condition precedent in absolute terms.

The judgment of the Court of Appeal is, in my humble opinion, wrong in two particulars. It imports the implication of a new clause into the contract—that the consent of the lessor to any responsible insurance office selected by the lessee is not to be unreasonably withheld—and, secondly, having imported by implication a clause in those terms, the court proceeds to attach to these terms and to this contract all that certain

A authorities hold is the further implication of such a clause, namely, that the lessor must furnish a justification for his refusal as something incidental to the individual contract itself and also to the financial standing or responsibility of the alternative insurance company. I am humbly of opinion that this process of piling implication upon implication is not a legitimate mode of construing a very simple and plain condition. It is clogged neither by the one implication nor the other. Were it necessary to inquire, **B** the facts of this case would show that there were sound business reasons behind this unfettered simplicity. The lessor was the owner of many hundreds of houses erected under building leases, and the development of a considerable estate required strict attention to, among other things, the insurance of the buildings erected. The difficulty in such cases is to check the failure in renewals. With properties so numerous, and insured, it may be, in a dozen different offices, this point of management becomes very **C** complex, and, in this case, it is pointed out that the cost involved becomes considerable. By a simple working arrangement with one office, such as the Law Fire, simplicity and accuracy are promptly secured. I put the point of the situation of a person in Lord Tredegar's position with contracts of insurance by numerous offices offered, the names of which are the alternatives suggested by various tenants out of the many hundreds. It does not appear to me that any duty is cast upon a lessor to enter into or obtain **D** information upon the financial situation or standing of the offices suggested, although, if the judgment appealed from were to stand, each lessee of each house could demand of Lord Tredegar an answer justifying refusal to consent, an answer which was of the nature of reasons against the financial responsibilities of a particular office. This kind of issue is totally different from the issue which arises in sub-letting cases with a specific term against unreasonable refusal of a sub-tenant. I cannot hold that, under the present **E** contract, the refusal to consent is clogged in the manner suggested. On the merits I should, further, hold, if the matter were gone into, that the refusal here was perfectly reasonable and that it would be wrong to confine the reason in such case to the particular house exclusive of all considerations as to the management of the estate to which it belonged. Nor would it, in my view, be, in the second place, reasonable to cast upon the **F** landlord the proposing of a suggestion of the instability of an insurance company suggested by the lessee. The lessor might know that company quite well and feel that it was a strong office, but an office which, in his past dealings, he had every reason to know was litigious, dilatory or difficult to deal with. It would yet, however, remain under the category of a responsible office. I take, however, the absolute view of this case to the effect that the lessor's consent is a condition precedent in fact to the acceptance of an alternative insurance office, and that that consent can be refused simpliciter—**G** without entering upon reasons.

LORD PHILLIMORE.—I agree with the opinion given by the noble and learned Lords who have spoken. Two persons each sui juris and under no constraint enter into an agreement. Why should we not give effect to the plain words of their agreement? Why should we seek for some far-fetched meaning? Moreover, if it were a question, **H** which it is not, whether Lord Tredegar was, in seeking to enforce the agreement, acting reasonably, I should say that he was so acting. I share the doubt expressed by **VISCOUNT DUNEDIN** as to the soundness of the judgment in *Re Gibbs and Houlder Bros.' Lease, Houlder Bros. & Co., Ltd. v. Gibbs* (1). If it be a question whether a man is acting reasonably, as distinguished from justly, fairly, or kindly, you are to take into consideration the motives of convenience and interest which affect him, not those which affect **I** somebody else.

In the first draft of my opinion I had stopped at this point. But as I find that there is an argument (not based upon supposed grounds of policy or fairness, or the previous practice of the landlord, but strictly founded upon the literal construction of the words) which still finds some favour in your Lordships' House, it would be more respectful if I give my reasons for not accepting it. I construe the covenant thus: No. 1. The tenant covenants to insure against fire. No. 2. He covenants to insure in the Law Fire Office unless as an alternative both parties agree to some other office. No office can be substituted for the Law Fire Office except by mutual agreement. The tenant would

fulfil his covenant if he insures in the Law Fire Office, even though the landlord did not wish it. The landlord on the other hand can say that he will approve of no office except the Law Fire. I regard the word "responsible" as monitory. It would be of no use for you, the tenant, or for you, the landlord, if you have taken a dislike to the Law Fire, to suggest any office of doubtful repute. The idea that the introduction of the word "responsible" affects or increases the duty of the landlord to the tenant, seems to me, with all respect, fanciful. During the course of the argument, I made the suggestion: substitute for the word "responsible" the word "English." Would that enable a tenant to say: "I am complying with the covenant because I am tendering an office which is not Scottish, nor Irish, but English, and which you, therefore, must approve unless you can show good reason to the contrary."

LORD BLANESBURGH (read by LORD SHAW).—The question in this case is a simple one. It is not, for that reason, easy. TOMLIN, J., thought the language of the clause in debate was plain, or, at any rate, reasonably plain. His decision was for the appellant. The unanimous conclusion of the Court of Appeal, on the other hand, was in favour of the respondents. LAWRENCE, L.J., expressing a view, clearly enough shared by his two learned colleagues, observed, in the course of his judgment:

"I confess that but for the opinion expressed by the learned judge and the arguments of counsel for [Lord Tredegar], I should have thought that the construction did not present any real difficulty."

I regret that that divergence of judicial opinion has not yet entirely disappeared. But while I hope that I appreciate fully the considerations which have led your Lordships who have preceded me to revert to the view of TOMLIN, J., I feel bound to say, with the utmost respect, that my own opinion remains in accord with that of the Court of Appeal. I need hardly, I feel sure, affirm that in reaching that conclusion I in no way underrate either the reasonableness or wisdom from his own point of view of the appellant's recent resolve to have effected in one office all the insurances upon his Cardiff leases. Nor, when I regard the services, clerical and otherwise, to be rendered to him in consideration by the Law Fire Office, do I doubt that the appellant has chosen prudently in selecting that office as the favoured medium of insurance. I should equally commend his wisdom if, as a result of the tender or even more valuable services, the appellant were later on to transfer his insurance favours to some other responsible office, say, for example, the Atlas. But it is not his prudence in either direction which is relevant now. The question is whether under the insurance covenant in the respondent Mrs. Harwood's lease, Lord Tredegar can require her to insure in the Law Fire Office, to the exclusion, in all circumstances, of any other. It must, I think, be agreed that that requirement of the appellant is beset by at least some initial difficulty. There is a well-known common form covenant which would indubitably have established the privilege he claims. It has not been utilised. The covenant chosen as the estate covenant is an equally well-known alternative style, to some extent, it must be agreed—how much is here the question—more favourable to the lessee than the other. And when it is remembered that in a building estate, to be developed largely by advances made by building societies and other lenders to the lessees, a covenant convenient to the lenders may be of final advantage to the ground landlord, the choice of this less stringent form of covenant may well have been deliberate. Certain it is that no such policy as that recently adopted by the estate was in view when the covenant was selected.

The arrangement with the Law Fire Office which, having been come to, has quite prudently led to the requirement now made by the appellant is a new thing. But the covenant unaltered has been in use on the estate for many years, and throughout that period the view of it still taken by the respondents has in practice been accepted and acted upon by the appellant. As appears from the correspondence, very many of the houses on the estate have been built with moneys advanced by the respondent building society to lessees on the security of their leases, and the society, for reasons analogous to those now moving the appellant, has always required its mortgagor lessees—as in this case it required Mrs. Harwood—to effect their insurances with the Atlas, which, as a responsible office, has been accepted by the estate without question. It may, of course,

A be suggested that this action on the part of the appellant's representatives was no more than an indulgence which the appellant was not concerned, as things stood, to withhold from his tenants. It is pertinent, therefore, to observe that in circumstances not unlike the present, the covenant would certainly be unequal to the burden the appellant now seeks to place upon it. Suppose, as has already been suggested, that the appellant were to find it to his interest to have all these insurances effected with some office other than the Law Fire. It cannot, in that case, I think, be doubted that he would nevertheless be bound to accept, as a complete performance in that behalf of the lessee's covenant, an insurance with the Law Fire, if tendered. Suppose again, that for some reason the Law Fire disappeared or were absorbed in some other office. The appellant could not in that case require a lessee to insure in an office of his own nomination, for the privilege of nomination is not reserved to him. And if the appellant, desirous of confining insurances to one office, were to disapprove of every other office as submitted to him, however responsible or unobjectionable in every way some at all events of those submitted might be, that action on his part, I cannot doubt, would be held unwarranted on the well-known principle explained and applied by TINDAL, C.J., in *Dallman v. King* (3) (4 Bing. N.C. at p. 109), that, the gist of the covenant being that the office selected by the lessee and tendered for approval should be responsible, to withhold approval from every responsible office but one, and that, for some reason entirely irrelevant to insurance protection, would go to the destruction of the thing granted which, "according to the well-known rule, would pass discharged of the condition."

D The alternative form of covenant which would have resolved all these questions in the appellant's favour is a very simple one, and it will be found, with variations in detail, in every standard book of precedents. By its terms the lessee covenants to insure "in such insurance office as shall be named by the lessor," or "in such office as the lessor shall appoint." Indeed, you have in this very covenant, by apt words, power reserved to the appellant, in case of default by the lessee, to realise his will in this matter. He is thereby empowered "to insure the said premises . . . as [he] may think fit." The aptness, for the same purpose of the covenant exacted by the respondent building society in Mrs. Harwood's mortgage of July 30, 1924, will not be missed. Thereby Mrs. Harwood covenants to "insure and keep insured the said premises . . . in such office and for such amount as the society shall appoint." The contrast between the present covenant and any one of these alternatives is very striking. Under it, the lessee is, as I think in plain language, given the option of fulfilling his obligation in one of two ways, either (a) by insuring in the Law Fire, or (b) in some other responsible insurance office to be approved by the lessor. The only preference enjoyed by the Law Fire Office is that it is a responsible office of which no further approval by the lessor is required. There is nothing in the covenant which either necessarily or naturally imports that the alternative is only exercisable if insurance in the Law Fire is impracticable. To introduce that qualification, some such words as "failing that office" would have to be added, and they are not there. The choice of the other office rests with the lessee: the approval only is with the lessor, not the selection, and the right of the lessor is limited to considering and approving or declining to approve the responsible office so chosen. It is here that the addition of the word "responsible" to the description of the office chosen for approval is so illuminating. Unless the name of a responsible office is tendered, the lessor need not consider the proposal at all. No step towards compliance with the covenant has so far been taken. Insurance in a responsible office is the gist of the covenant, and when in exercise of his privilege of selection the name of a responsible office is tendered by the lessee then the correlative duty of approval or disapproval by the appellant immediately arises.

I The action of the appellant in relation to the respondents' insurance with the Atlas was here very striking. Really, I think, he definitely refused to consider the case of any insurance office except the Law Fire. It may, however, be said that his refusal to approve the Atlas was attributable, not to any objection on the ground of responsibility or otherwise to that office, but to a preference for the Law Fire or to the fact that the Atlas was not the Law Fire. Be it so. The appellant's position is not, as I see it, thereby improved. In my opinion, however unrestricted may be his legitimate grounds

of objection in other directions the action of the appellant in withholding approval on any such ground cannot, on the true meaning of the covenant, be justified. As LAWRENCE, L.J., puts it in his judgment ([1928] Ch. at p. 72) the avowed action of the appellant "amounts to a complete negation of the right of the lessee to fulfil his obligation under the covenant by insuring in some responsible office other than the Law Fire. The lessor is in effect treating the covenant as if it were a covenant to insure in the Law Fire only and as if the alternative method of complying with it had not been inserted." In other words the appellant, by declaring that in no circumstances will any office other than the Law Fire be entertained by him, has brought it about that the respondents' insurance in the Atlas, an admittedly responsible office, is in the result a compliance with the covenant inasmuch as the covenant must, owing to the appellant's attitude in relation to that insurance, be regarded as "discharged of the condition." In my judgment, it is only under some other form of covenant, and not under this form, that the appellant is entitled to the right which here, for the reason assigned, he has claimed to exercise. On these grounds, if the decision rested with me, I would be for affirming the order of the Court of Appeal.

Appeal allowed.

Solicitors: *Rider, Heaton, Meredith & Mills*, for *Davis, Lloyds & Wilson*, Newport; *Church, Adams, Tatham & Co.*, for *Merrills, Ede & Nicholls*, Cardiff.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

ENGELKE v. MUSMANN

[HOUSE OF LORDS (Lord Buckmaster, Viscount Dunedin, Lord Phillimore, Lord Blanesburgh and Lord Warrington), June 14, 15, July 18, 1928]

[Reported [1928] A.C. 433; 97 L.J.K.B. 789; 139 L.T. 586; 44 T.L.R. 731]

Constitutional Law—Diplomatic privilege—Proof—Statement by Attorney-General on behalf of Foreign Secretary—Consular secretary at embassy—Diplomatic Privileges Act, 1708 (7 Anne, c. 12), s. 3.

The determination of the status of a person employed as a member of the ambassador's staff at a foreign embassy and claiming diplomatic privilege is a matter for the Crown in the exercise of its prerogative acting through the Secretary of State for Foreign Affairs, and a statement made to the court by the Attorney-General on behalf of the Secretary of State relating to that matter is final and conclusive.

The positions of diplomat and consular officer are not mutually exclusive, and a consular officer who exercises diplomatic functions will acquire diplomatic status.

Decision of Court of Appeal, [1928] 1 K.B. 90, reversed.

Notes. Applied: *Re. C. (an infant)*, [1958] 2 All E.R. 656. Referred to: *The Amazone*, [1940] 1 All E.R. 269; *R. v. A. B.*, [1941] 1 K.B. 454.

As to diplomatic privilege, see 7 HALSBURY'S LAWS (3rd Edn.) 267 et seq.; and for cases see 11 DIGEST (Repl.) 628 et seq. For Diplomatic Privileges Act, 1708, see 4 HALSBURY'S STATUTES (2nd Edn.) 591.

Cases referred to:

- (1) *Duff Development Co., Ltd. v. Kelantan Government*, [1924] A.C. 797; 93 L.J.Ch. 343; 131 L.T. 676; 40 T.L.R. 566; 68 Sol. Jo. 559, H.L.; 11 Digest (Repl.) 616, 439.
- (2) *Crosse v. Talbot* (1724), 8 Mod. Rep. 288; 88 E.R. 205; 11 Digest (Repl.) 632, 548.
- (3) *Seacombe v. Bowlney* (1744), 1 Wils. 20; 95 E.R. 469; 11 Digest (Repl.) 632, 557.

- (4) *Triquet v. Bath* (1764), 3 Burr. 1478; 1 Wm. Bl. 471; 97 E.R. 936; 11 Digest (Repl.) 632, 555.
- (5) *Heathfield v. Chilton* (1767), 4 Burr. 2015; 98 E.R. 50; 11 Digest (Repl.) 632, 551.
- (6) *Fisher v. Begrez* (1832), 1 Cr. & M. 117; 1 Dowl. 588; 3 Tyr. 184; 2 L.J.Ex. 13; 149 E.R. 338; 11 Digest (Repl.) 631, 546.
- (7) *Macartney v. Garbutt* (1890), 24 Q.B.D. 368; 62 L.T. 656; 54 J.P. 437; 38 W.R. 559; 6 T.L.R. 214; 11 Digest (Repl.) 630, 534.
- (8) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 11 Digest (Repl.) 628, 516.
- (9) *Re Suarez, Suarez v. Suarez*, [1918] 1 Ch. 176; 87 L.J.Ch. 173; 118 L.T. 279; 34 T.L.R. 127; 62 Sol. Jo. 158, C.A.; 11 Digest (Repl.) 635, 594.
- (10) *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94; 28 L.J.Q.B. 310; 34 L.T.O.S. 30; 5 Jur.N.S. 1260; 7 W.R. 598; 121 E.R. 36; 11 Digest (Repl.) 628, 513.
- (11) *Ex parte Edwards* (1873), 9 Ch. App. 138; 43 L.J.Ch. 350; 29 L.T. 711; 38 J.P. 277; 22 W.R. 143, L.C. & L.J.; 19 Digest 339, 1503.

Appeal by defendant from an order of the Court of Appeal (SCRUTTON and SARGANT, L.JJ.; LORD HANWORTH, M.R., dissenting) (reported [1928] 1 K.B. 90) dismissing an appeal from an order of SHEARMAN, J.

The questions for determination in this appeal were: (a) whether a statement made by the Attorney-General on the instructions of the Foreign Office that a person claiming immunity from civil process had diplomatic status was admissible in evidence; (b) whether a statement so made was conclusive; and (c) whether, having regard to the materials available in the courts below, the appellant, who claimed diplomatic immunity from civil process, should be ordered to attend to be cross-examined in the courts of this country, where he claimed to be immune, upon the affidavits in which his claim was preferred. The majority of the Court of Appeal held that the Attorney-General's statement regarding the result of the Foreign Office's investigation was not binding on the court and conclusive, and the best means to arrive at the true facts was by cross-examination of the appellant on his affidavit. The defendant appealed.

W. A. Jowitt, K.C., D. N. Pritt, K.C., and W. T. Monckton for the appellant.

F. Ritter for the respondent.

The Attorney-General (Sir Thomas Inskip, K.C.) and M. N. Drucquer for the Attorney-General.

The House took time for consideration.

July 18. The following opinions were read.

LORD BUCKMASTER (read by VISCOUNT DUNEDIN).—The privilege affording ambassadors and other accredited representatives of foreign countries immunity from all writs and processes is an ancient doctrine of the common law declared in terms by the Diplomatic Privileges Act, 1708. No question is raised on this appeal affecting the existence or the extent of this protection. The sole point for determination is the method by which the status of any person who claims the benefit of this privilege is to be determined. For the appellants it is contended that the statement of the Attorney-General on the instructions of the Foreign Office is for this purpose conclusive, while the respondent asserts that any such dispute should be ascertained in the ordinary way according to the usual rules of evidence.

The present appeal arises out of the following circumstances. On July 28, 1926, the respondent issued a writ in the King's Bench Division of the High Court claiming against the appellant rent alleged to be due under a lease dated Aug. 18, 1924, and damages for breach of covenant. A conditional appearance was entered by the appellant, and a summons was issued by him asking that the writ might be set aside on the ground that he had been a consular secretary on the staff of the German embassy, London, since Nov. 25, 1920, and had been notified as such to the British Foreign Office and that his name appeared in the diplomatic list issued by the British Foreign Office. It is unnecessary to follow the varying fate of this application before the master and the judge, for,

pursuant to leave, another summons was issued by the appellant on Oct. 26, 1926, asking the same relief as before. On this application, as on the former, the appellant filed an affidavit; prolonged and fruitless proceedings in chambers ensued, until finally, on Mar. 4, 1927—eight months after the issue of the writ—SHEARMAN, J., made an order that the appellant should attend for cross-examination on his affidavit, at the same time granting leave to appeal against his order. The appellant availed himself of this permission and appealed to the Court of Appeal, who on June 23, 1927, confirmed the order of SHEARMAN, J., the Master of the Rolls dissenting, and from their judgment this appeal has been brought. In form, therefore, this appeal is against an order for cross-examination, but in substance the dispute is far more important. A B

On the first day of the hearing of the appeal the Attorney-General informed the court on their invitation that the appellant "has been appointed as a member of the staff of the German ambassador under the style of consular secretary and has been received in that capacity by the British government. His name has been submitted to the Foreign Office by the ambassador in the usual way, and his position as a member of the embassy is, and has been since December, 1920, recognised without reservation or condition of any sort. He has been engaged during the last twelve months, at any rate, as a member of the staff of the Commercial Division of the embassy. As such he has been obliged to take part from time to time in the general work of the embassy staff, and particularly as regards the ciphering and de-ciphering of telegrams, that is, telegrams from the German ambassador to his government. He is responsible in all that he does to the German ambassador." He further added that he had himself communicated with the Foreign Office, had ascertained and accepted and was able to say that he was satisfied that the information was correct as to the appellant's position at all relevant dates. If this statement as to status be accepted, no question arises upon the construction of the statute: the appellant would then be entitled to the benefit of the privilege that he invokes. SCRUTTON, L.J., with whom SARGANT, L.J., agreed, felt himself unable to accept this statement as binding: to do so would, in his opinion, be contrary to principle and unsupported by authority. I find myself unable to agree with this conclusion. C D E

So far as the question of principle is concerned, the case decided in this House of *Duff Development Co., Ltd. v. Kelantan Government* (1) is a clear authority that the method of proving the status either of sovereigns or of the ambassadors who are their representatives is by the very method that is challenged in the present case. The statute, however, draws no distinction between the ambassadors and what, in the language of s. 3 of the Act of 1708, is described as the "domestic or domestic servant of any such ambassador," and it seems difficult to understand when the principle is admitted with regard to the one that it should not apply in relation to the other, for the privilege is the same in each case. With regard to the sovereignty of a particular State and whether or not a particular person is a sovereign ruler, the case referred to makes the general principle plain. As LORD FINLAY said ([1924] A.C. at p. 813): F G

"It has long been settled that on any question of the status of any foreign Power the proper course is that the court should apply to His Majesty's government, and that in any such matter it is bound to act on the information given to them through the proper Department. Such information is not in the nature of evidence; it is a statement by the sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognisance." H

LORD DUNEDIN expressed the same opinion in these words ([1924] A.C. at p. 820):

"It seems to me that once you trace the doctrine of the freedom of a foreign sovereign from interference by the courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition." I

The acceptance and recognition of persons who form the staff of an ambassador are matters which, having regard to the practice in the conduct of foreign affairs, are equally based on the comity of nations and necessarily also within the cognisance of the Crown acting through the Foreign Office. They are in a position to know what are the duties performed and the persons who perform them, and it is plain that, though they trust the list put forward if it appears from their knowledge to be a list which might reasonably be

accepted, yet the list itself is scrutinised, inquiries are made, and, if necessary, persons are removed for sufficient reasons. That some such practice is contemplated under the Act itself is plain from s. 6 which provides that no person shall be proceeded against for the arrest of a servant of the ambassador unless his name shall have been registered in the office of one of the principal Secretaries of State and transmitted to the sheriffs of London and Middlesex, who are to hang the list up in some public place. This, of course, is a negative provision and does not show that the list should be accepted as evidence; but it does contemplate the preparation of a list of people for whom immunity is claimed and its publication in the manner therein provided. The list is not conclusive, nor is it the list itself on which reliance is to be placed, but on the statement of the Crown, speaking through the Attorney-General, stating that a particular person at the critical moment is qualified to be upon the list. When this statement has been made it is difficult to see how it can be questioned without the introduction of proceedings which in the person of the ambassador himself, and equally of his wife and family and staff, it would obviously be undesirable to institute.

But apart from the question of principle, it appears to me that there is valuable information to be found in the authorities. In *Crosse v. Talbot* (2) a question arose whether a particular person was on the staff of the Duke of Holstein's resident here, and a certificate was produced that he was the valet de chambre of such resident at certain wages. The court, however, held that he appeared to be a mere nominal servant and that he consequently was not within the privilege, but the certificate of the resident as to what his status actually was does not appear to have been challenged. In cases like *Seacombe v. Boulney* (3) and *Triquet v. Bath* (4), the dispute was, in fact, tried upon affidavit and the only questions determined were whether these affidavits showed that the status was adequate to secure the protection. The latter case is interesting because it explains the origin of the passing of the Diplomatic Privileges Act, 1708. In *Heathfield v. Chilton* (5) the dispute was whether the person in whose service the defendant who had been arrested was himself within the privilege. LORD MANSFIELD there said that

“the application was not by the Attorney-General—that would have shown that the Crown thought the person was entitled to the character of a public Minister; it now remains uncertain what his proper character is.”

LORD MANSFIELD also added that the registration of a particular person's name in the Secretary of State's office was not a condition precedent to his right of protection. In *Fisher v. Begrez* (6), the question was whether a chorister was within the protection, and it was there held that the certificate itself was not a sufficient authority that the defendant was as a chorister a domestic servant and therefore privileged.

Beyond this, the earlier cases throw little light upon the question, and this is possibly due to the fact that in all those cases, the defendant being the subject of arrest, application was immediately made on affidavit for his release; and that the matter could be tried by affidavit, if no intervention took place and if the defendant so liked, is not in dispute. The latter cases are more instructive. In *Macartney v. Garbutt* (7) a question arose whether a British subject accredited to Great Britain by a foreign government as a member of its embassy was liable to distress on the furniture of his house for rent. Such distress had been levied and had been paid out by the plaintiff, who brought an action to recover back the sum. In the course of his judgment MATHEW, J., said that the plaintiff was an English subject, had been appointed by the Chinese government English secretary to the Chinese embassy and had been received in that capacity by the British government; his name had been submitted to the Foreign Office in the usual way and his position as a member of the embassy recognised without reservation or condition of any sort. He would, therefore, seem to be clearly entitled to the privileges of the corps diplomatique. The importance of this statement is that the learned judge bases his judgment upon the reception of the person as secretary by the British government, the submission of his name to the Foreign Office, and his recognition by them. Now those circumstances could only be proved either by a person speaking on behalf of the Crown as representing the Foreign Office, or by such person giving evidence and being subject to cross-examination, but directly the matter is based upon the reception and recognition

by the Foreign Office it seems impossible to suggest a reason why such recognition should be good in the case of the ambassador and bad in the case of his staff. In *The Parlement Belge* (8) there is contained a very important statement by JAMES, L.J. BRETT, L.J., appears to have doubted whether the recognition by the Crown of an ambassador could be accepted if the person in question had not, in fact, been sent as an ambassador, but JAMES, L.J., states that that question is outside the authority of any municipal court, and adds: "I apprehend that we should be bound to act on the representation of the Foreign Office." And, in *Re Suarez, Suarez v. Suarez* (9) it was decided in the Court of Appeal that a letter from the Foreign Office under the hand of an Assistant Secretary of State stating that a Minister's name has been removed from the diplomatic list is sufficient evidence that he had ceased to hold diplomatic office at the date of the letter.

It is, of course, obvious that the privilege claimed has serious results, as it excludes from their remedies in the courts the people with whom members of the ambassador's staff may have incurred obligations, and it is possible that it is open to abuse. It is of the essence of all privilege that it may be abused, but that question has nothing to do with the matter we are called upon to decide; the merits of the dispute out of which this question has arisen are in no way before us for consideration. The privilege itself depends upon maintaining the obligations of international law and the comity of nations. It would, indeed, be unfortunate if, after recognition had been afforded by His Majesty through the Foreign Office to people as holding such posts on the ambassadorial staff as entitled them to the privilege and the statement as to their position had been afforded on behalf of the Crown through the Attorney-General, it was to be disregarded by the judiciary for, in such circumstances, the ensuing contest could not possibly enure to the public good.

VISCOUNT DUNEDIN.—My noble and learned friend **LORD BLANESBURGH** concurs in the opinion of **LORD BUCKMASTER**. I myself entirely concur with what has been said by the noble and learned Lord on the Woolsack as to the unfortunate way in which this case was begun. Had the question remained merely whether cross-examination was permissible upon an affidavit in which the appellant set forth his own status, I should have been of opinion with the court below. But, in truth, the whole case was altered funditus when the Attorney-General intervened. The respondent tried to convince us that, if this case was decided in favour of the appellant, it was opening the door to the granting of diplomatic privilege to the consular service. It is nothing of the sort, Mr. Engelke will enjoy diplomatic privilege not because he is styled Consular Secretary but because he, as an accredited member of the ambassador's household, has privilege as such and does not forfeit it because he does some consular work. In *Duff Development Co., Ltd. v. Kelantan Government* (1) in this House, it was pointed out that the acknowledgment of diplomatic privilege entitling immunity from being sued in the tribunals of this country rests on comity, and that the statute of Anne does no more than confirm the common law and annex certain penalties to those who transgress it. Mr. Engelke is, in the words of the statute, "a domestic of the ambassador." In the Oxford Dictionary "domestic" as a substantive is defined as "a member of the household, one who dwells in the house, an inmate"; and there is a quotation, from a work published in 1656: "from that time he had his access to His Majesty's person as a domestique without ceremony." To prove that he is so rests on the fact that it has been brought to the notice of the court through the Attorney-General, as the mouth-piece of the Foreign Office, that Mr. Engelke was presented to the Foreign Office, as belonging to the personal staff of the ambassador in the list supplied by him to the Foreign Office and accepted as such by the Foreign Office. In such a case the comment which I made in *Duff's Case* (1) and which, I think, was quoted by the Master of the Rolls, seems to me directly in point. The Attorney-General, in his very careful statement, shows that the acceptance of the list is no matter of necessity, but that it is subjected to careful scrutiny. This seems to me to obviate the possibility of abuse, or of such extension of privilege if it was sought to include the whole consular service. The judgment of the Court of Appeal should be reversed and a declaration made that the appellant is entitled to diplomatic privilege.

LORD PHILLIMORE.—The plaintiff in this case brought an action claiming certain relief against the defendant in respect of the lease of a house. The defendant who claims diplomatic privilege as one of the staff of the German embassy entered a conditional appearance and took out a summons for an order that the writ be set aside. In support of this summons he filed an affidavit by his solicitor speaking partly to the deponent's own knowledge, but mainly upon information and belief. This affidavit was rejected, perhaps unfortunately, by TALBOT, J., as being insufficient even to raise the point. Thereupon, the defendant filed his own affidavit and then a further affidavit on his own behalf, and the plaintiff, being minded to contest the accuracy of the statements contained in these affidavits, applied to cross-examine the defendant upon them. The defendant, upon the instructions of the ambassador, declined to submit himself to cross-examination and after the matter had been to and fro in a not very edifying series of applications to master and judge, it came before the Court of Appeal. Before that court the Attorney-General appeared, instructed by the Foreign Office, to give certain information as to the status of the defendant, and after he had given that information, the court, nevertheless, by a majority affirmed the decision of the judge at chambers directing that the defendant should attend for the purpose of cross-examination. It is from this order of the Court of Appeal that the appeal has now been brought to your Lordships' House.

The description which the defendant gave of himself and which has been given of him by the Foreign Office is, that he is a Consular Secretary on the staff of the German ambassador and the argument for the plaintiff rested on the expression "consular" with a suggestion that an attempt was being made to get diplomatic privilege for a person who was not truly diplomatic, but only in the consular service. For reasons which will appear in the course of this opinion, it is not necessary to go very deeply into this point, but I may observe that the positions of diplomat and consular employee are not mutually exclusive, and that, indeed, it has been in the past not uncommon to clothe a consul or consul-general with certain diplomatic functions and thereby to give him a diplomatic status. But the question before your Lordships turns on other matters.

If this case now turned upon the question whether the defendant should be cross-examined upon his affidavit, or not, it may be that the result would be unfavourable to him. Where an application is made to stop a suit in limine and the application rests upon a disputed matter of fact, it would be right that the evidence should be scrutinised. On the other hand, where an applicant is claiming that he is privileged from litigation it seems a strange result if he is forced to litigate in order to obtain his exemption from litigation. But as the defendant is now content to rely solely upon the certificate of the Foreign Office delivered to the court by the Attorney-General, it is unnecessary to consider the question of cross-examination. The objection taken on behalf of the plaintiff to the reception of this certificate and the criticism of its weight seems to me to rest upon misapprehensions as to the nature of diplomatic privilege.

By international law which is part of the common law of this country, an ambassador, by which term I intend to include diplomatic agents of all sorts—the stately ambassador, in the restricted sense of the word, the special envoy, the resident Minister, and the Chargé d'Affaires—is sent by the one country and received by the other upon the term that he has among his other diplomatic privileges immunity from legal process in the courts of the country which receives him. The reasons for this immunity are well expressed in *Magdalena Steam Navigation Co. v. Martin* (10). This immunity being accorded to him in order that he may transact his sovereign's business, is a privilege which he cannot waive unless under direction from his sovereign. The ambassador further requires, in order that he may effectually do his sovereign's business, that there should be a like immunity for his personal family, that is to say, his wife and his children if living with him, his diplomatic family as it is sometimes called, that is to say, his counsellors, secretaries, and clerks whom I take to be intended by the word "domestic" in s. 3 of the Diplomatic Privileges Act, 1708, and his ordinary servants described in the section as "domestic servants" with a possible reservation in the case of domestic servants who are nationals of the receiving country. The privilege of all these persons is a derived privilege created for the benefit of the ambassador and may be waived by

him, but should, unless waived, be taken by them for the ambassador's benefit. But, just as the receiving State may intimate that a proposed ambassador will not be agreeable to it and will be refused, so, if the ambassador tenders a person as a domestic or domestic servant, the receiving State may refuse to accept and recognise the man as such, and when the person tendered is a subject of the receiving country conditions may be made. In old days, a resident Minister or chargé d'affaires was not unfrequently a subject of the receiving country, distinguished from an envoy who, as the derivation of the word shows, would be sent from the one country to the other. I take it that in living memory our business at the court of the ruler of Afghanistan was conducted on this footing. But generally, now, the ambassador is a subject of the sending and not of the receiving country, and is, therefore, said to be extra-territorial. But his domestic servants or some of them will almost certainly be subjects of the receiving country, and in certain cases some members of the staff may be drawn from the receiving country. *Macartney v. Garbutt* (7) affords such an instance. Sir Halliday Macartney was appointed English secretary to the Chinese legation, and, as the case narrates, his appointment was communicated to, and accepted by, the Foreign Office without conditions, though, as he was a British subject, it might have been made subject to the condition that no privilege was claimed for him. The Siamese legation has had, to my knowledge, similar English secretaries, but whether they were accepted by the Foreign Office conditionally or unconditionally, I know not. When we come to the ordinary domestic servant, it may well be, that, if he be a British subject, the Foreign Office may intimate that they cannot accept him so as to give him privilege. But, according to English law (which may in respect of the domestic servant who is a national go somewhat beyond general international law), once the person is tendered as a domestic or as a domestic servant, and the tender is accepted, the status is created and the privilege attaches.

When, therefore, the certificate from the Foreign Office was delivered by the Attorney-General, it was not, as suggested on behalf of the plaintiff, a piece of hearsay evidence, a mere narrative of what the ambassador had told the Foreign Office. It was a statement of what the Secretary of State on behalf of his Majesty had done, not what he was doing ad hoc, or what he was believing and repeating, but what the Foreign Office had done. The certificate is no attempt on the part of the Executive to interfere with the judiciary of the country. The status which gives the privilege has been already created by the Crown in virtue of its prerogative in order to administer its relations with a foreign country in accordance with international law. For the plaintiff, reliance was not unnaturally placed upon a number of cases, principally in the eighteenth century, where privilege was asserted by an application to discharge the defendant supported by an affidavit of the facts, whether made by or on behalf of the defendant; and it was submitted that this was the only way in which the status (except in the case of the actual ambassador) could be proved, with a further submission that the proper consequence would be that the deponent might be cross-examined. It would seem that the privilege might be claimed and proved in this manner, but there were reasons for this procedure which no longer exist, and there are objections to it in principle which seem to me to make it a less desirable course. In these eighteenth-century cases the defendant seems always to have been a British subject. I should gather that in most of them he was not on the sheriff's list, and I would insist upon this, not because of the direct importance of the list, but because he would have been on the list if he had been made known to the Foreign Office and accepted as one of the ambassador's retinue, and it follows, therefore, that he never had been tendered and accepted and was reduced to proving his privilege in fact by showing his service.

My next observation would be that, according to the procedure of those days, process was initiated by arrest of the person and that a defendant had perforce to submit so far to the jurisdiction as to procure his release by giving bail. Further, I would observe that counsel have told your Lordships that the result of their researches is that cross-examination upon affidavit was an unknown form of procedure till introduced by the Chancery Procedure Act, 1852, so that the affidavit of the eighteenth century was merely a solemn mode of making a claim. It was, indeed, the only way, as far as I know the old procedure, because I conceive that a suggestion on the roll would not be applicable

and that the only form of process would be by a rule nisi supported by affidavit. Such defendants, not having been made known to the Secretary of State, could not well expect to have the benefit of the procedure suggested by LORD MANSFIELD in *Heathfield v. Chilton* (5). I quote his words:

“I find this is not an application by the Attorney-General by the direction and at the expense of the Crown. That, indeed, would have shown that the Crown thought this person intitled to the character of a public Minister.”

Fisher v. Begrez (6) is, perhaps, the most favourable to the plaintiff. There the claim of privilege was disallowed, and there are expressions in the report to the effect that the certificate from the Secretary of State was not conclusive; but what is referred to is not a real certificate, but the sheriff's list, and the reason given is that a man may well have been put on the list as being at the time in the suite of an ambassador, and yet be no longer in that capacity. There was not, as in this case, a certificate *de præsenti*. It may be further noticed that the claim for privilege was made in respect of a writ of *fi. fa.*, so that the case must have proceeded to judgment without any such claim having been made, and it seems to have been an after-thought. The case of the Russian ambassador which led to the Diplomatic Privileges Act, 1708, is related by LORD MANSFIELD in *Triquet v. Bath* (4), and is given more at length in BLACKSTONE'S COMMENTARIES (2nd Edn.) vol. 2, p. 255, repeated by STEPHEN. BLACKSTONE got his account from BOYER'S ANNALS OF QUEEN ANNE, pp. 354–396 *passim*, to which I have referred. LORD MANSFIELD, following, I think, the train of thought which he expressed later in *Heathfield v. Chilton* (5), seems rather to complain that in that case there was no direct intervention by the Attorney-General. He observes as follows:

“If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that bail was put in before any complaint was made.”

I do not, however, know what the unfortunate ambassador could have done. His carriage was stopped, he was dragged out of it with violence and taken to a sponging house, where he had to remain till two distinguished persons put in bail for him. He then went straight to the Queen to complain, and the whole Diplomatic Corps joined in protesting, whereupon the delinquents were summoned before the Privy Council, of which it is stated that HOLT, C.J., was sworn a member, apparently in order that he might sit. One of the persons complained of was discharged, but the rest were committed to prison, and the Attorney-General was directed to file an information against them, on which they were convicted, judgment being reserved, in order to consider the international law; but the Czar, having been mollified by the passing of the Act of Parliament and the presentation of an elaborately engrossed copy, desired that they should not be punished, and they were, accordingly, released. It does not appear that any steps were taken to vacate the bail bond or dismiss the suit. Probably any such step was deemed unnecessary. There was intervention by the Crown, but after a different fashion.

I have already observed that, in my judgment, there are objections in principle against driving a defendant to the course adopted in the eighteenth-century cases. The object to be attained is immunity from the vexation of litigation with its impediments to the discharge of the functions of the domestic or domestic servant, as illustrated in the case which I have already quoted of *Magdalena Steam Navigation Co. v. Martin* (10). Absolute freedom is difficult to procure. Litigation, as MELLISH, L.J., observed in *Ex parte Edwards* (11), usually begins *ex parte*, and a defendant served with a writ must enter an appearance, even if it be only a conditional appearance, or he will have judgment against him, and he must follow up appearance by a summons to set aside the writ. All this is unfortunate, and is intended to be provided against in our country by the statute of Anne and the sheriff's list. But the only compensation, if it be compensation, is to give the defendant his costs. If possible, there should be no further interference with him, but if he is put to file an affidavit it is a further step in *de facto* submission. If he has to attend for cross-examination, it is a further submission and not unlikely to interfere with the discharge of his other duties. Where the man's chief has not taken the precaution of tendering the man and procuring his acceptance, the man may have still

to prove his status aliunde. But where the man has been tendered and accepted the joint act creates a status, which can only be removed by showing that his duties have ceased or that he has engaged in trade. If I am not mistaken, when a question arises in the Law Courts whether a ruler is a sovereign, and a proper Secretary of State is consulted, the right answer is not "A. B. is a sovereign," but "A. B. is recognised by his Majesty as a sovereign," so I think the exact inquiry in this case is not whether the defendant is a member of the ambassadorial staff, but whether he has been accepted and recognised by the Crown as such a member, and it appears to me that he has so been. Therefore, I think that this appeal should be allowed.

LORD WARRINGTON.—The appellant is defendant in an action brought against him by the respondent Musmann for the recovery of rents reserved by, and damages for breach of, covenants contained in a lease dated Aug. 18, 1924, made between the respondent, of the one part, and the appellant, of the other part, of certain premises at Hampstead. The appellant, having entered a conditional appearance, applied to have the writ and all subsequent proceedings set aside on the ground that he is a consular secretary on the staff of the German embassy, and, therefore, entitled to immunity from civil proceedings. In support of this application he filed affidavits stating the nature of his employment and making the claim to immunity. On Mar. 4, 1927, SHEARMAN, J., on an appeal from a decision of Master MOSELEY, given in chambers on Feb. 15, 1927, ordered the appellant to attend for cross-examination, but gave leave to appeal. The appeal came before the Court of Appeal on April 12, and May 30 and 31, 1927. The Attorney-General attended and at the request of the court informed them that the appellant had been appointed a member of the staff of the German embassy, under the style of Consular Secretary, and had been received in that capacity by the British government, that his name had been submitted to the Foreign Office by the German ambassador in the usual way, and that his position as a member of the embassy was and had been since December, 1920, recognised without reservation or condition of any sort. He gave the court certain further information as to the particulars of the appellant's employment which it is not necessary to state in detail, and stated that he gave the information both on the instructions of the Foreign Office and on his own responsibility as Attorney-General. On June 23, 1927, the Court of Appeal by a majority, SCRUTTON and SARGANT, L.JJ. (the Master of the Rolls dissenting), made an order affirming the order of SHEARMAN, J. This is an appeal from that order. On Nov. 25, 1927, the Attorney-General lodged a petition to this House praying leave to intervene in this appeal and to lodge a case and to be heard thereon. The prayer of this petition was granted by the appeal committee, reserving to the respondent Musmann the right to take on the hearing of the appeal such preliminary objection to the Attorney-General being heard as he might be advised. The Attorney-General, accordingly, lodged a Case and appeared before your Lordships, but, the respondent objecting to his being heard, and the Attorney-General stating that the printed Case contained all that he desired to say, he did not address any argument to your Lordships.

The real question, therefore, and it is an important one, is whether in such a case information given by the Attorney-General in the circumstances stated above as to the diplomatic status of a person claiming immunity from civil process is conclusive as to the fact of such status. If it is, then cross-examination on an affidavit with the object of displacing the effect of the information would be irrelevant and useless and ought to be refused. It must be borne in mind that all that is directly in issue is the fact of the appellant's status. Whether, that fact being established, a defendant is entitled to the immunity he claims is a further question, which might have to be determined by the court. In the present case, however, it does not appear that there is in issue any question of law or fact other than that of status.

It is now well settled that in certain matters connected with our relations with foreign States it is for the court to take judicial notice of the facts relating thereto, and, further, that in all matters of which the court takes judicial cognisance the court may have recourse to any proper source of information, and there is no question that in such a case as the present the source of information actually applied to was the proper source.

A The information so obtained is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognisance, and the court is bound to act on such a statement: see the opinion of LORD FINLAY in *Duff Development Co., Ltd. v. Kelantan Government* (1) ([1924] A.C. at p. 813). It is admitted that among the matters of which the court is bound to take judicial cognisance are the status of an ambassador himself and even that of a mere chargé d'affaires. In *Macartney v. Garbutt* (7) it would seem, though it is not quite clear, that the court acted on information obtained from a government Department, in that case the Home Secretary, as to the status of the English secretary of the Chinese Embassy. But, once it is established, and I think it is, that the court takes judicial cognisance of the status of any member of a foreign embassy, it is impossible on any principle to draw a distinction between one class of member and another and to say that the rule applies to the first and not to the second. The Attorney-General states explicitly in his Case that it is a necessary part of His Majesty's prerogative in his conduct of foreign affairs and his relations with foreign States and their representatives to accord or refuse recognition to any person as a member of a foreign ambassador's staff exercising diplomatic functions. The fact of recognition is, of course, peculiarly within the knowledge of the Department according to, and a statement by or on behalf of the Department

D that it has been accorded to any person must, in my opinion, come within the principles above referred to and be conclusive as to the status of that person. It may be added that the Attorney-General states in his printed Case that, for the purpose of obtaining recognition of the members of an ambassador's staff exercising diplomatic functions, a list of such members is furnished from time to time to the Secretary of State by every ambassador. The list is not accepted as of course on behalf of His Majesty, and after

E investigation, it not infrequently happens that recognition is withheld from a person whose name appears upon the furnished list, either because his diplomatic status is in doubt, or because the number of persons for whom status is claimed appears to the Secretary of State to be excessive.

I have not thought it necessary to discuss the many cases which were cited in this House. It is enough to say that some of them support, and no one of them is opposed to, the views I have above expressed. I have also thought it unnecessary to say anything about the Act of 1708. It is well settled that the questions we have been discussing do not depend on the statute, but are principles of common law having their origin in the idea of the comity of nations. For the reasons above expressed I am of opinion that this appeal should succeed and the orders of the Court of Appeal and SHEARMAN, J., should be discharged and a declaration made as proposed from the Woolsack. The appellant

G does not ask for costs and the order will therefore be without costs here or below.

Appeal allowed.

Solicitors: *Buckeridge & Braune; Glynn, Barton & Pocock; Treasury Solicitor.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

ST. ANNE'S WELL BREWERY CO. v. ROBERTS

[COURT OF APPEAL (Scrutton, Lawrence and Greer, L.J.J.), July 3, 4, 5, 1928]

[Reported 140 L.T. 1; 92 J.P. 180; 44 T.L.R. 703; 26 L.G.R. 638]

Nuisance—Negligence—Adjoining premises—Liability of adjoining owner not in occupation—Need to prove knowledge of nuisance at time of granting lease—Liability of adjoining tenant occupier—Nuisance not created by him—Nuisance known to tenant and allowed to continue.

An owner not in occupation of land on which is created a nuisance which causes damage to an adjoining property owner is not liable in respect of that damage unless it can be shown that at the time he let the premises there was then a nuisance on them and that he knew, or ought to have known, of it. A tenant occupier is not liable for such damage if he did not create the nuisance on the land he occupies unless, perhaps, knowing of it or being in such a position that he ought with reasonable care to have known of it, he allowed it to continue. The doctrine of *Rylands v. Fletcher* (1) (1868), L.R. 3 H.L. 330, applies to occupiers and not to owners not in possession, and it does not apply in the case of a normal use of land.

The plaintiffs were the owners of an inn, one side of which was bounded by the ancient city wall of Exeter, part of which was the property of the defendants. At all material times the land retained by the part of the wall in question was occupied by a tenant of the defendants. In 1927 a considerable portion of the wall belonging to the defendants collapsed and damaged the plaintiff's inn. In an action by the plaintiffs claiming damages for nuisance and/or negligence,

Held: to build a retaining wall on land was a normal user of the land; there was no evidence that the defendants knew, or should have known, of any defect in the wall; and, therefore, the plaintiffs were not entitled to recover.

Notes. Followed: *Wilkins v. Leighton*, [1932] All E.R.Rep. 55. Considered: *Wringe v. Cohen*, [1939] 4 All E.R. 241. Referred to: *Cunard v. Antifyre, Ltd.*, [1932] All E.R.Rep. 558; *Wilchick v. Marks and Silverstone*, [1934] All E.R.Rep. 73; *Metropolitan Properties, Ltd. v. Jones*, [1939] 2 All E.R. 202; *Sedleigh-Denfield v. O'Callagan*, [1940] 3 All E.R. 349; *Slater v. Worthington's Cash Stores* (1930), *Ltd.*, [1941] 1 All E.R. 245; *Read v. J. Lyons & Co., Ltd.*, [1945] 1 All E.R. 106.

As to the duty of occupiers of premises to their neighbours, see 23 HALSBURY'S LAWS (2nd Edn.) 614-617, and *ibid.*, vol. 24, 41 et seq.; and for cases see 36 DIGEST (Repl.) 281 et seq.

Cases referred to:

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, 334.
- (2) *Chauntler v. Robinson* (1849), 4 Exch. 163; 19 L.J.Ex. 170; 14 L.T.O.S. 107; 154 E.R. 1166; 36 Digest (Repl.) 299, 435.
- (3) *Todd v. Flight* (1860), 9 C.B.N.S. 377; 30 L.J.C.P. 21; 3 L.T. 325; 7 Jur.N.S. 291; 9 W.R. 145; 142 E.R. 148; 31 Digest (Repl.) 381, 5094.
- (4) *Wilson v. Waddell* (1876), 2 App. Cas. 95; 35 L.T. 639; 42 J.P. 116, H.L.; 34 Digest 725, 1071.
- (5) *Ilford U.D.C. v. Beal and Judd*, [1925] 1 K.B. 671; 94 L.J.K.B. 402; 133 L.T. 303; 89 J.P. 77; 41 T.L.R. 317; 23 L.G.R. 260; 36 Digest (Repl.) 294, 407.
- (6) *Barker v. Herbert*, [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 488; 9 L.G.R. 1083, C.A.; 36 Digest (Repl.) 297, 419.
- (7) *Nelson v. Liverpool Brewery Co.* (1877), 2 C.P.D. 311; 46 L.J.Q.B. 675; 25 W.R. 877; 31 Digest (Repl.) 380, 5083.
- (8) *West v. Bristol Tramways Co.*, [1908] 2 K.B. 14; 77 L.J.K.B. 684; 99 L.T. 264; 72 J.P. 243; 24 T.L.R. 478; 52 Sol. Jo. 393; 6 L.G.R. 609, C.A.; 36 Digest (Repl.) 293, 399.

Appeal from an order made by ACTON, J., in an action tried before him at Exeter Assizes, and adjourned to London for argument.

The plaintiffs were the owners of the house, premises and grounds known as the Custom House Inn, Quay Hill, in the city of Exeter. The premises were bounded on one side by a portion of the ancient wall of the city, which portion was vested in the two first-named defendants as trustees under the will of Robert William Wreford, the defendant Harriet Roberts being tenant for life of the said portion of the wall under the settlement created by the will. On Mar. 11, 1927, the said portion of the wall fell upon the premises, destroying the greater part of the house, and covering the grounds thereof with debris. The plaintiffs alleged that at the time of the fall, as the defendants well knew or ought to have known, the said portion of the wall was in a dangerous condition and constituted a nuisance. Further and in the alternative they said that the fall of the said portion of the wall was occasioned by the negligence and/or breach of duty of the defendants in failing to maintain the wall in a safe condition. The plaintiffs claimed damages. By their defence the defendants pleaded that the portion of wall in question was, at all material times, in the possession of one John Wilson, to whom it had been leased, and not in that of the defendants or any of them. The defendants admitted that on Mar. 11, 1927, the portion of the wall fell upon the premises and caused damage thereto, but said that if (which was denied) the said portion of the wall was ever in a dangerous condition or constituted a nuisance the defendants were not, nor was any of them, ever aware of the said fact nor ought they, or any of them, to have been aware thereof. The defendants denied negligence, and pleaded contributory negligence on the part of the plaintiffs by their cutting into the wall from the inn. ACTON, J., in giving judgment, said that there was no doubt that there was a duty on the owner of a building to keep it in such a state that his neighbour might not be injured by its fall: see *Chauntler v. Robinson* (2), 4 Exch. at p. 170, and *Todd v. Flight* (3). The marginal note of the latter case was as follows:

"An action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain until by reason of the want of reparation they fall upon and injure the house of an adjoining owner."

There could be no doubt that there was a breach of that duty by the defendants, for though they owned this very picturesque and imposing length of ancient wall, they did nothing whatever to see whether it was safe or unsafe, but simply left matters to chance, unfortunately with the most disastrous consequences. There could be little doubt that it was assumed by them that what had stood unshaken for so many hundreds of years might be trusted to stand indefinitely without having anything done to it, and without even being inspected from time to time with the view of seeing in what condition the fabric of the wall was throughout, and whether anything required to be done to any portion of it. He, accordingly, gave judgment for the plaintiffs, and the defendants appealed.

du Parc, K.C., and J. L. Pratt for the defendants.

Holman Gregory, K.C., and G. D. Roberts for the plaintiffs.

SCRUTTON, L.J.—This appeal raises some curious and interesting questions. The matter complained of by the plaintiffs, who are the owners of an inn situate in the ancient city of Exeter, was that a large portion of the city wall fell into their premises and did a great deal of damage, and they claimed compensation for that damage against two trustees and a tenant for life of the property which is said to comprise that portion of the city wall. The city wall has surrounded the city of Exeter more or less continuously for centuries. It is a very substantial structure. It is six feet thick, and some 30 to 40 ft. high; and in this part of the city it appears to have been built on the side of a hill. Against it—I am not certain whether I am using a correct term, for a reason that I will state in a moment—there appears to have been built many years ago the plaintiffs' inn, known as the Custom House Inn, which has now been destroyed. In the top floors of that inn there was daylight between the wall and the structure of the inn. In the lower floor of the inn it is very difficult to know what the position was. It rather looks as if in certain portions the city wall formed the back wall of the inn.

It may be that in some places a thin brick wall had been built against the city wall. But when the inn and the wall were standing one could not see what the relations of the inn to the wall were, and now that the wall has fallen the wall and the inn are buried under one huge mass of masonry, and one will never know what the position was. It is difficult to be sure of whether the city wall was the back wall of the inn or whether there was a wall of the inn next to the city wall. And nobody knows where the brickwork of the wall began in relation to the floor of the inn; whether it began on the level of the ground floor, whether it went down lower than the ground floor, whether it began higher up the hill than the ground floor will, I imagine, never be known in that particular portion of the wall. About 30 ft. in length of the wall fell. The evidence is that it began dropping down, that it sagged, and then fell out.

Why did it fall? There was very considerable controversy at the trial whether the structure of the wall was a wall with buttresses, or whether there had been on the part of those who built the inn or inhabited the inn, at some time or other, excavation into the wall, for on each side of the fireplace in the kitchen on the ground floor there were two cupboarded recesses going back some 6 ft. or 7 ft., and the case made for the defendants was that whoever built these had at some time dug into the wall to make the two recesses. On behalf of the plaintiffs it was said: "No, you are wrong in that; the fireplace is on a buttress, the sides of the cupboards furthest from the fireplace on each side are also buttresses, and that explains the two cupboards." At the trial the learned judge, having heard the evidence and looked at the plans, some imaginative and some taken from measurement, came to the conclusion that the cupboards or recesses were excavated from the wall. Speaking for myself, having looked at the evidence, and, in particular, having looked at the plan prepared from actual measurements, I have come to the conclusion that at some time or other excavations were made into the wall to form recesses, which went some considerable way into the wall. In those circumstances, the defendants say: "You have only yourselves to thank for what has happened. You have been weakening our wall by digging into it, and when it ultimately tumbles down because you weakened it by digging into it, you must not come to us and complain that it has tumbled down. You must thank yourselves for this tumbling down; you should not have dug into it." The learned judge takes the view—and I see no reason to differ from his conclusion—that the fall of the wall was due partly to its being weakened by these recesses, partly to the continual percolation of ordinary rain through the soil down to the bottom of the wall, possibly washing away foundations or soil from around the foundation of the wall. One other fact has to be appreciated, namely, that nobody could see what was going on at the base of this wall; on the side furthest from the inn you could not find out without digging down for 20 ft. or 30 ft. into the soil. On the other side, in order to find out what was happening you would have had to break through the line of brick which was in the cupboards, possibly to bore the wall to find out how thick it was, possibly to go digging to find out exactly where its foundations were. Therefore, if there was anything wrong, it was about as latent a defect as you could expect any defect to be.

That I take to be the sort of facts we have to investigate, and on these facts the plaintiffs say to the defendants: "Never mind for the moment what your legal relations are with anybody to whom you have let the land. You are owners of land. On it you have erected an artificial structure. You have not kept that artificial structure on your own land. You have not prevented it from falling on our land; and we say, therefore, under the well-known doctrine of *Rylands v. Fletcher* (1) that, having put bricks on your land you have not kept them on your own land, and you are absolutely liable, whether you were negligent or not." It strikes me that there are two reasons why *Rylands v. Fletcher* (1) does not apply, and the learned judge has found that it does not apply in this case. In the first place, as I understand the doctrine of *Rylands v. Fletcher* (1), it relates to occupiers. I do not know, and neither counsel for the respondents could refer me to any case where the doctrine of *Rylands v. Fletcher* (1) has been applied to an owner not in occupation. If there are such cases, though each counsel has been invited to supply me with them, none has been supplied to me. The doctrine of *Rylands v. Fletcher* (1), as I understand it—I take it from a well-known

A text-book (SALMOND ON TORTS (6th Edn.) at p. 257), which appears to me to be accurate—is this:

“The occupier of land who brings or keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the natural and probable consequences of its escape, even if he has been guilty of no negligence.”

B While stated in that way, it is an absolute liability, but there are so many exceptions to it that it is doubtful whether there is much of the rule left. I do not propose in this judgment—I do not think it is necessary—to try and state what there is left of the rule when you have taken out all the exceptions.

C The first point that I have mentioned will, of course, be relevant when we come to see what the exact position of the defendants is, namely, whether they are owners or occupiers, but there is another matter which seems to me of great importance. It has been frequently said that the doctrine of *Rylands v. Fletcher* (1) does not apply to what may be called the normal use of land. I will not put it in my own words. I will put it in the words of LORD CAIRNS, L.C., in *Rylands v. Fletcher* (1), who says (L.R. 3 H.L. at p. 338):

D “My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place.”

E That view about the normal use of land is not only LORD CAIRN’S; because in a later case of *Wilson v. Waddell* (4), where LORD BLACKBURN gave the judgment of the court, the facts were that the land in its ordinary condition drained in a particular way, and the water went in a particular way. The occupier of a coalfield excavated all the coal from the land, with the result that the water went in quite a different way on to the land of a different adjoining owner who said: “Your land in its natural state sends its water to A. You have done something to the land which sends it to me, B. You are liable under the doctrine of *Rylands v. Fletcher* (1).” LORD BLACKBURN says this (2 App. Cas. at p. 99):

G “The general rule of law in both countries [England and Scotland] is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals”;

H and then he cites the passage from LORD CAIRNS to the effect that if when that is done or if using it in the normal way the water in the ordinary course is diverted somewhere else, there is no cause of action by third parties for damage by the receipt of the water, because the occupier of the land is only using it in the normal way. That argument, which has been put forward in this case, is met by counsel for the respondents by saying: “It is not a normal use of land to have a retaining wall.” I am afraid I have not been able to appreciate that. One of the most normal uses of land, it appears to me, is to put buildings on it; and if one puts a building on the land and it falls, either because one’s adjoining owner has done something to the building to weaken it, or because the operations of nature by the fall of rain weaken its foundations without one knowing it—and one cannot be down at the foundations all the time to see how they are getting on—the adjoining owner has no cause of action. For these reasons, without going into the whole doctrine of *Rylands v. Fletcher* (1), I think the attempt to say that this is a case of that class fails. Similar views are expressed by BRANSON, J., in *Ilford U.D.C. v. Beal and Judd* (5), where he held that the erection of a retaining wall on land was a normal use of land, and that resultant damage done to underground

property, which was not known to exist, did not constitute a case like *Rylands v. Fletcher* (1). I agree, and I think this case is on the same lines as the *Ilford Case* (5). A

The next line of attack was this: It is said: "Anyhow, this wall falling was a nuisance." I think it was correct to say that it was a nuisance, and not a trespass, because neither the owner nor the occupier themselves threw this wall into the plaintiff's property; it fell into the plaintiffs' property from indirect causes, not by direct action of the owner or occupier of the plaintiffs' land. It is said: "There being a nuisance, we say that you, the trustees and the tenant for life, legal and equitable owners of this land—one or other of you—are liable, because there has been a nuisance on your land which has done us damage." No doubt, the first question to decide—which also has a relevance with regard to the point about *Rylands v. Fletcher* (1)—is: Who was the occupier of the wall? In fact, in 1918 the then trustees of the will of a Mr. Wreford, who had made his will in 1893 and died in 1899, let the house and the garden at the top of the wall to one Wilson as a weekly tenant at 4s. 3d. a week. It is said by the defendants: "When we let him the garden, of course we let him the garden wall; we did not let him the wall without the garden; and it is impossible to conceive us as remaining in occupation of the wall while he is in occupation of the garden." On the other side, it is said, as I understand: "When you let a house and a small garden like this at 4s. 3d., you never thought of letting the wall. You never supposed that the weekly tenant was tenant of the wall." It seems a small matter to deal with; it seems to me that when you let a house and garden you ordinarily let the boundaries of the garden; though I have no doubt Wilson during his tenancy would have been rather astonished to hear that he was the tenant of the wall. I should imagine that in law he was the tenant of the wall, and it was included in the premises for which he was paying 4s. 3d. a week. If that is so, then Wilson was the occupier of the premises on which there was a nuisance. I think also it is clear law that the person liable for a nuisance on premises is certainly the occupier. I think also that it has been established by authority binding on this court here—I refer to *Barker v. Herbert* (6), which has been followed in other cases in this court—that the occupier is not liable if he did not create the nuisance on the land he occupies unless—perhaps not even then—knowing of the nuisance or being in such a position that he ought with reasonable care to have known of the nuisance, he allows it to continue. I refer to the passages in *FLETCHER MOULTON*, L.J.'s judgment in *Barker v. Herbert* (6) ([1911] 2 K.B. at pp. 642, 643), and to the passage in *FARWELL*, L.J.'s judgment ([1911] 2 K.B. at p. 645). Therefore, if Wilson had been sued for nuisance, he being the occupier of this wall, which was the nuisance, I think the question to be determined would have been: Did you know that there was a nuisance? Ought you with the exercise of reasonable care to have known there was a nuisance? If both those questions were answered in the negative, there would have been no liability on the occupier. But there might in certain cases, it is said, have been, even in that case, a liability on the owner, and that is the ground, as I understand, on which *ACTON, J.*, has given judgment against the trustees and tenant for life. D E F G

He has referred to, and, if I understand it, followed, *Todd v. Flight* (3), and he has treated that case as deciding what I think it does not decide, though I think in doing so he has the authority at least of *LOPES, J.*, in *Nelson v. Liverpool Brewery Co.* (7), which has been cited to us. *Todd v. Flight* (3) was decided on demurrer, that is to say, if the statements in the declaration were true, did they give a right of action against the defendant? Cases decided on demurrer in that way are not authorities for what would be the case if there were other statements in the declaration. They are authorities on the question, the statements in the declaration being taken as true: Do they give a cause of action? The statements in the declaration were these: That the defendants owned a building and stack of chimneys, which stack of chimneys were in a dilapidated, decayed, ruinous, insecure, and improper state, and in danger of falling, and the defendant, well knowing that the chimneys were in a dilapidated, etc., state, let his building to an occupier, and the court held that the allegation that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, and kept and maintained them in that state, did give a cause of action against I

A the defendant. It seems to me clear that when that case is looked at, it is no authority for the proposition that if, though the chimneys were in a defective condition, the defendant did not know it and could not by reasonable care have known it, he would then be liable, though he was not the occupier, to the person subsequently damaged by the fall of the chimneys. When LOPES, J., in *Nelson's Case* (7) says that an action will lie against the landlord in case of a misfeasance by the landlord, as, for instance, B where he lets premises in a ruinous condition, unless the learned judge meant, as he probably did, that he must have known of the ruinous condition, that passage misrepresents, I think, what was decided in *Todd v. Flight* (3). It appears to me that you are not able successfully to attack an owner no longer in occupation, because he has let the premises on which there is ultimately found to be a nuisance, unless you can show that at the time he let them there was then a nuisance on the premises and C that he knew it.

In the present case it appears to me to be impossible to say that any of the defendants knew, either at the time they let the premises or at any time after till about a week before the wall fell, that there was anything wrong with the foundations of the wall. The wall had stood for centuries; and when the city architect saw it about a month before it fell, he said, according to the evidence: "The wall is all right; it will stand for some time." Further, there is no evidence that I can see that any of the defendants D knew that these excavations had been made in the wall by some person connected with the ownership of the inn. There is no evidence that any of them had ever been in the inn. They would have no right that I know of to enter the inn; and I do not think it is to be regarded as neglect that they have not either, on the one side, dug down the wall to find out what the conditions of the foundations were inside and away from the inn, or insisted on entering the inn to see if they could find out anything by looking E at the wall of the kitchen in the inn. In those circumstances it appears to me that the cardinal thing which would have to be proved to establish any liability against anybody would be, namely, knowledge of the defect which ultimately resulted in the fall of the wall and/or failure to acquire that knowledge because you had failed to use reasonable care to ascertain what you should have ascertained. In my opinion, both F fail. In those circumstances it appears to me that no claim can be made against the defendants for nuisance; and for these reasons, rejecting the claim both on the ground of *Rylands v. Fletcher* (1) and on the ground of nuisance, it appears to me that the learned judge came to a wrong conclusion. The judgment must be set aside and entered for the defendants with costs.

G **LAWRENCE, L.J.**—I agree. The first question on this appeal is whether at the crucial time this property was being used by the defendants in an abnormal or unnatural manner so as to bring in the principle of *Rylands v. Fletcher* (1) and render any question of their negligence immaterial. ACTON, J., has not definitely decided that question, but, reading his judgment, I think one can say that he inclined to the opinion that the principle of *Rylands v. Fletcher* (1) did not apply. I agree with I SCRUTTON, L.J., that the keeping of this wall by the plaintiffs on their property was not an abnormal or unnatural use of their property in the situation in which that property was found. The wall was, no doubt, originally built for two purposes, for defence and as a retaining wall. It has long since lost its use for defence, but has still for many centuries existed as a retaining wall supporting the houses which have been built behind it. I fail to see how the plaintiffs can be charged with having brought upon I their property something which is of a dangerous or unusual character. The wall has for a very long time admirably fulfilled its purpose as a retaining wall, and was so fulfilling it down to the time when it collapsed. It seems to me that this case is not one to which the principle of *Rylands v. Fletcher* (1) applies.

The second question is whether the defendants have been guilty of any breach of their duty towards their neighbour. That question depends, first of all, on whether they were in occupation of the wall when it collapsed. The duty to the neighbour is one which, I think, must fall upon the person in occupation. In the present case the garden behind the wall was let to Mr. Wilson on a weekly tenancy, and it is suggested

that the letting was such that the wall itself was not comprised in it. I think it would require the strongest possible evidence, where there is a piece of ground situate as it was here, bounded on the south by a wall with nothing but empty space behind it for a depth of 40 ft., before one could say that the wall, which supported the garden and protected it, was not comprised in the letting. It is quite true that the tenant may not have thought that he had acquired a tenancy of the wall right down to the bottom of the ground, but I think that, if the matter were tested in a court of law, that would be held to be the true result of letting the ground as it stood. The question here is not whether a wall separating two adjoining tenements on the same level passes with one or the other of those tenements, but whether a wall which is essential to the enjoyment of the property comprised in the tenancy and which belongs to the landlord passes to the tenant. It would, in my opinion, require very strong evidence to show that the landlord had reserved the wall to himself. I have come to the conclusion that the occupier of the wall was Wilson, and that as between himself and the landlord he would be liable for any acts of negligence to third parties. Junior counsel for the plaintiffs argued that the question would depend upon whether under the terms of letting the duty of repairing the wall was cast upon the tenant or upon the landlord. I do not think so. Any bargain made by the person responsible to his neighbour or to the public that another person should perform that obligation may give rise to rights as between the two contracting parties, but does not, in my judgment, in any way affect any right of third parties, who are not parties or privy to such contract. The cases to which counsel referred deal with a liability as between landlord and tenant. *Nelson v. Liverpool Brewery Co.* (7) does contain a dictum, by LOPES, J., which carries the case further to this extent, that, although the *primâ facie* liability is on the owner and occupier, yet the landlord may also be liable if there is a covenant to repair. Speaking with great respect for the learned judge, I do not agree with that dictum. In the present case, however, it is not suggested that there was a covenant by the landlord to repair. In fact, it is one of those ordinary tenancies in which neither the landlord nor the tenant has expressly undertaken the obligation to repair. In those circumstances, the *primâ facie* liability of the occupier towards third parties is unaffected by any bargain between landlord and tenant.

It would be unsatisfactory to leave the matter there. The case has been fought and decided upon the question whether or not the defendants have been guilty of negligence in failing to abate a nuisance upon their property for a reasonable time after it had come, or ought to have come, to their knowledge. That raises the question whether the defendants were or ought to have been aware of the nuisance. The facts on this point are hardly in dispute. I will not repeat them. SCRUTTON, L.J., has fully stated them. It seems to me that it would be a strong thing to hold that the defendants ought to have known that the cupboards or holes, which, obviously from the evidence, have led to the collapse of the wall, had been made either in or underneath the wall. It is true that there are other factors which have led to the collapse, but it is nowhere suggested that, but for the weakening of the wall by making the cupboards, those factors would alone have brought down the wall. It would be wrong, in my opinion, to attribute negligence to the defendants, as the wall was in excellent condition so far as they could tell and had been undermined by the plaintiffs or their predecessors in title, unknown to the defendants, and without the slightest outward sign of anything of that kind having been done. In the circumstances, I think that no negligence ought to be attributed to the defendants. For these reasons I agree that the appeal succeeds.

GREER, L.J.—I agree. This appeal and the action in respect of which the appeal is brought raised certain mixed questions of law and fact which were tried before ACTON, J., at Exeter Assizes and on further consideration in London. We are not differing from the learned judge in any estimate of the respective value to be attached to the evidence of the witnesses of the one side or the other; and so far as we are differing from him with regard to the conclusions of fact and with regard to the application of principles of law to the facts which he found.

A The claim rested on what is regarded in law as a nuisance, and the first point, in my judgment, to be determined is whether the defendants, at the time when the action was brought, were in fact in occupation of the property which caused the damage. Nine years before the damage was caused the defendants' predecessors in title, one of whom is one of the present defendants, had let to a Mr. Wilson a cottage and a garden in the position which had been referred to in my Lord's judgment, and is detailed in
B the evidence. It appears from the photograph to be quite plain that the major portion of this old wall constituted part of the surface of the tenant's garden, this boundary consisting merely of the parapet of the wall. As he was the tenant of the house and garden it seems to me impossible to suppose that he was not the tenant of that portion of the wall which was part of his garden, and it seems to me equally impossible to suppose that he was not the tenant of the part of the wall which was his boundary wall
C as well as the part which was part of the surface of his garden. If that be so, it follows that the occupier was responsible on the principle of *Rylands v. Fletcher* (1). *Rylands v. Fletcher* (1) has never been applied to effect the liability of an owner who is out of possession at the time that the injury takes place. But beyond and above that, I think that the cases that have been referred to, especially the judgment of FARWELL, L.J., in *West v. Bristol Tramways Co.* (8) ([1908] 2 K.B. at p. 23), show conclusively
D that in order to come within the doctrine of *Rylands v. Fletcher* (1) it is necessary to show that the user which is complained of is something out of the ordinary, something of an unusual character to which the land has been put. Though the defendants did not erect this wall, they certainly took it over when they bought the property, when the property became theirs. They did not take it over as suggested, because it was a piece of antiquity; they took it over because it was the boundary of their property
E and formed a good retaining wall for it and without which their property could not have continued to exist. It was just as much a retaining wall as if they had built it themselves for that purpose; and, therefore, it seems to me on the authorities that they were only using their property in one of the ordinary ways in which property is used, and that accordingly they are outside the authority of *Rylands v. Fletcher* (1). Then it was said: Assuming they are outside the authority of *Rylands v. Fletcher* (1) they are
F still liable upon the principles laid down in *Todd v. Flight* (3). I think it is clearly established by the facts that there is no reason to suppose that when they let the property to Mr. Wilson, it was in fact in a ruinous condition, or that they had the slightest notice that it was in a ruinous condition or that in the exercise of reasonable diligence they could have ascertained that it was in a ruinous and dangerous condition; if so, the plaintiffs have failed to bring their case within the principles of the decision in *Todd v.*
G *Flight* (3) and the cases which have followed that decision. A very large number of cases have been cited here; but the principles applicable to the facts of this case do not seem to me to be in doubt, and it is not necessary to refer to any further authorities. I agree that the appeal must be allowed.

Appeal allowed.

H Solicitors: *Parker, Garrett & Co.*, for *Michelmores*, Exeter; *Guscombe, Wadham & Co.*, for *Sparkes, Pope, Thomas & Mathew*, Exeter.

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

HARDIE AND LANE, LTD. v. CHILTON AND OTHERS

[COURT OF APPEAL (Scrutton and Sankey, L.JJ., and ROMER, J.), March 15, 16, April 16, 1928]

[Reported [1928] 2 K.B. 306; 97 L.J.K.B. 539; 139 L.T. 275; 44 T.L.R. 470]

Conspiracy—Money had and received—Trade association—"Stop list"—Members breaking rules placed on list—Member in breach of rules, on making payment, not put on list—Right to recover sum paid—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 29 (1) (i).

The publication by a trade association of a member's name on a "stop list" with the result that other members refuse to supply him with goods, being lawful if done bona fide and reasonably in the protection of trade interests (*Ware and De Freville, Ltd. v. Motor Trade Association* (1), [1921] 3 K.B. 40), an agreement by the association to forbear from publishing a member's name on the list in consideration of his making, as he legally can, a payment to the association which is not extortionate is not unlawful, but is a lawful exercise of the right of any individual or association to compromise a dispute which involves no criminality. Therefore, (i) in such circumstances the member cannot recover from the association the amount of his payment as damages for conspiracy to defraud or injure him or as money had and received to his use; and (ii) if a person writes on behalf of the association a letter to the member stating that the member's name will not be placed on the stop list if he makes a payment to the association, that person is acting with "reasonable cause" and so is not guilty of uttering a letter demanding money with menaces within s. 29 (1) (i) of the Larceny Act, 1916.

The plaintiffs, a firm of motor agents, were members, and the defendants were officials, of the M. trade association, which was composed of manufacturers, agents, and dealers in motor-cars, formed with the object of encouraging and protecting the motor industry in the United Kingdom, and of insuring that all members of the trade should deal fairly with each other. One of the matters it dealt with was the prevention of agents who sold motor-cars for manufacturers from selling cars at prices either above or below the manufacturers' list prices. The association endeavoured to enforce the list prices by putting those who contravened them on a "stop list," the effect of which would be that no member of the association would supply goods to the named person. In January, 1926, it came to the notice of the association that the plaintiffs had transgressed one of the rules of the association by selling a motor-car at a price below the list price. One of the partners in the plaintiff firm, as a result of a communication sent to the firm by the association, attended before the stop list committee of the association, with notice of the charge against him, and, subsequently, by a letter dated Mar. 18, 1926, the association informed the plaintiff firm that, if they would (inter alia) pay £200, the firm would not be put on the stop list. The plaintiff firm agreed, and on Mar. 24 sent the association £100 on account of the £200 "fine," and other sums. The association had no express power to demand an apology or an undertaking for future conduct from a member who under-sold. In an action by the plaintiffs claiming damages for conspiracy and money had and received to their use,

Held: (i) a conspiracy was actionable in law when there was an agreement by two or more persons to do an unlawful act or to do a lawful act by unlawful means; in the present case neither of these elements existed; and, therefore, the action failed on this point.

(ii) in the circumstances there was no such redress as would entitle the plaintiffs to recover from the defendants the sums paid as money had and received to their use.

Notes. Considered: *Thorne v. Motor Trade Association*, [1937] 3 All E.R. 157. Referred to: *Lord Chief Justice's Note* (1928), 20 Cr. App. Rep. 185.

As to conspiracy in relation to trade, see 32 HALSBURY'S LAWS (2nd Edn.) 522-524; and for cases see 43 DIGEST 112 et seq. As to the action for money had and received,

A see 8 HALSBURY'S LAWS (3rd Edn.) 235 et seq.; and for cases see 12 DIGEST (Repl.) 605 et seq. For Larceny Act, 1916, see 5 HALSBURY'S STATUTES (2nd Edn.) 1011.

Cases referred to:

- (1) *Ware and De Freville, Ltd. v. Motor Trade Association*, [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 37 T.L.R. 213; sub nom. *Wake and De Freville, Ltd. v. Motor Trade Association*, 65 Sol. Jo. 239, C.A.; 43 Digest 124, 1264.
- (2) *R. v. Miard* (1844), 1 Cox, C.C. 22; 15 Digest (Repl.) 1123, 11,199.
- (3) *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 19 T.L.R. 708, C.A.; 43 Digest 118, 1226.
- (4) *Conway v. Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest 120, 1237.
- (5) *Sorrell v. Smith*, [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370; 41 T.L.R. 529; 69 Sol. Jo. 641, H.L.; 43 Digest 113, 1183.
- (6) *Hardie and Lane, Ltd. v. Chilton*, [1928] 1 K.B. 663; 96 L.J.K.B. 1040; 138 L.T. 14; 43 T.L.R. 709; 71 Sol. Jo. 664, C.A.; 12 Digest (Repl.) 632, 4885.
- (7) *Hodges v. Webb*, [1920] 2 Ch. 70; 89 L.J.Ch. 273; 123 L.T. 80; 36 T.L.R. 311; 43 Digest 121, 1240.
- (8) *White v. Riley*, [1921] 1 Ch. 1; 89 L.J.Ch. 628; 124 L.T. 168; 36 T.L.R. 849; 64 Sol. Jo. 725, C.A.; 43 Digest 122, 1242.
- (9) *Vegelahn v. Guntner*, [1896] Mass. 92.
- (10) *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, 1164.
- (11) *Fisher & Co. v. Apollinaris Co.* (1875), 10 Ch.App. 297; 44 L.J.Ch. 500; 32 L.T. 628; 39 J.P. 564; 23 W.R. 460, L.J.J.; 15 Digest (Repl.) 850, 8176.
- (12) *Skeate v. Beale* (1840), 11 Ad. & El. 983; 3 Per. & Dav. 597; 9 L.J.Q.B. 233; 4 Jur. 766; 113 E.R. 688; 12 Digest (Repl.) 107, 633.
- (13) *Jones v. Ashburnham* (1804), 4 East, 455; 1 Smith, K.B. 188; 102 E.R. 905; 12 Digest (Repl.) 222, 1641.
- (14) *R. v. Denyer*, [1926] 2 K.B. 258; 95 L.J.K.B. 699; 134 L.T. 637; 42 T.L.R. 452; 28 Cox, C.C. 153; 19 Cr. App. Rep. 93, C.C.A.; 43 Digest 119, 1234.
- (15) *R. v. Dymond*, [1920] 2 K.B. 260; 89 L.J.K.B. 876; 123 L.T. 336; 84 J.P. 103; 36 T.L.R. 421; 64 Sol. Jo. 571; 26 Cox, C.C. 621; 15 Cr. App. Rep. 1, C.C.A.; 15 Digest (Repl.) 1124, 11,209.
- (16) *Quinn v. Leatham*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, 1179.
- (17) *Cadaval v. Collins* (1836), 4 Ad. & El. 858; 2 Har. & W. 54; 6 Nev. & M.K.B. 324; 5 L.J.K.B. 171; 111 E.R. 1006; 12 Digest (Repl.) 625, 4830.
- (18) *Williams v. Bayley* (1866), L.R. 1 H.L. 200; 35 L.J.Ch. 717; 14 L.T. 802; 12 Jur.N.S. 875, H.L.; 12 Digest (Repl.) 104, 611.

H Appeal from a verdict and judgment in an action tried by AVORY, J., and a special jury.

I The plaintiffs, Hardie and Lane, Ltd., motor dealers, claimed from the defendants, John Chilton, Harry Arnold Bennett, and Percy Ingram Denyer, officials of the Motor Trade Association, damages for, inter alia, conspiracy and money had and received to the use of the plaintiffs. The plaintiffs were members of the association which was formed to protect the motor industry and the interests of manufacturers, wholesalers, and retailers of motor-cars and goods, and to promote fair dealing between members of the trade. Its rules forbade the sale of certain articles, including motor-cars, at a price above or below the "protected price." Persons who broke the rules could be put on the "stop list," in which case other members of the association were forbidden to deal with them. The plaintiffs' case was that in January, 1926, a man named Neale, who was employed by the association, called on them and represented that he was an old customer and wanted a Rover motor-car, but could barely afford to pay for it, and he asked for a discount. The plaintiffs refused to give him a discount, but they agreed not to charge him for delivery, to pay a year's tax for him, and to give him

some number plates. In March, 1926, they were accused by the Motor Trade Association with having sold the motor-car at less than the proper price, which was £225, by the amount of the allowances. Later, they were told that the "stop list" committee had found the charges proved, but that the matter might be ended by their paying £200 to the indemnity fund of the association, buying back the car at its list price, and signing and paying for advertising an undertaking. Fearing that the only alternative was to be put on the "stop list," the plaintiffs paid £100 on account to the association, and £7 to advertise their undertaking, and they also bought back the motor-car, which they afterwards re-sold at a loss of £25. The plaintiffs complained that the association had no right to fine them, and that they had suffered damage through being influenced by the threats of the defendants. The defendants denied that there had been any conspiracy or any misrepresentation. The jury returned a verdict for the plaintiffs, assessing the damages at £132, and judgment was entered accordingly. The defendants appealed.

Sir Patrick Hastings, K.C., and St. John Field for the defendants.

Sir Henry Slessor, K.C., and Harold Simmons for the plaintiffs.

The following cases were referred to in argument, but not in the judgments:—*R. v. Miard* (2); *Giblan v. National Amalgamated Labourers' Union* (3); *Conway v. Wade* (4).

Cur. adv. vult.

April 3. The following judgments were read.

SCRUTTON, L.J.—This is an appeal from a refusal of AVORY, J., to withdraw the case from the jury and enter judgment for the defendants. The facts are these. An association, called the Motor Trade Association, is registered as a trade union. Its objects are to protect the interests of motor manufacturers and traders. One of the matters with which it endeavours to deal is to prevent the agents who sell cars for manufacturers from selling cars either above or below the manufacturers' list price. To sell below the list price, if this is done by competing agents, disturbs the manufacturers' system of regular prices and of agency, as does selling above the list price in times of scarcity of cars. The association endeavours to enforce the list price, by putting those who contravene it, whether members of the association or not, on a "stop list." The effect of being on this stop list is that no member of the association will supply goods to the named person, or to anyone who supplies him with the protected goods. The legality of this system, even against a non-member, was determined by the Court of Appeal in *Ware and De Freville, Ltd. v. Motor Trade Association* (1) and this decision was approved by the House of Lords in *Sorrell v. Smith* (5). Hardie and Lane, Ltd., were motor agents and had been members of the Motor Trade Association for some years. The directors were Captain Hardie and Captain Lane. Captain Hardie said that he knew that the objects of the association were to prevent alteration of list prices by agents and to promote fair dealing in the trade. He joined them for that reason, and because in some cases he could get a better trade discount by doing so. He knew that people were put on the "stop list" for selling at prices different from the list price, and he was anxious that such a system of underselling should be stopped. He knew also that sometimes the association, instead of putting on the "stop list" a man who had broken the rules, allowed him to escape it by paying a sum of money towards the expenses of the association and publishing an apology. He recognised that the latter was a more lenient course than putting a man on the "stop list," which was very serious. In these circumstances, Captain Hardie sold to an agent of the association, who was sent to find out if he was keeping the rules about list prices, or, as he said, to "trap" him, a car for less than the list price, by taking the full list price, but including in the consideration for it a full year's tax—about £9—and some minor matters. Captain Hardie admitted that when he sold the car in this way he knew that, if he was found out, he might go on the "stop list," but thought that he might only be warned. He was called before the "stop list" committee of the association, with notice of the charge against him, and the committee informed him by a letter of Mar. 18, 1926, that, if he

A would pay £200, buy back the car at its list price, and insert a signed undertaking in the association's journal, he would not be put on the "stop list." He assented on Mar. 22, but got the fine altered to payment in two instalments. On Mar. 24 he sent the association a cheque for £332, being £225 for the purchase of the car, £7 the cost of advertising the undertaking, and £100 for the first instalment, the balance to be paid in three months. In the summer *R. v. Denyer* (14) was reported, in which the Court of Criminal Appeal decided that to obtain money by a threat of putting a person on the "stop list" was criminal. The plaintiffs thereupon declined to pay the last instalment and on Oct. 28, 1926, issued a writ against the defendants, John Chilton, Harry Arnold Bennett, and Percy Ingram Denyer, sued on their own behalf and on behalf of all other members of the Motor Trade Association. Of the persons named, Denyer was the agent of the "stop list" committee who had communicated with the plaintiffs, C Chilton and Bennett were probably selected as defendants and representatives because on a writ issued on July 17, 1926, their names had been selected to sue, as members representing the Motor Trade Association, on behalf of themselves and all other members of the Motor Trade Association, for the second instalment of £100. This action was discontinued, and on June 29, 1927, the Motor Trade Association, as sued in the name of representative members, was struck out of the present action by the Court of Appeal D on the ground that the fluctuating members of the Motor Trade Association had not the same interest so that any member could represent them, and that the Motor Trade Association, being a trade union, could not be sued in tort; see *Hardie and Lane v. Chilton* (6). As a matter of fact, Chilton was the chairman of the "stop list" committee; all that was proved about Bennett was that he was believed to have been present at one meeting of the "stop list" committee, and that his name was put on the first writ as a representative member. E

The causes of action on the writ were damages for conspiracy; damages for deceit; money had and received by the defendants to the use of the plaintiffs; damages for breach of agreement; damages for libel contained in a journal called "Motor Commerce", dated Mar. 27, 1926. In the statement of claim the allegation of conspiracy was expanded into an allegation that Chilton, Bennett, and Denyer entered into a conspiracy to obtain money fraudulently and by duress from the plaintiffs without any consideration. The allegation of fraud was abandoned at the trial and the allegation "without consideration" was obviously unsupportable in view of the fact that the money was paid to procure that the plaintiffs should not be put on the "stop list," a most valuable consideration. The case, therefore, resolved itself into an allegation of conspiracy to obtain money by duress, occasioned by the threat, menace, or intimidation, that the plaintiffs would be put on the "stop list" if the money was not paid, and could escape being put on the stop list if the money was paid. G

Conspiracy as a cause of action exists either when the end aimed at by the agreement is unlawful and causes damage, or when the means by which a lawful end is pursued are unlawful and cause damage. An agreement is not actionable when neither the end nor the means are unlawful. In the present case an agreement to protect trade interests by refusing to supply a trader departing from fixed prices with any goods either directly or indirectly, and announcing that refusal by putting his name on a "stop list" has been held legal by this court in *Ware and De Freville, Ltd. v. Motor Trade Association* (1), as approved in *Sorrell v. Smith* (5) by the House of Lords, although it causes damage to an individual, if it is done in reasonable protection of trade interests, as was found to be the case. If the action of putting on the "stop list" is lawful, it is not unlawful to say that you are going to do it. In *Sorrell v. Smith* (5) LORD CAVE, L.C., said ([1925] A.C. at p. 712): H

"I deduce as material for the decision of the present case two propositions of law, which may be stated as follows: (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed, and no action will lie, although damage to another ensues." I

And again ([1925] A.C. at p. 714):

"The second proposition, of course, assumes the absence of means which are in themselves unlawful, such as violence or the threat of violence or fraud. Your Lordships were asked to say that a threat to withdraw custom or supplies falls within this category, and of itself introduces an element of illegality; but although there are passages in the books which appear to support that contention, it did not appear to me that the contention was made good. If a trader may withdraw his custom without breaking any law, he may with equal legality express his intention of withdrawing it unless his wishes are met, subject always to the condition that the purpose of the threat is to forward his trade interests and not wilfully and ultroneously to injure the trade of another: see on this point *Hodges v. Webb* (7) and *White v. Riley* (8), and the observations of HOLMES, J., in the American case of *Vegeahn v. Guntner* (9)."

LORD DUNEDIN said ([1925] A.C. at p. 730):

"Expressing the matter in my own words, I would say that a threat is a pre-emption of proposed action of some sort. That action must be either per se a legal action or an illegal, i.e., a tortious action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding; if of the second, it falls within the description of illegal means and the right to sue of the person injured is established."

I adopt the language of HOLMES, J., in *Vegeahn v. Guntner* (9) that the unlawfulness of threats depends on what you threaten, and of compulsion on how you compel. ATKIN, L.J., expressed the same point in *Ware and De Freville's Case* (1). He said ([1921] 3 K.B. at p. 81):

"What is meant by coercion? If it means no more than procuring a person to do what he does not want to do, it covers many cases where no cause of action can be suggested to exist. The use of parental rights, the use of rights of property, the deprivation of social advantages, may be so applied as to make it plain to the person affected that he must yield or be ruined. A necessary servant or agent may compel advantages to himself or herself by offering as an alternative the withdrawal of his or her services; and in the same way may compel disadvantageous treatment of third parties. I conceive that the logical mind of CAVE, J., on his view of the law was working on lines of necessity in accepting the view that if the cook says to the master: 'Discharge the butler or I leave you,' and the butler is consequently discharged, the cook is liable to an action: *Allen v. Flood* (10) ([1898] A.C. at p. 36). Yet the decision in *Allen v. Flood* (10) repudiates this view. In my opinion the wrongfulness of the inducement applied to the third person cannot depend upon its weight. Coercion, therefore, cannot simply mean successful or even inevitably successful inducement. I am satisfied myself that it means nothing at all on a question of tort except in reference to the means employed."

There is also an excellent passage in the judgment of PETERSON, J., in *Hodges v. Webb* (7) ([1920] 2 Ch. at pp. 87-90) to a similar effect.

I take it, therefore, to be clear law that, if it is lawful to put a man on the "stop list" for breaking a rule, to say that you are going to put him on the "stop list" when he has broken that rule cannot be illegal at common law. And I am quite unable to understand how it can be illegal to say, "I could lawfully put you on the 'stop list, but if you will do something which is not illegal, and is less burdensome to you than the 'stop list,' I will not exercise my power." For instance, the Motor Trade Association has no express power to demand an apology, or an undertaking for future conduct, from a member who undersells, but it seems to me impossible to say that a statement, that such a member will go on the "stop list" unless he apologises or gives an undertaking for the future, is a threat to do an illegal act, or a threat which is itself unlawful, and though the Motor Trade Association has no express power to ask for money as a more lenient alternative to the "stop list," which the plaintiffs admit it to be, it appears to have the ordinary power of any individual of compromising a dispute which involves

A no criminality but only a breach of rules. A member of a club after dinner, in a row, damages some club property. He is told that he is liable to expulsion, but that the committee will not enforce it if he makes good the damage. Are the committee conspirators who have obtained by threats money or money's worth which can be recovered by the member? In *Fisher & Co. v. Apollinaris Co.* (11) Fisher was prosecuted for unlawfully using the company's trade mark. The prosecution was abandoned on an agreement by Fisher to give an apology which might be published. Fisher afterwards endeavoured to stop publication on the ground that the apology was obtained under duress of the criminal prosecution. MELLISH, L.J., says (10 Ch. App. at p. 303):

C "There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The prosecutors allowed him to state that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal courts in cases of assault or libel. In some cases there is a payment of money; in other cases, no payment at all; and it has never been considered that there was anything wrong in such transactions. It would, of course, be different if there was any case alleged of extorting money under threats."

D All compromises of proceedings are induced by the desire to avoid the continuance of proceedings which will go on if the compromise is not arrived at, but there is nothing illegal in agreeing to do a legal act in order to avoid action which the other party may legally take.

E When the end or means are illegal the case is, of course, different. It was thought to have some bearing on the case below to introduce Dick Turpin's: "Your money or your life." This when expanded is: "I will murder you"—crime No. 1—"if you do not allow me to rob you"—crime No. 2. What possible relevance this can have to a statement that I will not do an act that I may lawfully do, if you will do an act that you may lawfully do, but I shall do my act, if you do not do your act, I cannot understand. I regret that I did not add to my list of question-begging epithets in *Ware's Case* (1) ([1921] 3 K.B. at p. 69), "Dick Turpin" and "highwaymen." The learned judge below during the opening argument asked:

F "Is there any authority that you know of which establishes this proposition—that if a person having a legal right to do something threatens that he will exercise that right unless the other pays a sum of money, that affords no cause of action?"

G The passages cited above seem to me clear authority for the proposition. But any number of cases in real life would show its truth. A. has land facing a new house of B's. A. proposes to build on that land a house which will spoil the view from and the light to B's house, and depreciate the value of his property. B. implores A. not to build. A. says: "I will not build if you pay me £1,000; but I shall build if you do not." B. pays the money and A. does not build. Could it be seriously argued that B. could recover the money back as obtained by threats? A valued cook comes to her mistress and says: "Raise my wages by £20 a year or I shall give you notice." H The mistress foreseeing and much disturbed in mind by the tragedy that the loss of the cook will involve pays the money. Can she recover it as obtained by threats? Examples innumerable could be quoted.

I Cases involving agreements to abstain from prosecution in a matter of public interest if money is not paid are obviously different. To know of a felony and not to inform the King's officers is misprision of felony: ARCHBOLD (27th Edn.), p. 1430. An agreement not to prosecute for a misdemeanour of a public character is void as contrary to the public interest. An agreement to combine to obtain money by an agreement not to prosecute would both have an unlawful end and be obtained by unlawful means. The learned judge below carefully directed the jury in considered terms to which I refer but do not read in full. I shorten this, I hope accurately, into a direction that either for two or more to agree to obtain, or for one to obtain, money to which there is no legal claim either for themselves, or for a third person, by threats calculated to deprive a reasonable man of his voluntary power of action, is illegal. In my opinion, this direction is wrong in the following respects: (i) Where the money is not legally

due without an agreement, but is due under an agreement obtained by the threat to do an act which may be lawfully done if the agreement is not made, both the agreement and the threat are lawful; the direction would make them unlawful. If the agreement is unlawful, or the threat inducing it is a threat to do an unlawful act, the case would be different. In the present case, it was lawful to put a member who broke the rules on the "stop list"; it was lawful to say that one was going to do it; it was lawful or not unlawful, to agree not to exercise the legal right to put a man who broke the rules on the "stop list," if a more lenient alternative in the shape of a payment of money was exercised. (ii) This is a minor form of the same point. In my opinion, the direction is wrong if it assumes that to threaten to do what you have a legal right to do can ever be a ground for obtaining back money alleged to be paid under duress. A man lawfully claims a lien on property of which you are in urgent need; because of your urgent necessity you pay, the necessity disturbing your power of judgment. Is it suggested that you can recover the money back? To do so, you must prove that the lien is unlawful. A judge tells a prisoner who has stolen that if he makes restitution his sentence will be lighter; terrified by the prospect of a heavy sentence, the prisoner makes restitution. Can he obtain the property back as having been handed over under duress? (iii) It appears to be clear at common law that duress to goods does not avoid an agreement: see per LORD DENMAN in *Skeate v. Beale* (12) (11 Ad. & El. at p. 990). It is difficult to see, therefore, how a threat not to supply goods can be a valid ground of duress. Money paid under duress to goods can only be recovered in an action for money had and received if the detention of the goods or refusal to supply them was illegal. But forbearance to do an act which you have a legal right to do is good consideration for an agreement otherwise lawful: *Jones v. Ashburnham* (13).

It follows from these reasons: (i) That the judge below should have withdrawn the case from the jury because the evidence only showed an agreement to forbear from doing a legal act, putting the plaintiffs on the stop list, if the plaintiffs would do an act which was not unlawful, that is, pay money which the plaintiffs might legally pay and the association legally receive; and such an agreement was not a conspiracy, there being neither unlawful end nor unlawful means, and there being, therefore, no evidence of lack of reasonable and probable cause for the demand. (ii) That there was no case of obtaining money by duress, because the only duress was a threat, in effect, not to supply goods, and such a threat could not legally be held to deprive any reasonable man of his voluntary power of action or constitute any ground for twelve reasonable men making such a finding. Indeed, all that Captain Hardie said was that he was frightened of being put on the "stop list," and he paid the money to avoid going on the "stop list." He said: "It was better than going on the stop list." Persons who have broken rules and know it are often frightened of the consequences, but when the consequences are not unlawful an agreement to avoid them by doing something not itself unlawful is not illegal. (iii) In my opinion, also, there was no evidence that Bennett was a party to any agreement, good or bad, and I doubt whether there was any as to Chilton, but the first two reasons are enough to justify the court in setting aside the present judgment. It is to be noted that the plaintiffs themselves put in the answers to interrogatories of Chilton and Bennett, which state that neither of them knew of nor authorised or sanctioned the visit of Neale to the plaintiffs; that neither of them published nor was responsible for "Motor Commerce"; and that neither of them received any money from the plaintiffs, it being entirely a Motor Trade Association matter.

I think it better to say something about *R. v. Denyer* (14), decided after the House of Lords had, in *Sorrell v. Smith* (5), upheld the legality of the "stop list," as decided by the Court of Appeal in *Ware's Case* (1). In *R. v. Denyer* (14) the Court of Criminal Appeal held that it was criminal to obtain money for the association by a threat of putting on the "stop list." The statute contravened was said to be the Larceny Act, 1916, s. 29 (1), making it an offence punishable with penal servitude for life for any person, knowing the contents thereof, to utter a letter demanding of any person with menaces and without any reasonable or probable cause any valuable thing. On this I would remark that the language of the statute shows that you may demand a valuable thing with menaces with reasonable or probable cause without committing any offence;

A and the most obvious reasonable or probable cause appears to me to be when you have a legal right to do the thing which you threaten to do, on the assumption that the obtaining of the valuable thing thereby does not involve any criminal act such as an agreement not to prosecute or not to inform the authorities of a felony. In *Ware and De Freville's Case* (1) the person put on the "stop list" was not a member of the association, and had received an offer that if he paid a donation to a trade charity, gave an apology, not to be published, and an undertaking not to break the rules in future, he would not be put on the "stop list." He refused and was put on the "stop list." The conditional threat was not treated by the Court of Appeal or the House of Lords as having any effect on the legality of the transaction. In *R. v. Denyer* (14) the menace was to put a person not a member on the "stop list," that is, not to supply him with goods, both legal acts. In the present case the person was a member of the association who had broken the rules, thereby rendering himself liable to be put on the "stop list," though there would be nothing contrary to the public interest in not putting him on the "stop list." In such circumstances it appears to me clear that a person menacing or stating that he would do an act which he had a legal right to do and compromising the menace by an agreement to substitute a more lenient and not unlawful penalty was guilty of no criminal offence against the Larceny Act, 1916. In my opinion, *R. v. Denyer* (14) was wrongly decided. There was no evidence from which a jury could find want of reasonable or probable cause, no evidence of any menace constituting a crime, and the judge should, as in this case, have withdrawn the case from the jury. I am not saying that there may not be cases where a threat to do an act not unlawful may come within the statute though I find it difficult to imagine them. Generally when the threat is to make public something which it is not desired to publish, but which is true, the publication may be good cause for a criminal prosecution for libel, on the ground that, though true, it is not for the public interest to publish a defamatory statement, which may lead to a breach of the peace. Cases of this class may afford evidence of lack of reasonable or probable cause.

Before coming to this conclusion I have, of course, carefully considered the reasons given for the judgment in *R. v. Denyer* (14). Section 29 of the Larceny Act, 1916, after the general subsection acted on in *R. v. Denyer* (14) contains subsections dealing with threats to accuse of specified crimes of a serious character, for example, sub-s. (3), and this, in clause (b) of sub-s. (2), is enlarged into "any felony." Crimes not coming within these subsections must be dealt with under sub-s. (1), which limits the menaces or demands to those made "without reasonable or probable cause," a provision omitted in the other subsections. As I have pointed out, this assumes that there may be reasonable or probable cause for demanding money for not accusing of criminal acts, and the trade mark prosecution in *Fisher's Case* (11), with its compromise, be an example of such a case. Subsection (4) is not very intelligible. It provides as follows:

H "For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person."

I As some of the subsections make accusation of crime the offence, it is not quite clear why it is immaterial whether the threats are of accusation. I suppose the subsection means that it is not necessary that the threat be of violence, or personal injury, or injury to goods, injury meaning unlawful damage, and that there may be criminal threats which are not threats of an accusation; but they must, in my opinion, be threats to do an unlawful act. LORD HEWART, C.J., in *R. v. Denyer* (14), obviously recognised that some remarks of members of this court in *Ware and De Freville v. Motor Trade Association* (1) were contrary to the view which he was expressing, but he thought that they were obiter dicta. As the case was one of a threat to place on the "stop list" if money was not paid, put into execution when money was not paid, I do not think that the remarks were obiter; anyhow, I think they were right. I selected the case of a proposal to abandon a libel action, which otherwise would be prosecuted, if money was paid to a charitable institution. The Lord Chief Justice says that the case

is one in which ex hypothesi the person making the claim has a money claim sounding in damages. What does this mean? The plaintiff in the libel action may be making a claim which in the opinion of the jury will fail, but he has a legal right to compromise it by accepting a payment of money. Does not the Lord Chief Justice's observation show that a threat to do what the claimant has a right to do, that is, to proceed with the action, does not invalidate, or render criminal, a proposal to settle that claim by payment of money, with a threat to proceed if the money is not paid, which is contrary to what the judgment is saying. The quotation from *R. v. Dymond* (15) ([1920] 2 K.B. at p. 265), which is directed to saying that belief that the person threatening has reasonable or probable cause for threatening is no justification for threatening if, in fact, the belief is erroneous, does not deal with what is to me the more obvious position that if there is no evidence on which a jury could find lack of reasonable or probable cause, in that the act threatened is one which the defendant had a right to do, the judge should withdraw the case from the jury. Such a case is when a threatener has a legal right to do what he threatens. The Lord Chief Justice states the proposition on which this judgment rests, and says ([1926] 2 K.B. at p. 268), "it is not merely untrue; it is precisely the reverse of the truth." I can only say that I think the proposition is, for the reasons given in this judgment, true, and supported by the judgments of the House of Lords in *Sorrell v. Smith* (5), and, to me at any rate, it is obvious. The Lord Chief Justice says that it is an excuse which might be offered by blackmailers to an indefinite extent. I cannot understand this. The blackmailer is demanding money in return for a promise to abstain from making public an accusation of crime. The very agreement is illegal, even if a crime of a certain class has been committed. A man has no right to suppress his knowledge of a felony. How can this be analogous to proposing not to do a thing which you have a legal right to do, if money is paid to you, there being no public mischief in the agreement? I do not understand the next sentence about "nexus or relationship." Supposing the person threatened with the "stop list" himself says, before any demand of money: "If you will not put me on the 'stop list,' I will pay £100 to any charity that you select, and give an understanding not to break the rule in future," would there be anything illegal in accepting the offer, and would not there be the direct "nexus or relationship" between the offer and the consideration for which it is offered? Does it then make any difference from which side the proposal comes? Lastly, the judgment quotes a passage from the summing-up of TALBOT, J. ([1926] 2 K.B. at p. 269):

"A person has no right to demand money, according to the Act of Parliament, as a price of abstaining from inflicting unpleasant consequences upon a man."

This, as expressed, is inaccurate, as it would include the cases which I have put above, of damaging a man's property, or light, or view, unless he pays money, or of the cook giving notice. Its inaccuracy is not excepting the cases where the man has a legal right to inflict unpleasant consequences. In that case there is no evidence of want of reasonable or probable cause to go to the jury, and there is nothing illegal in the agreement to abstain from inflicting such consequences for a money consideration. In truth, the judgment in *R. v. Denyer* (14), however well intentioned, would make the case of members of trade associations who break the rules of their associations much worse than it is at present. They would no longer be able to avert the agreed consequences of their breach of rules by accepting the offer of a money payment, though they consider it more lenient than the agreed consequences. Anyhow, they can in future avert evil consequences by not knowingly breaking the rules of the associations of which they are members.

In my opinion, the judge below should have withdrawn the case from the jury on the ground that there was no evidence of any lack of reasonable or probable cause to go to the jury and no illegal demand of money nor any evidence of duress, and the appeal must, therefore, be allowed and judgment entered for the defendants with costs here and below. In any event, there would have had to be an order for a new trial, as the judge, in the respects I have mentioned, in my opinion, misdirected the jury as to the law.

A SANKEY, L.J.—In this case the plaintiffs sued the defendants for damages for conspiracy, and, alternatively, for money had and received by the defendants to the use of the plaintiffs, upon the ground that the money in question had been obtained from them by the defendants by duress. The action was tried by a judge and jury and at the conclusion of the plaintiff's case the defendants submitted that there was no case to go to the jury. The judge overruled the objection, whereupon the defendants **B** elected to call no evidence, the jury returned a verdict for the plaintiffs for £132—a sum arrived at after giving certain credits—and the judge gave judgment accordingly. From that judgment the present appeal is brought upon the grounds: (i) That the learned judge was wrong in leaving the case to the jury, and (ii) that the learned judge misdirected the jury. The facts are as follows. The plaintiff and the defendants are all members or officials of a society known as the Motor Trade Association. That is **C** an association composed of manufacturers, agents and dealers in motor cars formed with the object of encouraging and protecting the motor industry in the United Kingdom, and, as admitted by the plaintiff Hardie, of ensuring that all members of the trade should deal fairly with each other. It has a number of regulations and byelaws, and it seeks to maintain and stabilise the price of motor-cars. It has certain byelaws under which a "stop list" is created. It will be observed that there is no express **D** power in the byelaws for the association to take money in lieu of putting a person on the "stop list." In January, 1926, it came to the notice of the association that the plaintiffs had transgressed one of the rules of the association by selling a motor-car at a price below the list price. In fact, they had been induced to do so by one Neale, and one of the complaints in the statement of claim was that Neale acted in concert with the defendants and fraudulently induced the plaintiffs to enter into the above-mentioned transaction, but this charge of fraud against the defendants was abandoned **E** at the trial. In these circumstances, the defendants upon Mar. 3, 1926, wrote the following letter to the plaintiffs:

"Dear Sirs,—As you are doubtless aware, this association exists for the purpose of protecting the fixed prices of its manufacturer and concessionnaire members who desire that none of their goods be sold, offered or advertised above or below such fixed prices. We regret to have to inform you that facts have been brought to the notice of the association with which your name is connected and which will be brought before the 'stop list' committee of this association meeting at this address on Wednesday, the 10th instant, at 11.45 a.m. Your attendance is invited, and if you attend you will have an opportunity of hearing the case submitted in your presence and of making any answer or explanation which you may think **G** fit to place before the committee. We think it proper, however, to inform you that should you not attend, the matter will, nevertheless, be inquired into in your absence and such recommendation made to the council as is deemed appropriate. We enclose précis of the case which will be placed before the committee. Yours faithfully, The Motor Trade Association."

H The two directors of the plaintiffs' company—namely, Captain Hardie and Captain Lane—attended the meeting of the "stop list" committee when the charge against them was investigated. They said that they had always tried to carry out the rules of the association, but that the man, Neale, had pestered them into doing what they had done. On Mar. 18 the defendants wrote to the plaintiffs the following letter:

I "Dear Sirs,—With reference to your appearance before the 'stop list' committee at their meeting on Wednesday, 10th instant, we beg to inform you that the committee fully considered the evidence placed before them and came to the conclusion that the infringement of our recognised principles of price regulations alleged, as already stated to you, was proved to their satisfaction. The committee under all the circumstances are prepared to recommend to the council that if you will pay a sum of £200 to our indemnity fund (which is applied towards expenses) to mark your regret, sign and pay for the insertion of the enclosed undertaking in MOTOR COMMERCE, also re-purchase the car purchased from you, that this shall be regarded on this occasion as a satisfactory ending of the matter. Please let us hear from

you by Wednesday, 24th instant, if you agree, and in that event let us have cheques for £200 and £225 made payable to this association and the signed undertaking with a cheque for £7 made payable to MOTOR COMMERCE. If we do not hear from you by the day named, we will assume that you do not desire to avail yourself of this method of concluding the matter."

On receipt of that letter the plaintiffs wrote the following letter on Mar. 22:

"Dear Sirs,—We beg to acknowledge receipt of your letter of the 18th inst., reference S. L. B./L. M., and note that your 'stop list' committee are prepared to recommend to your council that if we will pay the sum of £200 to the indemnity fund, and also repurchase from you the car which you purchased from us, and pay a further charge of £7 to MOTOR COMMERCE that the incident will be regarded as ended. We are quite prepared to re-purchase the car in question immediately, but would respectfully submit that the fine of £200 is extremely severe having regard to all the circumstances, and we would be glad if you will kindly let us know by Wednesday next, the 24th instant, whether we may be permitted to appear again in person to appeal for a reduction of the fine."

Captain Lane saw Mr. Denyer and it was agreed that he should pay £332 at once and the balance of £100 in three months. This was confirmed by the plaintiffs in their letter of the 24th and accepted by the defendants in their letter of Mar. 25, the plaintiffs' letter being:

"Dear Sirs,—Confirming our Captain Lane's call to-day when he saw your Mr. Denyer, we enclose herewith our cheque for £332, this sum being made up as follows: Re-purchase of car, £225; cost of insertion in MOTOR COMMERCE, £7; the remaining £100 being on account of the £200 fine, the balance of which to be paid within three months from this date. We shall be glad to have your authority to collect the 9 h.p. Rover as soon as possible."

The following undertaking was enclosed with the letter:

"To THE MOTOR TRADE ASSOCIATION.—We, the undersigned, hereby undertake that we will strictly observe the protected prices of motor cars, motor cycles, petrol and oil and other articles, the prices of which are protected by the Motor Trade Association, and will not sell or be party to the sale, directly or indirectly, of any article the price of which is so protected at a price either below or above such protected price. We enclose herewith cheque value £200 as a contribution to your indemnity fund and the proprietors of MOTOR COMMERCE are hereby authorised to insert this undertaking once at our expense."

In his evidence Captain Hardie said that he knew the "stop list" committee had been adopting a similar course in other cases, that he was afraid of being put on the "stop list," and that he realised that to pay the fine, and give the undertaking was a lenient alternative to going on the "stop list." The defendant, Chilton, was chairman of the "stop list" committee, Bennett is a member of the association, and Denyer is the secretary of the association and wrote the letters.

On July 17, 1926, the defendants, Chilton and Bennett, suing on behalf of themselves and of other members of the Motor Trade Association, issued a writ against the present plaintiffs for the balance of £100. Meanwhile, however, the defendant Denyer had been convicted at the Exeter assizes under the Larceny Act, 1916, and his appeal against the conviction had been dismissed by the Court of Criminal Appeal: see *R. v. Denyer* (14). The conviction was in respect of circumstances not dissimilar from the present ones. The plaintiffs, therefore, refused to pay the £100 and brought the present action for damages and alternatively for the return of the money which they had paid to the defendants. It was contended by the defendants that there was no evidence of any conspiracy, that none of the defendants had done anything illegal, that all they had done was to tell the plaintiffs what they, the defendants, were entitled to do, and would do and to give the plaintiffs an option of paying a sum of money instead. On the other hand it was argued for the plaintiffs that the defendants were not entitled to demand money under coercion, and that it was immaterial whether the threat they

A made was a lawful or an unlawful threat, and they pointed out on appeal that the finding of the jury was that the threat deprived the plaintiffs of their voluntary power of action.

The first matter to be considered is what are the circumstances which give rise to an actionable conspiracy. A conspiracy is defined in the Oxford Dictionary as being "a combination of persons for an evil or unlawful purpose." In my view, a conspiracy

B is actionable in law where it is an agreement by two or more persons to do an unlawful act or to do a lawful act by unlawful means. One of the means by which a conspiracy can be carried out is by making threats, and, there again, threats may be lawful or unlawful. In *Sorrell v. Smith* (5) LORD DUNEDIN says ([1925] A.C. at p. 730):

C "A threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal action or an illegal, that is, a tortious action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding; if of the second, it falls within the description of the illegal means, and the right to sue of the person injured is established."

This makes clear the meaning of s. 29 of the Larceny Act, 1916, which deals with demanding money with menaces and creates an offence where a person utters, knowing the contents thereof, any letter demanding of any person, with menaces and without

D any reasonable and probable cause, any property. That section clearly contemplates that there may be cases where there may be reasonable and probable cause for uttering a letter with menaces. Indeed, that must be so. Take for example, the case of three persons who lend £1,000 without interest to a fourth person, and take a bond from him for repayment of the sum. Supposing the obligor refuses to repay and the three

E obligees meet together and write a letter to him threatening to bring an action unless he pays the money within a given time. That would be a case in which they would be demanding money with menaces, but with reasonable cause, and they could not be convicted under the section in question. There would be no evidence on which the judge could leave to the jury the question whether there was a lack of reasonable and probable cause, and he should withdraw the case from the jury. Suppose, again, the

F same case, but the obligees, after sending the letter in question, agreeing to compromise their claim for £500 and demanding that sum. There, again, they would not be committing an offence within the section.

Dealing now with the case before us, it must be admitted that since the decision of *Ware and De Freville, Ltd. v. Motor Trade Association* (1), the defendants' object was not an illegal one. The defendants in that case were this very same Motor Trade

G Association, the plaintiffs were not members thereof, but it was held that the publication of the plaintiffs' name in the "stop list" was done by the defendants bona fide in the protection of the trade interests of the members of the association, and, therefore, was not unlawful and an injunction should not be granted to restrain them doing so. SCRUTTON, L.J., said ([1921] 3 K.B. at p. 64):

H "It is the commonest transaction to say in a libel action: 'I will not issue a writ or ask for damages if you will apologise and pay my costs,' but I never heard it called 'demanding money with menaces' before,"

and ([1921] 3 K.B. at p. 69):

I "If you may lawfully do a thing it cannot be unlawful to say you are going to do it; if men may refuse to work for a master, they may surely tell him they propose to do so if he acts in a certain way."

Further, he says ([1921] 3 K.B. at p. 71):

"If so the question in this case is whether a combination (1) intended to secure that new goods shall be sold at a fixed price, neither higher nor lower, by refusing to supply with goods a person who sells those goods at other than the fixed price; and (2) to inform the confederates who such persons are by means of a "stop list"; and (3) to take steps to insure that the person who is not to be supplied with goods directly is not supplied with them indirectly, is a reasonable and legitimate means of protecting trade interests. In my view it is."

Starting, therefore, with the proposition that the defendants' object was not unlawful, and that the means by which they sought to attain it, namely, the threat and the "stop list," were not unlawful, there is not any ground upon which the plaintiffs have an action for conspiracy so far, but it is said that they had no power to take money in lieu of putting the plaintiffs upon the "stop list." I cannot think, however, that what they did with regard to taking money in the present case gives the plaintiffs an actionable right of conspiracy. It will be observed that Captain Hardie himself said that he realised that to pay the fine and give the undertaking was a lenient alternative to going on the "stop list." There is no evidence that the fine itself was an excessive or extortionate amount. It cannot be maintained that the defendants had no right to forgo their full rights under the contract and to compromise their claim any more than the obligees in the instance above given had no right to compromise their claim.

In *Fisher & Co. v. Apollinaris Co.* (11), the headnote, which correctly states the facts, is as follows:

"The prosecutors in a trade mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months: Held, that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter."

MELLISH, L.J., said as follows (10 Ch. App. at p. 303):

"But in my opinion, there is no objection to the compromise of a charge of this sort on such terms. The complaint was that Fisher had used the trade marks of this company. Now, previously to the Trade Marks Act, 1862, the sole remedy for the wrong complained of by the company would have been by action at law or suit in equity, but under this Act the wrong became also the subject of a criminal prosecution. There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The prosecutors allowed him to state that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal courts in cases of assault or libel. In some cases there is a payment of money; in other cases, no payment at all; and it has never been considered that there was anything wrong in such transactions. It would, of course, be different if there was any case alleged of extorting money under threats."

It is not necessary to speculate what may be the circumstances under which a conspiracy becomes actionable by reason of the unlawful means used to attain the object.

In *Sorrell v. Smith* (5) LORD DUNEDIN said ([1925] A.C. at p. 719):

"I entirely concur with what was said by ATKIN, L.J., in *Ware and De Freville, Ltd. v. Motor Trade Association* (1) ([1921] 3 K.B. at p. 90): 'It appears to me,' he says, 'to be beyond dispute that the effect of the two decisions in *Allen v. Flood* (10) and *Quinn v. Leathem* (16) is this: That on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another.'"

It would not only be dangerous but impossible to lay down by anticipation a category of unlawful means, and it is not difficult to postulate circumstances in which even the Motor Trade Association might use unlawful means to carry out their object, but in the present case there is no evidence upon which it was possible to say that their object was unlawful, or that the means which they used to attain it were.

In *R. v. Denyer* (14) I think the court was not correct in saying ([1926] 2 K.B. at p. 268) that there was not the remotest nexus or relationship between a right to put the name of Read on the "stop list" and a right to demand from him £257 as the price of abstaining from that course. On the contrary, I think there was a nexus in the circumstances: see the remarks of MELLISH, L.J., above referred to in *Fisher & Co. v.*

A *Apollinaris Co.* (11). There may be circumstances in connection with a demand which may make it illegal, but I cannot see the presence of any such circumstance either in this or in *Denyer's Case* (14).

B With regard to the second cause of action, that is for money had and received by the defendants, we were much pressed by the learned counsel for the plaintiffs with *Cadaval v. Collins* (17) and *Williams v. Bayley* (18). In my view, both those cases are distinguishable. In the first, there had been fraudulent use made of legal process, in the second, the court found that an agreement to make an equitable mortgage of his property had been obtained from a father, he well knowing that if he did not make the agreement his son would be prosecuted with a moral certainty of conviction. Both those cases must be read with reference to the facts which are entirely different from those now before the court. Having regard to the evidence given in the present case, C I am unable to see that there were any such duress as would entitle the plaintiffs to recover this money from the defendants. I have already referred to the learned judge's note of the evidence, which is borne out by the transcript of the shorthand notes. The defendants had a perfect right to threaten to put the plaintiffs on the "stop list," just as the obligees in the instance given above had a perfect right to threaten the obligor to bring an action against him if he did not pay the £1,000. Both had a right to com- D promise their full rights for something more lenient, and it cannot be said in either case that the money so obtained was money obtained by duress. I do not desire to add anything to what my Lord has said on the question of misdirection, but upon the ground that there was no evidence to go to the jury, I am of opinion that this appeal should be allowed and judgment entered for the defendants with costs.

E **ROMER, J.**—The allegations of fraud with which the statement of claim is plentifully sprinkled having been abandoned, the relevant facts of this case are simple, and for the most part are not in dispute. The plaintiffs being suspected of having infringed a price regulation of the Motor Trade Association, of which they were members, were invited to attend a meeting of the "stop list" committee of the association of Mar. 10. F The two directors of the plaintiff company, Captain Hardie and Captain Lane, duly attended the meeting, at which the former stated in evidence that he thought the defendant Chilton was present, and the latter stated that he believed both the defendant Chilton and the defendant Bennett were present. As a result of the meeting the "stop list" committee appear to have come to the conclusion that the infringement by the plaintiffs of the price regulation had been proved. The plaintiffs accordingly G became liable to have their name placed upon the association's "stop list." Had this been done, the result would no doubt have been a serious matter for the plaintiffs. The "stop list" committee were therefore prepared to take a more lenient course and to recommend to the council of the association to treat the matter as being satisfactorily ended if the plaintiffs, to mark their regret, would pay a sum of £200 to the indemnity fund of the association, would sign and pay for an undertaking as to their future conduct to be inserted in *MOTOR COMMERCE*, and repurchase the car, the sale of which by H the plaintiffs to an emissary of the association for £225 had been the cause of the trouble. This decision of the committee was in due course communicated to the plaintiffs by the defendant Denyer, who was the agent of the committee for such purposes, by a letter dated Mar. 18, 1926. The association had no express power to accept a payment and undertaking in lieu of inserting an offending member's name in the "stop list"; but in mercy to the offenders this association in proper cases adopted this course from time I to time, and this fact was known to the plaintiffs, who recognised that they were being offered a lenient alternative. They tried, however, to get the alternative made even more lenient, and at an interview with the defendant Denyer on Mar. 24, Captain Lane was successful in obtaining an alteration of the terms by virtue of which in lieu of an immediate payment of the £200, the plaintiffs were to pay £100 down and another £100 in three months' time. Thereupon the plaintiffs paid to the association the sum of £332, which was made up of the £225, the first £100, and £7 for the cost of insertion of their undertaking in *MOTOR COMMERCE*. The second sum of £100 was never paid by the plaintiffs, but on Oct. 28, 1926, they issued the writ in this action against Chilton,



Bennett, and Denyer, claiming, among other relief not now material, (a) damages for conspiracy, and (c) money had and received by the defendants to the use of the plaintiffs. By their statement of claim they asked for damages including the £332 as special damage, and alternatively, the sum of £332 as and by way of money had and received by the defendants to the use of the plaintiffs. A

Inasmuch as it must be conceded that the defendants, whether acting individually or in combination, would have committed no wrongful act had they placed the names of the plaintiffs upon the "stop list" without the plaintiffs being given the lenient alternative, it would seem at first sight to require some little ingenuity to discover in the facts that I have mentioned, any cause of action vested in the plaintiffs. So far as the claim is for money had and received by the defendants to the use of the plaintiffs, it does not appear that the defendants, or any one of them, ever had or received anything. The plaintiffs' only remedy, if any, must, therefore, lie in damages, and it was a judgment for damages that the plaintiffs succeeded in obtaining in the court below. Now that judgment is based upon certain propositions of law which were enunciated by AVORY, J., in the course of his summing-up to the jury, and which involve the following one: If A., or A. and B. acting in agreement together, induce C. to pay money, which he may lawfully pay, to some other person who has no legal claim to it, by means of threats which are calculated to deprive any reasonable man of his voluntary power of action, and C. thereby suffers damage, he is entitled to recover such damages from A. or A. and B. as the case may be, even though the threat be to do some lawful act. But I am not aware of any authority for so wide a proposition as this, and it is, in my respectful opinion, an unsound one in law. It is not difficult to imagine cases that may arise in everyday life in which the proposition, if applied, would produce results that are nothing less than extravagant. Some of these have already been referred to by SCRUTTON, L.J., and I do not desire to multiply examples. "But"—say the plaintiffs—"however extravagant you may regard the proposition in its relation to your domestic or your club life, or any other situations your fancy may suggest, allow us to point out to you that in the present case the defendants have committed a felony for which they are liable to penal servitude for life." This, I agree, is a serious matter indeed, if it be true, serious not only to the defendants in the present case, but to all who in analogous circumstances may seek to temper justice with mercy; and whatever modifications may have to be introduced into the proposition of law to which I have referred, that proposition must still be expressed in terms wide enough to cover the present case, if in the present case a felony has in truth been committed. B C D E F

In order to ascertain whether this be the fact or no, it becomes necessary to consider s. 29 (1) of the Larceny Act, 1916. That subsection, so far as material to the present case, provides as follows: G

"Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing; . . . shall be guilty of felony."

Subsection (4) provides: H

"For the purpose of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person."

It is said that the letter of Mar. 18, 1926, was such a letter as is mentioned in the first subsection. It was actually written by Denyer alone, and, speaking for myself, I am unable to find anything worthy of the name of evidence to show that the other defendants had anything to do with the uttering of it, but for the purposes of this judgment I am willing to assume that the three defendants agreed together to have the letter written and sent to the plaintiffs. The question then arises whether the demand contained in the letter was made with menaces and without any reasonable or probable cause. In my opinion, this question must be answered in the negative, for the demand was not made without reasonable or probable cause. What the meaning of the word "probable" may be in this connection, is the question that I am content to leave to others who are more familiar with the criminal law than I am, for it is sufficient for the I

A defendants if they had reasonable cause for making the demand—and that they had I can feel no doubt, for they had it in their power to place the plaintiffs on the “stop list,” but, being desirous of taking a more lenient course, they gave them the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do. The question of reasonable or probable cause appears to be one for the jury, but only, of course, where there is some evidence of its absence. In the present case there is, in my opinion, none. I cannot find that the defendants have done anything of which complaint can be made in a court, whether of civil or criminal jurisdiction. In my opinion, the evidence shows at the most no more than that the defendants in good faith proposed and agreed to abstain from doing something that they could lawfully do, on condition that the plaintiffs made a payment that they could lawfully make. This being so, the case should have been withdrawn from the jury, and judgment entered for the defendants with costs. That must now be done, and the appeal allowed with the usual consequences.

Appeal allowed.

Solicitors: *Kenneth, Brown, Baker, Baker; C. S. Tomlinson.*

[*Reported by T. W. MORGAN, ESQ., Barrister-at-Law.*]

D

E

MARSLAND v. TAGGART

[KING’S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), April 30, May 1, 1928]

F

[Reported [1928] 2 K.B. 447; 97 L.J.K.B. 787; 139 L.T. 192; 92 J.P. 118; 44 T.L.R. 543; 26 L.G.R. 377; 28 Cox, C.C. 511]

Case Stated—Signature—Death of justice before signature—Signature by remaining justices—Summary Jurisdiction Act, 1857 (20 & 21 Vict., c. 43), s. 2.

G

Three justices heard and dismissed a complaint, but agreed to state a Case. Before the Case was signed one of the three justices died, and consequently the Case was signed by two of the justices only. A preliminary objection was taken that in these circumstances the Case had not been signed by the justices who had heard the matter, and, in view of the provisions of s. 2 of the Summary Jurisdiction Act, 1857, the Divisional Court had no jurisdiction to entertain the appeal.

H

Held: as the absence of the signature of the third justice was due only to his death the court had jurisdiction to entertain the appeal.

Kean v. Robinson (1), [1910] 2 I.R. 306, 323, applied.

I

Notes. It is now provided by r. 62 of the Magistrates’ Courts Rules, 1952 (S.I. 1952 No. 2190) that a Case may be stated on behalf of justices whose decision is questioned by any two of such justices: this case, however, is reprinted as it may be authority for the proposition that even where the decision questioned was that of only two justices, and one dies before a Case has been stated, a Case may be stated and signed by the surviving justice: cf. *Perademya Service Bus Co., Ltd. v. Srihaulea Omnibus Co., Ltd.*, [1952] W.N. 373. The Summary Jurisdiction Act, 1857, has been repealed by the Magistrates’ Courts Act, 1952, s. 87 of which gives power to require magistrates to state a Case.

As to signature of a Case stated by magistrates, see 25 HALSBURY’S LAWS (3rd Edn.) 254; and for cases see 33 DIGEST 413–414. For the Magistrates’ Courts Act, 1952, s. 87, see 32 HALSBURY’S STATUTES (2nd Edn.) 488, and for the Magistrates’ Courts Rules, 1952, r. 62, see 13 HALSBURY’S STATUTORY INSTRUMENTS.

Cases referred to:

- (1) *Kean v. Robinson*, [1910] 2 I.R. 306, 323; 33 Digest 413, *b*.
- (2) *Barker v. Hodgson* (1904), 68 J.P. 310, D.C.; 33 Digest 413, 1236.
- (3) *R. v. Leicestershire Justices* (1850), 15 Q.B. 88; 4 New Mag. Cas. 83; 4 New Sess. Cas. 124; 19 L.J.M.C. 209; 15 L.T.O.S. 132; 14 J.P. 542; 14 Jur. 550; 117 E.R. 391; 22 Digest (Repl.) 280, 2838.

Case Stated by justices for Derbyshire.

On May 30, 1927, the appellant, Joseph Marsland, surveyor for the Mellor parish of the rural district council of Hayfield, Derbyshire, preferred a complaint against the respondent, Aaron Taggart, under s. 19 (2) of the Public Health Acts Amendment Act, 1907, alleging that certain necessary repairs to a street known as Shiioh Road, in the parish of Mellor, of which the respondent was a frontager, and which was not a highway repairable by the inhabitants at large, had been executed by the Hayfield Rural District Council after the respondent had failed to execute them. The appellant claimed £22 3s., the cost of the repairs. The complaint came before the justices sitting at New Mills on June 29, 1927. The hearing was adjourned until Aug. 3 and then until Aug. 24 when the claim was dismissed with costs. Three justices—Mr. Reekie, Mr. Chell, and Mr. Wainwright—heard the complaint. On Aug. 30 the appellant applied to the justices to state and sign a Case for the opinion of the High Court, and they agreed to do so. On Sept. 23 Mr. Wainwright died and the Case, which was stated on Nov. 18, was signed only by Mr. Reekie and Mr. Chell.

R. W. Leach (*Montgomery, K.C.*, with him), for the respondent, took the preliminary objection that s. 2 of the Summary Jurisdiction Act, 1857, had not been complied with, and that therefore the court had no jurisdiction to hear the appeal.

Scholefield, K.C., and *P. Ridgeway Bennett* for the appellant.

LORD HEWART, C.J.—The objection which is taken here is that the court has no jurisdiction to hear this appeal by way of Case Stated because the Case is signed by only two of the three justices who heard the complaint, the third having died between the date of the justices' decision and the date of the statement of the Case. There is no doubt that in ordinary circumstances all the justices who have heard an information or complaint are required to state and sign a Special Case. As was said by LORD ALVERSTONE, C.J., in *Barker v. Hodgson* (2) (68 J.P. at p. 310):

"I attach considerable importance to the signatures of all the justices being affixed to a Case, especially of the minority in a case like this where there has been a difference of opinion."

That judgment was concurred in by DARLING and CHANNELL, JJ. But in that case the reason why some of the justices had refrained from signing the Case was that they dissented from the decision of the court. The present case raises no such question. Nothing here depends on the volition of any individual. The signature is absent because the signatory is dead. On the matters so raised the case which appears to be relevant is *Kean v. Robinson* (1). There a Case, the draft of which had been agreed on behalf of the parties, had been approved and signed by one of three justices who had heard the complaint. The second justice had also approved the Case, but he had died without signing it, and the third justice had died without having either approved or signed it. The question arose whether the King's Bench Division in Ireland had jurisdiction in those circumstances to hear the case, and the majority of the court decided that it had. One, at any rate, of the grounds of that decision was concisely stated by MADDEN, J., when he said ([1910] 2 I.R. at p. 319):

"An authority which affords a satisfactory basis for my judgment is *R. v. Leicestershire Justices* (3). In that case the sending of notice of appeal was, by the statute, a condition precedent to the right of appeal. The person upon whom the notice should have been served was dead at the time of posting the notice. It was held—I quote from the judgment of PATTESON, J.—'that, as the duty of the appellant to give such notice was cast upon him by the law, not by his own voluntary con-

A tract, he is excused from performing that duty by its becoming impossible by the act of God.' ”

Those words of PATTESON, J., were also cited with approval by LORD O'BRIEN, C.J., who said ([1910] 2 I.R. at p. 321):

B “This is the language of PATTESON, J., stating what is now the well-established law. It draws the familiar distinction between a duty created by law and a duty created by voluntary contract, when a party can introduce any stipulation he likes.”

C Those observations were made as illustrating the principles *Actus Dei nemini injuriam facit* and *Lex non cogit ad impossibilia*. *Kean v. Robinson* (1) went to the Court of Appeal in Ireland ([1910] 2 I.R. at p. 323), and the Court of Appeal ordered the appeal to be struck out because the decision of the King's Bench Division, which had been said to have no jurisdiction, was final. In my opinion, similar considerations apply here. As the reason of the absence of the signature is the death of the justice who would otherwise have signed, this court has jurisdiction to proceed with the matter.

AVORY, J.—I agree.

D SHEARMAN, J.—I am of the same opinion. Justices come and go, but justice itself should endure. I see no sense in an objection which means that when the Summary Jurisdiction Act, 1857, provides that an aggrieved party may apply to the justices to state and sign a Case, justice should come to an end because one of the justices who heard the complaint or information happened to die. That sort of objection ought to be as extinct as the thumbscrew.

E The court then heard and allowed the appeal on the merits.

Appeal allowed.

Solicitors: *P. R. Christie* for *Boddington, Jordan & Bowden*, Manchester; *Gibson & Weldon* for *H. S. Sleigh*, Denton.

[Reported by J. F. WALKER, ESQ., *Barrister-at-Law*.]

G ADAMS v. CAMFONI

[KING'S BENCH DIVISION (Lord Hewart, C.J., Acton and Branson, JJ.), July 17, 1928]

[Reported [1929] 1 K.B. 95; 98 L.J.K.B. 40; 139 L.T. 608; 92 J.P. 186; 44 T.L.R. 822; 28 Cox, C.C. 538; 26 L.G.R. 542]

H *Licensing—Offence—Sale of liquor outside permitted hours—Unauthorised act of servant—Liability of licensee—Licensing Act, 1921 (11 & 12 Geo. 5, c. 42), s. 4 (a).*

A licensee is not liable to be convicted of selling intoxicating liquor outside permitted hours in respect of a sale by his servant if such sale was against the servant's orders and was not done in the course of any duty delegated to the servant.

I **Notes.** The Licensing Act, 1921, has been repealed and replaced by the Licensing Act, 1953, s. 100 (1) of which corresponds to s. 4 (a) of the Act of 1921, and s. 165 (2) of which has the same effect as s. 18 of the Act of 1921.

As to selling intoxicating liquor outside permitted hours, see 22 HALSBURY'S LAWS (3rd Edn.) 674; and for cases see 30 DIGEST (Repl.) 106–107. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

Case referred to:

(1) *William v. Pearce* (1916), 85 L.J.K.B. 959; 114 L.T. 898; 80 J.P. 229; 32 T.L.R. 285; 14 L.G.R. 564; 25 Cox, C.C. 362, D.C.; 30 Digest (Repl.) 139, 905.

Case Stated by the stipendiary magistrate for Cardiff.

On Jan. 18, 1928, the respondent, Alfonso Camfoni, was charged by an information preferred against him by the appellant Sidney Adams, an inspector of police, for that he, on Dec. 14, 1927 did unlawfully by his agent supply in certain licensed premises, to wit, 168, Bute Street, Cardiff, during hours other than permitted hours, certain intoxicating liquor, to wit, whisky, to be consumed off the premises, contrary to s. 4 of the Licensing Act, 1921. One Ernest John was charged by the said information with unlawfully aiding and abetting Camfoni in the commission of the said offence. Both charges were dismissed.

By s. 4 of the Licensing Act, 1921

"no person shall, except during the permitted hours (a) either by himself or by any servant or agent sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed either on or off the premises."

It is enacted by s. 18 of the said Act that the provisions of the Act with respect to licensed premises shall apply to any premises or place where intoxicating liquors are sold by retail under a licence.

At the hearing of the information the following facts were proved or admitted. (a) On Dec. 14, 1927, the respondent was the holder of a spirit dealer's excise licence authorising him to sell spirits by retail for consumption off the premises at 168, Bute Street aforesaid. (b) On that date one Angel Gonzalez was in the employment of the respondent as manager of the wine and spirit business carried on by the respondent at 168, Bute Street aforesaid. (c) On the same date the said Ernest John, a youth sixteen years of age, was in the employment of the respondent as an errand or messenger boy in connection with the business carried on at 168, Bute Street aforesaid. (d) On Dec. 14, 1927, whilst the premises were not open for business, Ernest John, in the temporary absence of the respondent and of Angel Gonzalez, served one George Paris with two bottles of whisky from the stock at 168, Bute Street, during hours other than permitted hours. (e) Ernest John received no payment from George Paris in respect of the said bottles of whisky. (f) The respondent, when charged on the same day with the offence mentioned in the information, replied: "John has no right to supply anything at all." No evidence was adduced by the appellant that Ernest John: (a) Had any express or implied authority either on Dec. 14 or at any other time to sell or supply to any customer any part of the stock in 168, Bute Street aforesaid. (b) Had been left in charge of the premises 168, Bute Street aforesaid, either on that day or at any other time. (c) Had ever taken any part in selling or supplying to customers any part of the stock in the said premises. (d) Had ever been employed by the respondent or Angel Gonzalez in any capacity other than that of a mere errand or messenger boy.

It was contended on behalf of the respondent that the mere fact that the said Ernest John was employed by the respondent as an errand or messenger boy was not by itself sufficient to make Ernest John an agent or servant of the respondent within the meaning of s. 4 (a) of the Licensing Act, 1921, and that in the absence of any other evidence the information against the respondent ought to be dismissed. It was contended on behalf of the appellant that the mere fact that the said Ernest John was employed by the respondent as an errand or messenger boy was by itself sufficient to make Ernest John an agent or servant of the respondent within the meaning of s. 4 (a) aforesaid, and that even in the absence of any other evidence the respondent and Ernest John ought to be convicted. The stipendiary magistrate was of the opinion that the contention on behalf of the respondent was correct and that there was no evidence from which he could infer that Ernest John was acting as an agent or servant of the respondent. He, therefore, dismissed the said information against the respondent and Ernest John.

P. B. Morle for the appellant.

Joshua D. Davies for the respondent.

LORD HEWART, C.J.—It is not clear from this case whether in supplying the whisky John was honestly, though mistakenly, intending to serve his master's interests by

A supplying one of his master's customers on credit, or whether he was dishonestly taking his master's goods and supplying them to some person for his own ends.

It has been contended that the effect of s. 4 of the Licensing Act, 1921, is to put the respondent in the position of an insurer warranting that neither he nor anybody else on his premises should sell or supply his goods otherwise than during permitted hours. I cannot find any such meaning in the section. The section is said to be taken from the **B** Defence of the Realm Regulations, but it does not appear that the interpretation contended for has been put upon these words. On the contrary, in *Williams v. Pearce* (1), in which they were dealt with, LORD READING, C.J., said (114 L.T. at p. 902):

“This regulation, as I understand it, really carries out the policy manifested in many sections of the Licensing Acts. It is nothing new. I cannot find in the authorities to which our attention has been called anything which assists the **C** contention for the respondent on this point.”

That view was concurred in by SANKEY, J., and LOW, J. On the evidence the magistrate came to the conclusion that what happened was something of an accidental kind done by one who, no doubt, in a sense was in the respondent's service, but against orders and not in the course of performing any duty delegated to him. It is impossible to say that the magistrate was wrong, and I think the appeal must be dismissed.

D **ACTON, J.**—I agree.

BRANSON, J.—I agree.

Appeal dismissed.

Solicitors: *Smith, Rundell, Dods & Bockett*, for C. G. Brown, Cardiff; *Pritchard, Englefield & Co.*, for W. B. Francis & Son, Cardiff.

E [Reported by J. F. WALKER, Esq., Barrister-at-Law.]

F

HOSKINS-ABRAHALL v. PAIGNTON U.D.C.

[COURT OF APPEAL (Scrutton, Greer and Sankey, L.JJ.), December 10, 1928]

G [Reported [1929] 1 Ch. 375; 98 L.J.Ch. 103; 140 L.T. 397; 93 J.P. 93; 45 T.L.R. 161; 27 L.G.R. 129]

Burial—Vault—Exclusive right of burial therein—Right of grantee to open vault only for purpose of interment—Grantee's right of property in the vault—Cemeteries Clauses Act, 1847 (10 & 11 Vict., c. 65), ss. 40, 42—Public Health (Interments) Act, 1879 (42 & 43 Vict., c. 31), s. 2.

H A grant by a burial authority of the right to construct a vault with the exclusive right of burial therein does not convey to the grantee the right to enter the vault for the purpose of placing articles or performing private ceremonies therein. A grant of burial in a vault under the Cemeteries Clauses Act, 1847, ss. 40 and 42, entitles the grantee only to open the vault for the purpose of interments therein after notice to the cemetery authority and to execute necessary repairs with the **I** consent of that authority.

Per **Curiam**: The grant of the exclusive right of burial does not confer any freehold interest in the land, and the payment for the erection of a vault does not confer any property in the vault erected in the land.

McGough v. Lancaster Burial Board (1) (1888), 21 Q.B.D. 323, applied.

Decision of EVE, J., [1928] Ch. 671, affirmed.

Notes. Considered: *London Cemetery Co. v. Cundey*, [1953] 2 All E.R. 257.

As to exclusive rights of burial, etc., in general, see 4 HALSBURY'S LAWS (3rd Edn.)

62, para. 173; and as to such rights under the Cemeteries Clause Act, 1847, see *ibid.* A 78-80, paras. 225-231. For cases see 7 DIGEST 543, 229-231, 547, 260-262. For the Cemeteries Clauses Act, 1847, s. 40, s. 42, and the Public Health (Interments) Act, 1879, s. 2, see HALSBURY'S STATUTES (2nd Edn.), Vol. 2, pp. 776, 777 and Vol. 19, p. 119 respectively.

Case referred to:

- (1) *McGough v. Lancaster Burial Board* (1888), 21 Q.B.D. 323; 57 L.J.Q.B. 568; 52 J.P. 740; 36 W.R. 822; 4 T.L.R. 679, C.A.; 7 Digest 543, 231. B

Appeal from a judgment of EVE, J. (reported [1928] Ch. 671).

The plaintiff, Miss Gertrude Hoskyns-Abrahall, of Torre, Devonshire, claimed the right of access to a vault in Paignton cemetery in which the body of her mother was buried. The defendants, the cemetery authority, denied that the plaintiff had any absolute property in the vault, and contended that she had only an exclusive right of burial therein and a right of access thereto, subject to the byelaws and regulations and with the consent of the defendants. They alleged that they had been hindered by the conduct of the plaintiff in bringing various articles and placing them in the vault, in their duty of maintaining the cemetery in a proper and seemly manner, and they counter-claimed for a declaration that the plaintiff was not entitled to open the vault save for the purpose of interment, and with their written consent and subject to their rules and regulations for the time being in force. They also asked for an injunction restraining the plaintiff, her servants and agents, from placing in or upon the vault any articles other than articles approved by them, and from doing any other act or thing in the cemetery calculated to hinder the council in the proper maintenance thereof. The plaintiff alleged that the cemetery authority on divers occasions wrongfully prevented her from exercising her right of access to the vault, and claimed a declaration of title and other relief on the footing that the property of the vault was in her, that she was entitled to visit, open, and enter into the vault whenever she pleased for the purpose of performing certain alleged traditional family and Christian rites connected with the tendance of the remains of the dead and for other purposes, and that any regulations of the cemetery authority, contrary to this absolute right were *ultra vires*. D E

EVE, J., dismissed the plaintiff's action and granted the cemetery authority the declaration sought. The plaintiff appealed. F

G. B. Hurst, K.C., and *J. N. Gray* for the plaintiff.

Vaisey, K.C., and *Charles E. Harman* for the defendants.

SCRUTTON, L.J.—This is one of those unfortunate cases where an educated and sincere lady has formed views with regard to her duty to her dead which conflict with the ordinary habits of mankind, and she has, in consequence, indulged in a series of actions which have led the burial authority of the cemetery where her dead mother is buried to take action which probably they would not have dreamt of taking with persons who conduct themselves according to the ordinary beliefs of persons at the present time. G

The plaintiff's mother, who was a member of the Church of England, was buried in the consecrated portion of this cemetery belonging to the Paignton Urban District Council in 1915, and shortly after her mother's death, the plaintiff bought the exclusive right of burial in four plots in that cemetery, and obtained permission, by payment, to erect a vault in which her mother's body, in a coffin, was concreted round. There was a door opening into the vault and by the side of the concreted coffin there is a narrow passage. There would be room for further interment on the top of the concreted coffin, or, indeed, the whole vault might be filled up with coffins. The plaintiff, who says that she is a descendant of a family of old French nobility, has conceived the idea that it is her duty towards her dead mother to perform what she calls acts of piety which include burning incense around the coffin, placing food and drink on the coffin, placing money on the coffin and burning or placing various scented roots and liquids on the coffin. For some time it was not known exactly what the plaintiff was doing when she opened the vault, as she did, and went into it, but after some five or six years, what she was doing H I

A was brought to the attention of the cemetery authority and there was then found in the vault a very miscellaneous collection of articles. EVE, J., sets them out in his judgment ([1928] Ch. at p. 680):

B “There were found in this very small vault ‘two wooden tables, one wooden screen, two large flower pots with plants (evergreens), one mat, seven brass candlesticks, one large bowl, one small mirror, five flower vases, scent bottles, tin half full of camphor, two metal trays, one spirit lamp, one metal purse, four apostle spoons, one tumbler containing wine, a quarter bottle port wine, one cup and saucer, one china plate, one small jug, one plate, two pennies and five florins, and to these were added at the plaintiff’s request three bunches of violets, one bottle of Madeira wine, one bottle of oil of lavender, one bottle of oil of lemon, one bottle of essence of vanilla, and a pound tin of coffee.’”

C In addition to the proceedings, whereby the plaintiff had gradually collected in the vault this very miscellaneous collection of articles, the plaintiff at times by herself, or by her servants, burnt incense in and around the grave, and just before the writ was issued by her she went to the vault, taking with her flowers, fruit, fleur-de-lys, which appears to be some kind of root of a plant, orris root, a cooked pigeon, a table and wine and milk and coffee, and she was apparently prepared, and desired, as what she calls an act of piety, to place these things on the tomb in the interior of the vault in celebration or honour of her dead mother’s birthday. She was stopped from doing it by the cemetery authority, the Paignton Urban District Council, whereupon she issued a writ in which she claims that she had a right to use the vault for all reasonable purposes, including the observance of the rights of the Orthodox Greek Church and the provision of better ventilation and for reparation. It shows the difficulty of dealing with this very sincere lady that she was quite ready, for the purpose of enabling herself to carry out these acts of piety, as she calls them, to swear quite falsely, that she and her mother were members of the Orthodox Greek Church, which they had never been, both being members of the Church of England. A sincere lady who went so far in persuading herself with regard to what is right and what is wrong as to readily swear a thing which is quite

F untrue places any public authority in a position of great difficulty.

The plaintiff’s rights, such as they are, depend on the statutory powers given to the cemetery authority, the urban district council, and those powers are that, under the Public Health (Interments) Act, 1879, there are added to the powers given to urban district councils the power to provide and maintain cemeteries, and in that Act the Cemeteries Clauses Act, 1847, is incorporated. By s. 40 of the Cemeteries Clauses Act,

G 1847: “The company may set apart such parts of the cemetery as they think fit for the purpose of granting exclusive rights of burial therein, and they may sell, either in perpetuity or for a limited time, and subject to such conditions as they think fit, the exclusive right of burial in any parts of the cemetery so set apart, or the right of one or more burials therein, and they may sell the right of placing any monument or gravestone in the cemetery, or any tablet of monumental inscription on the walls of any chapel or other building within the cemetery.”

H In the preceding Act, which did not apply to public authorities, the Burial Act, 1852, the powers have been rather more extensively worded, for they include the right of constructing any vault or place of burial, with the exclusive right of burial therein in perpetuity, or for a limited period. Those words are omitted in the Cemeteries Clauses Act, 1847, which is incorporated in the Act under which the defendant cemetery authority act. The right of the plaintiff is derived from a grant made under the authority of that statute, an exclusive right of burial in certain grave spaces, together with a right, on payment, to construct a vault. The grant of the exclusive right of burial does not confer any freehold interest in the land and the payment for the erection of a vault does not confer any property in the vault erected in the land. It may be that if the materials are severed they could then become the property of the person who erected them, but the cemetery authority remain the owners and occupiers of the cemetery with the graves

I

in it including the vaults in it. I do not think that the statute or the regulations contemplate a vault which is to be a place of habitation for the living, temporary or permanent; they contemplate a vault which is to be a place of burial for the dead with a right of giving to a living person the right of exclusive burial in that vault or burial place. The idea of the plaintiff that the vault is a private place to which she has a right to resort for what she calls acts of piety is, I think, a mistaken one and the cemetery authority is perfectly right in preventing her from resorting to the vault for such a purpose. A B

That being the view which I take of the position, a view which seems to me entirely supported by the judgment of the Court of Appeal in *McGough v. Lancaster Burial Board* (1), it appears to me that the judgment of EVE, J., was perfectly correct. He stated that the plaintiff's right was only to open the vault for the purposes of interments therein and executing any necessary repairs thereto, or with the written consent of the defendants. To that I shall add, without altering the wording of the declaration, that it must be obvious that the lady cannot open the vault without giving notice to the cemetery authority. The idea of each proprietor of a vault being at liberty to open a vault whenever he likes without communication with the cemetery authority appears to me to be quite contrary to the authority vested in the cemetery authority, whoever it may be, and inasmuch as this is for the purpose of executing necessary repairs, I do not think the mere fact that the plaintiff says that there are necessary repairs wanted in the interior of the vault necessarily entitles her to open the vault. This plaintiff, unfortunately, has a habit of saying things which are not true if she thinks she can effect her purpose thereby, and in my judgment, without prejudicing other states of facts which may arise, the cemetery authority will be quite justified in saying that there is no satisfactory evidence that any interior repairs are wanted in this vault. Exterior repairs are obvious by inspection, but from the nature of this vault it is difficult to see what interior repairs are wanted. There has been no evidence at present that any interior repairs have been necessary since 1915. Although the plaintiff, through her legal advisers, talks about ventilation, she was given permission to put more ventilators in the vault, and, having got that permission, did not use it, and I can only suppose that this mention of repairs and ventilation is an excuse to enter the vault for the purpose of using it as a place of private habitation where she can perform what she calls acts of piety which, whatever she may think, were at least as common among savage races as among the early Christians whose habits she thinks she is following. The Assyrian kings surrounded themselves in burial with their dead wives and concubines and dead horses and dead slaves and food for the time when they awoke in the other world; the Red Indians do the same, and the plaintiff must not delude herself with the idea that she is following merely the practices of the early Christians; she is following the practices, as EVE, J., says, of a very large number of pagan tribes, and cemetery authorities are justified in a cemetery of the year 1928 in stopping the plaintiff from following those extraordinary practices which are quite out of touch with the habits of modern civilisation. C D E F G

For these reasons, without going in detail into the evidence, which is a melancholy example of what a sincere but quite wrong-headed woman can do, I think that the judgment of the learned judge should be affirmed and the appeal dismissed with costs. H

GREER, L.J.—I agree. The plaintiff asks us to say that EVE, J., was wrong in refusing her the injunction which she claimed. The learned judge summarises the claim that she was making before him in these words ([1928] Ch. at p. 677): I

"Apart then from the declaration of ownership of the vault, which I hold to be unsustainable, what is it that the plaintiff is claiming in this action? It is in substance an injunction to restrain the defendants from preventing her at her own pleasure opening and entering into and using the vault for—I am about to read para. B of the particulars of para. 4 of the statement of claim—'the purpose of the observance of the traditional Christian religious rites of the plaintiff's family and other Christian rites connected with the tendance of the remains of the dead and for the purposes of repairing and ventilating the said tomb.' The two last purposes

A can be disregarded, as no evidence has been produced that the vault has ever been out of repair, and, so far as ventilation is concerned, the defendants, as appears by the correspondence, granted permission in 1923 for the construction of additional ventilators in accordance with the proposals of Mr. John Bevan, an architect employed by the plaintiff. The plaintiff, however, would not allow Mr. Bevan to proceed with this work."

B Therefore, it is quite clear that the plaintiff was seeking the injunction in order that she might have free entry into the vault to do the kind of acts and perform the rites which have been described by my Lord. The fact that she might have a right of entry for some purposes would not entitle her to an injunction when the learned judge is satisfied that she does not want the injunction for the lawful purposes but to enable her to do that which she is not entitled to do. It is perfectly clear that, whatever rights C this plaintiff bought when she bought the perpetual right of burial in the plots which are covered by the vault, she did not buy the right to carry on these services which she insisted she was entitled to carry on in the vault. Those rights were never conferred on her at all, and inasmuch as she was asking the learned judge for an injunction to enable her to go on performing those things which she had no right to do, she is not D entitled to have the refusal of the injunction set aside because there may possibly be some lawful purpose which she may be entitled to exercise. The only remedy that the cemetery authority have, the only means they have of preventing her from doing what she is not entitled to do, is to exclude her altogether from the interior of the vault. They had allowed her to go in for the purpose of measuring the tomb and for the purpose of seeing about ventilation, and then it was found that she really did not use the permission granted for the purposes for which she asked for it, but for the purposes for E which she was not entitled to use it. The only way which the learned judge could have dealt with the claim was to refuse the injunction which was asked for.

A great many points have been made in the course of counsel for the plaintiff's interesting arguments which it does not seem necessary to enter into. I have myself a very grave doubt whether any right is conferred in cemeteries which are governed F merely by the Cemeteries Clauses Act, 1847, to do anything more than to bury from time to time those whom the person having been given the right desires to have buried in the vault. The right to put flowers on the grave, to plant things above the grave, is not a right in the strict sense of the word, but the kind of thing which the legislature trusts any sensible governing body will allow. It does not arise as a right but arises by reason of custom. However, it is not necessary to decide that in this case because it does not G arise. I have no doubt whatever that the right that was sold in this case, as in many other cases, to erect a monument does include a right from time to time when the monument gets out of repair, whether it is a vault or a gravestone, to go there and put it in repair. For my part I cannot find in the statute any power to grant any other right except those which are included in the grant, a perpetual right of burial and a right to erect a tombstone including therein a right from time to time to see to the repair of the H tombstone. Be that as it may, no construction of the statute can possibly confer upon the person described as the owner of the grave in these rules, the right to do what this lady has claimed she is entitled to do and what she will do if any permission is granted to her to enter this vault, because she unfortunately regards it as a religious duty to do the things which the cemetery authority, the court below and this court entirely disapprove of, as proper things to be done in that vault or grave. I do not think it is I necessary to refer to the case which has been cited except to say that, *McGough v. Lancaster Burial Board* (1) in the Court of Appeal seems to me to decide that the rights of a grave owner are confined to those two rights I have mentioned, the right to bury and the right to erect a tombstone. If that is so, of course, that finally decides this case. It seems to me quite unnecessary to go so far as that in this case, because it is obvious that the learned judge was right in refusing the injunction that was claimed, and he has left open to the plaintiff the right of going to the grave for repairs when the authority is satisfied that she really wants to go there for the exercise of that right.

For these reasons I agree that the appeal should be dismissed with costs.

SANKEY, L.J.—I agree. I wish particularly to confine my judgment to the question of the rights of this lady at a cemetery of this sort. I am not discussing any question of a churchyard. The rights she has are rights which arise either expressly or impliedly under the contract that she has with the rights which, by the powers conferred on the cemetery authority by the Act of Parliament, they may grant to her, namely, the exclusive right of burial in certain grave spaces, to hold the same for purposes of burial subject to the regulations now in force, or which may hereafter be issued—leaving out immaterial words—by the cemetery authority. The Act of Parliament under which the cemetery authority derive their authority, the Cemeteries Clauses Act, 1847, incorporated in the Public Health (Interments) Act, 1879, and the material section is s. 40. Under the rather different words of the Burial Act, 1852, *McGough v. Lancaster Burial Board* (1) was decided, and LORD ESHER, M.R., there said (21 Q.B.D. at p. 326):

“It seems to me that he [that is the person in question] had no legal right granted to him to do anything more than to bury his dead in that place, and put up a grave-stone, and that he had no right given to him to put up any other structure in addition thereto.”

It is to be observed that the right is a statutory right and, as BOWEN, L.J., said in the same case (21 Q.B.D. at p. 328):

“The right to be given under s. 33 is a statutory right and the matter appears to me to be only complicated by considering whether it can be called a freehold or not. The board may sell an exclusive right of burial subject to such restrictions as they think proper.”

It sounds, perhaps, rather a commercial way of putting it, especially in a case of this character, but the real question here is, What rights did the plaintiff acquire? It cannot in my view be said that she acquired any right of property in the cemetery. She had merely an exclusive right of burial, subject to the rules and regulations laid down by the cemetery authority. I cannot think she had any of the rights which she seeks to enforce in the present action which have been referred to by the learned judge in the court below, the rights of conducting ceremonies of the sort indicated within the interior of the vault itself. I rather think the legislature has purposely left a good many matters open to the reasonable good sense of the authorities. Perhaps it is not possible in a case where conscience claims to hold undisputed sway to appeal to reason, but in justice to the cemetery authority here it cannot be said that they in any way desire by what they have done or by the regulations they have made to prevent people showing a due respect to their dead.

I should not like it to be thought that we were saying anything to prevent time-honoured customs which you can see any day in any churchyard or in any cemetery in any town or village in England. By reg. 14 the public has access to the cemetery. There is nothing to prevent their having access to a grave or to a vault; I do not mean the inside of a vault, I mean at a vault or at a grave, and, as I read s. 10, there is nothing to prevent the public placing flowers on a grave or at a vault as distinguished from in a vault. Section 10 merely says: “No shrubs or flowers are to be planted over graves without permission first obtained.” That is a part of the contract. There is a certain fee which is contained in the last page of the regulations which the cemetery authority are entitled to for granting permission. It is quite impossible to uphold any of the contentions of the plaintiff in this case as to the rites which she claims to perform inside the vault over the remains of her deceased mother. The learned judge was perfectly right in the conclusion at which he arrived and I am quite satisfied that we are not doing anything in upholding the judgment which will in any way prevent the due observance of people's respect to their dead. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Peacock & Goddard; Torr & Co. for Eastley & Co.*

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.]

Re FORD. Ex parte TRUSTEE. RESTALL, BROWN AND CLENNELL'S CASE

[CHANCERY DIVISION (Clauson, J.), June 25, 1928]

[Reported [1929] 1 Ch. 134; 97 L.J.Ch. 334; 140 L.T. 275;
44 T.L.R. 643; 72 Sol. Jo. 517; [1928] B. & C.R. 55]

Bankruptcy—Property available for distribution—Reputed ownership—Antique furniture sent by wholesaler to retailer on sale or return—Custom of trade—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38 (c).

A wholesale antique furniture dealer sent trade goods to a retailer "on sale or return." While still in possession of the goods the retailer was made bankrupt.

Held: the custom of sending antique furniture to retailers "on sale or return" was a recognised trade custom, and so the bankrupt was not the "reputed owner" of the goods within the meaning of s. 38 (c) of the Bankruptcy Act, 1914.

Notes. Applied: *Re Ford, Ex parte Trustee, Powell's Case*, [1929] 1 Ch. 137.

As to reputed ownership in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 438–447; and for cases see 5 DIGEST 743–808; as to recognised trade customs, see 11 HALSBURY'S LAWS (3rd Edn.) 202–206; and for cases see 17 DIGEST (Repl.) 23 et seq. For Bankruptcy Act, 1914, s. 38 (c), see 2 HALSBURY'S STATUTES (2nd Edn.) 373.

Cases referred to:

- (1) *Livesay v. Hood* (1809), 2 Camp. 83, N.P.; 5 Digest 798, 6820.
- (2) *Re Bell, Ex parte Clarke* (1877), 47 L.J.Bey. 33; 37 L.T. 509; 5 Digest 758, 6526.
- (3) *Re Horn, Ex parte Nassau* (1886), 2 T.L.R. 339; 3 Morr. 51; 5 Digest 806, 6882.
- (4) *Re Goetz, Jonas & Co., Ex parte The Trustee*, [1898] 1 Q.B. 787; 67 L.J.Q.B. 577; 78 L.T. 399; 46 W.R. 469; 14 T.L.R. 327; sub nom. *Re Goetz, Jonas & Co., Ex parte Armstrong & Co.*, 5 Mans. 76, C. A.; 5 Digest 774, 6653.
- (5) *Re Florence, Ex parte Wingfield* (1879), 10 Ch.D. 591; 40 L.T. 15; 27 W.R. 346, C.A.; 5 Digest 806, 6885.
- (6) *Re Eslick, Ex parte Phillips, Ex parte Alexander* (1876), 4 Ch.D. 496; 35 L.T. 912; 25 W.R. 231; 5 Digest 793, 6784.
- (7) *Re Couston, Ex parte Watkins* (1873), 8 Ch. App. 520; 42 L.J.Bey. 50; 28 L.T. 793; 21 W.R. 530, L.C. & L.J.; 5 Digest 808, 6898.

Motion by the trustee in bankruptcy of one Ford, a furniture and antique dealer, for a declaration that the goods of a limited company, the respondent to the motion, were the property of the bankrupt, were divisible among his creditors, and vested in the applicant trustee either (i) because, when the bankruptcy commenced the property in the said goods was vested in the bankrupt, or (ii) by virtue of s. 38 (c) of the Bankruptcy Act, 1914.

By the Bankruptcy Act, 1914, s. 38 (c), the property of a bankrupt divisible amongst his creditors includes

"all goods, being at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and provision of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

The respondent company carried on a wholesale antique furniture business, and for some thirty-three years before this motion had been supplying goods to the bankrupt on "sale or return." This, in practice, meant that the bankrupt chose, from the premises of the respondent company, goods which the carman of the company delivered to his shop, together with a "sale or return" invoice of such goods and their prices; the bankrupt on such delivery receipted the goods on a delivery note, which was signed by him and given to the carman. The invoice supplied by the respondent company

did not lay down a time limit. As far as the company was concerned, all that a bankrupt had to do was either to pay the invoiced prices for the goods, or else to return them. What he in fact did was to pay sums, at intervals, on account of goods sold by him; and the respondent company regularly went through lists of goods which had been supplied to him, and entered them in its "bought" ledger. A receiving order was made, on the petition of the bankrupt, in November, 1927, and he was adjudicated bankrupt in the following month. At the date of the receiving order he was indebted to the respondent company on account of goods supplied on sale or return, to the extent of over £2,000, the goods being then exposed for sale in the shop of the bankrupt. Other goods of the same class were also exposed there; and there was nothing to indicate which were goods of the respondent company and which were not. Witnesses engaged in the trade gave evidence that the "sale or return procedure" was quite well known and recognised in the trade.

Edward Clayton, K.C., and *J. Flowers*, for the trustee, referred to *Livesay v. Hood* (1), *Re Bell* (2), *Re Horn* (3) and *Re Goetz, Jonas & Co.* (4).

Schiller, K.C., and *Stable*, for the respondent, referred to *Re Florence* (5), *Re Eslick* (6) and *Re Couston* (7).

CLAUSON, J.—From the practice adopted between the respondents and the bankrupt an intention in fact appears, within the meaning of s. 18 of the Sale of Goods Act, 1893, and to the exclusion of the rules stated in that section, that the property in the goods should not pass to the bankrupt until sale. Further proof of the notorious existence of such a trade custom as that which the respondents set up has been established by the evidence tendered before me, with the result that the goods in dispute were not at the commencement of the bankruptcy in the possession of the bankrupt under such circumstances that he was the reputed owner thereof within the meaning of s. 38 (c) of the Bankruptcy Act, 1914. The motion of the trustee will consequently be dismissed.

Solicitors: *W. Goodwin; Rye & Eyre.*

[Reported by K. R. A. HART, ESQ., Barrister-at-Law.]

HARKER v. BRITANNIC ASSURANCE CO., LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Branson, JJ.), December 13, 14, 1927, January 13, 1928]

[Reported [1928] 1 K.B. 766; 97 L.J.K.B. 359; 138 L.T. 395;
91 J.P. 51; 44 T.L.R. 243; 72 Sol. Jo. 121; 26 L.G.R. 136;
28 Cox, C.C. 475]

Insurance—Industrial assurance—Child—Maximum sum permitted—Assurance in excess—Proviso that statutory provisions as to maximum sum “shall apply to this policy”—Effect—Time of commission of offence—Limit of time for taking proceedings—Friendly Societies Act, 1896 (59 & 60 Vict., c. 25), s. 62—Industrial Assurance Act, 1923 (13 & 14 Geo. 5, c. 8), ss. 4 (1), 39—Friendly Societies Act, 1924 (14 & 15 Geo. 5, c. 11), s. 2.

An industrial assurance company issued in connection with industrial assurance business three policies on the life of a child. The first and second policies were dated Dec. 5, 1921, and the third was dated Aug. 7, 1922. Each policy contained a proviso that “the provisions of the Act of Parliament enacting that no greater amount than the sum of £6 shall be paid on the death of a child under the age of five years or than the sum of £10 on the death of a child under the age of ten years shall apply to this policy.” These were the maxima allowed under s. 62 of the Friendly Societies Act, 1896, which was in force at the dates of the policies. Section 4 (1) of the Industrial Assurance Act, 1923, extended s. 62 of the Act of 1896 to industrial assurance companies. Section 2 of the Friendly Societies Act, 1924, substituted for the maxima allowed by s. 62 of the Act of 1896, the following maxima: Under three years £6, under six £10, under ten £15. On Oct. 18, 1926, the child was under six, and, the weekly premiums having been paid regularly, the total sum for which he was insured on that date according to the tables in the policies was £15 10s. On April 13, 1927, an information was preferred against the company under the Act of 1923 for insuring the child on Oct. 18, 1926, for more than £10. The company contended that they had not insured for more than was lawfully permitted because there could in law be no effective insurance for more than that amount, alternatively because of the effect of the proviso; and that under s. 11 of the Summary Jurisdiction Act, 1848, the proceedings were out of time as more than six months had elapsed since the dates of issue of the policies.

Held: the company must be convicted because purporting to insure a child beyond the statutory limit constituted an offence; the proviso had no effect; the offence of insuring for a sum in excess of the prescribed limit was committed (per LORD HEWART, C.J.) on the occasion of the receipt of each premium on the policies (per AVORY and BRANSON, JJ.) during the whole time that the policies were in force, and so the proceedings were in time.

Notes. The Friendly Societies Act, 1896, ss. 63–66, and the Industrial Assurance Act, 1923, s. 4 (2) now apply only to insurances effected before June 30, 1948, and to insurances on the lives of children born before July 5, 1948, and at the time of the proposal resident outside the United Kingdom and the Isle of Man (see the Industrial Assurance and Friendly Societies Act, 1948, s. 6 (2)). The £10 limitation is, however, now imposed on other insurances on the death of a child under ten by ss. 6 (1), 7, and 23 (1) (a) of the 1948 Act: the wording of s. 6 (1) is “insure so as to render any sum payable, otherwise than by repayment of premiums in whole or in part, on the death under ten years of age of a child.” The opinion of the court in this case as to the effect of the proviso in the policy that the provisions of the Act shall apply, must now be read subject to the explanation of it given by the Court of Appeal in *Re Smith and the Britannic Assurance Co., Ltd.’s Arbitration*, [1933] 1 K.B. 109, and *Re Hirst and Liverpool Victoria Friendly Society*, [1930] 2 K.B. 209, in both of which cases the present case was distinguished by reason of the wording of that proviso.

As to Friendly Societies insurances on lives of children, see 18 HALSBURY'S LAWS A
(3rd Edn.) 88. For the Friendly Societies Acts, 1896 and 1924, the Industrial Assur-
ance Act, 1923, and the Industrial Assurance and Friendly Societies' Act, 1948, see
10 HALSBURY'S STATUTES (2nd Edn.) 531, 626, 594, 646.

Case Stated by justices for the West Riding of Yorkshire.

An information was preferred at Goole Petty Sessions on April 13, 1927, by Harold B
Parkinson Harker, the appellant, at the instance of George Stuart Robertson, K.C.,
Industrial Assurance Commissioner, against the Britannic Assurance Co., Ltd., the
respondents, under s. 39 of the Industrial Assurance Act, 1923, charging that the
respondents on Oct. 18, 1926, unlawfully insured the sum of £15 10s., payable on the
death of Frederick Cowling, being a child under the age of six years, which exceeded
the sum of £10, contrary to s. 4 of the said Act of 1923, as amended by s. 2 of the Friendly C
Societies Act, 1924.

The following facts were proved. On Oct. 18, 1926, the said Frederick Cowling, son
of Adelaide Cowling, was under six years of age, having been born on Nov. 12, 1921.
On Oct. 18, 1926, there were in existence three policies of assurance on the life of the
said Frederick Cowling issued by the respondent company to his mother, the said Ade-
laide Cowling, the person assured under the policies. The particulars of the policies were D
as follows: (a) Policy No. 18,743,638 dated Dec. 5, 1921, assuring the life of the said
Frederick Cowling. The sum payable on death subject to the terms of the policy was
calculated under a table given in the policy according to the period during which the
policy had been in existence at the date of death. Under this table the sum of £4 10s.
was assured on the life of the said Frederick Cowling on Oct. 18, 1926. The premium
on the policy was 1d. per week. (b) Policy No. 18,743,639, dated Dec. 5, 1921, assuring E
the life of the said Frederick Cowling, subject to the terms of the policy, for a sum
calculated under a similar table in the policy. This policy also assured by way of
endowment a sum of £5 5s. on the maturity of the policy after fifteen years. Under the
table in this policy a sum of £2 was assured on the life of the said Frederick Cowling on
Oct. 18, 1926. The premium was 2d. a week. (c) Policy No. 19,015,281, dated Aug. 7,
1922. The conditions of this policy were similar to those of (b). The terms provided F
for a payment of £23 12s. 6d. on maturity, and a sum calculated as mentioned above on
death previous to maturity. Under this policy subject to its terms the sum of £9 was
assured on the life of the said Frederick Cowling on Oct. 18, 1926. The premium was
9d. a week. The total sum according to the tables in the policies for which the said
Frederick Cowling was assured on Oct. 18, 1926, was £15 10s.

The respondent company was an industrial assurance company within the meaning of
s. 1 of the Industrial Assurance Act, 1923, and the above policies were issued in G
connection with industrial assurance business carried on by the said company, as defined
by sub-s. (2) of that section, in that the premiums were payable weekly and were col-
lected at the house of the assured person by collectors employed by the respondent
company. Each of the above policies contained a proviso in the following terms, viz.:

"The provisions of the Act of Parliament enacting that no greater amount than H
the sum of £6 shall be paid on the death of a child under the age of five years or than
the sum of £10 on the death of a child under the age of ten years shall apply to this
policy."

These were the maximum sums allowed under s. 62 of the Friendly Societies Act, 1896,
to be insured or paid on the death of a child under ten years of age in respect of insur- I
ances entered into at the dates of the above policies. These maximum sums were
altered by s. 2 of the Friendly Societies Act, 1924, which, so far as it was material to this
case, was as follows:—

"(1) Section 62 of the Friendly Societies Act, 1896 (which relates to assurances on
children), both as originally enacted and as applied to trade unions and industrial
assurance companies, shall have effect as if for that section the following section
were substituted: A society or branch, whether registered or unregistered, shall not
insure or pay on the death of a child under the ages hereinafter specified any sum of

money which exceeds or which, when added to any amount payable on the death of that child by any other society or branch or by any trade union or industrial assurance company, exceeds the amounts hereinafter specified. [These were: Under three, £6; under six, £10; under ten, £15.] (3) Subsection (1) of section 4 of the Industrial Assurance Act, 1923, shall be repealed from the words "except that" to the end of the subsection."

Section 4 (1), of the Industrial Assurance Act, 1923, as amended by the Friendly Societies Act, 1924, was as follows:—

"(1) The provisions of sections 62 and 64 to 67 of the Friendly Societies Act, 1896, relating to payments on the death of children shall extend to industrial assurance companies as if those provisions were herein re-enacted, and in terms made applicable to industrial assurance companies."

Section 39 of the Industrial Assurance Act, 1923, provided:—

"(2) Any industrial assurance company which contravenes or fails to comply with any of the provisions of this Act, or any directions given by the Commissioner thereunder shall be guilty of an offence under this Act. . . . (5) Notwithstanding any limitation on the time for the taking of proceedings contained in any Act, summary proceedings for offences under this Act, or for offences under the Friendly Societies Act, 1896, where the society by or in respect of which, or the person by or in respect of whom, the offence is alleged to have been committed is a collecting society or an officer of such a society, may be commenced at any time within one year of the first discovery thereof by the Commissioner, but not in any case after more than three years from the commission of the offence."

Section 11 of the Summary Jurisdiction Act, 1848, provided that in all cases where no time was specially limited an information should be laid within six calendar months from the time when the matter of it arose.

The justices were of opinion that contentions on behalf of the respondent company, that the provision in the policies to the effect that on death the amount payable would not be greater than the maximum allowed by law afforded no answer to the charge against the respondents, and that the matter of this case arose on Oct. 18, 1926, as on that date the company was insuring on the death of the child an amount which was greater than by law allowed, were correct in law, and they dismissed the information.

H. M. Givven for the appellant.

Comyns Carr, K.C., and *G. R. Blanco White* for the respondents.

Cur. adv. vult.

Jan. 13. The following judgments were read:

LORD HEWART, C.J.—This is a Case stated by justices for the West Riding of Yorkshire. The question arises out of an information preferred by Harold Parkinson Harker, the appellant, at the instance of George Stuart Robertson, an Industrial Assurance Commissioner, against the respondents, the Britannic Assurance Co., Ltd., under s. 39 of the Industrial Assurance Act, 1923, charging that the respondents, on Oct. 18, 1926, unlawfully insured the sum of £15 10s. payable on the death of one Frederick Cowling, a child under the age of six years, which sum exceeded the sum of £10, contrary to s. 4 of the Act of 1923, as amended by s. 2 of the Friendly Societies Act, 1924. That information was heard and determined by the justices on April 13, 1927, and they dismissed the information. The question for the court is whether, in so dismissing the information, the justices came to a correct determination in point of law.

It is not necessary, I think, to recapitulate the facts which are fully and clearly set out in the Case Stated. It was established by the evidence that on Oct. 18, 1926, the infant, Frederick Cowling, the son of Adelaide Cowling, was under six years of age; he had, in fact, been born on Nov. 12, 1921, and the effect of the grant of the series of insurance policies upon the life of that infant, which policies are described, with particulars and dates, in the Case Stated, was that the total sum, according to the tables in

the policies, for which the infant was assured on Oct. 18, 1926, was £15 10s. In those circumstances it was contended on behalf of the appellant that an offence had been committed. It was contended, on the other hand, by the respondents, the assurance company, that the prohibition in the statutes, although it prohibited payment, did not prohibit insurance; and, secondly, that the company could not be said to have insured for more than was lawfully permitted, because nobody could insure effectively for more than was lawfully permitted; and, finally, that in any event the proceedings were out of time. Contention (e) of the contentions of the assurance company was in these remarkable terms:

“that, alternatively, insuring more than the maximum sum was not an offence, because such insuring was forbidden by the section, and therefore it was impossible in law so to insure, and the policy purporting to insure was a mere nullity.”

It was provided by s. 62 of the Friendly Societies Act, 1896, that a society or branch should not insure or pay on the death of a child under five years of age any sum which, added to any amount payable on the death of that child by any other society or branch, exceeded £6, or on the death of a child under ten years of age, any sum which, added to any amount payable on the death of that child by any other society or branch, exceeded £10. By s. 4 (1) of the Industrial Assurance Act, 1923, the provisions of s. 62 of the Friendly Societies Act, 1896, *inter alia*, were extended to industrial assurance companies as if those provisions were therein re-enacted and in terms made applicable to industrial assurance companies. It was contended on behalf of the respondents that by reason of the words “relating to payments on the death of children” the provisions of the section were extended to industrial assurance companies only in so far as they related to payments, and not in so far as they related to the insurance of children in excess of the prescribed limit. But the statutory heading of ss. 62 to 67 of the Act of 1896 is “payments on death of children,” and, in my opinion, the words “relating to payments on the death of children” in s. 4 (1) of the Act of 1923 are merely descriptive of the sections therein referred to, and do not limit those sections in their application to industrial assurance companies. This view is confirmed by the amending section of the Friendly Societies Act, 1924 (s. 2). This section, while it alters the amounts for which children may lawfully be insured, again uses the words “shall not insure or pay on the death of a child,” and, in express terms, refers to s. 62 of the Act of 1896 as applied to industrial assurance companies. Section 39 (2) of the Industrial Assurance Act, 1923, provides that any industrial assurance company which contravenes or fails to comply with any of the provisions of the Act shall be guilty of an offence under the Act. It follows that if an industrial assurance company insures a child for a sum which exceeds the sum mentioned in s. 2 (1) of the Friendly Societies Act, 1924, that is to say, in the case of a child under six years of age, £10, the company is guilty of an offence under the Act of 1923.

But it was argued that the respondent company did not insure the child for a sum in excess of the limit, inasmuch as each of the policies contained a proviso in the following terms:

“The provisions of the Act of Parliament enacting that no greater amount than the sum of £6 shall be paid on the death of a child under the age of five years or than the sum of £10 on the death of a child under the age of ten years shall apply to this policy.”

And it was said that, though the sum for which the child was insured according to the tables in the policies was £15 10s., he was really insured only for £6 in the case of death under the age of five years, or £10 in the case of death between the ages of five and ten years. This proviso, I think, has no legal effect at all. All insurances are necessarily subject to the statutory provisions relating thereto, and the effect of the argument is that, because a company cannot lawfully insure a child for a sum beyond the statutory limit, it commits no offence if it grants such an insurance unlawfully. It is an entertaining argument. It seems to involve the proposition that a person cannot effectively commit an offence which is forbidden by law because the law steps in to prevent his act from being completed, or, at any rate, from remaining undisturbed. Unfortunately, the

law cannot always prevent the commission of offences. Sometimes it has to punish the offender. In my opinion, if a company purports to insure a child for a sum beyond the limit, it commits an offence under the statute, and none the less because it may also be perpetrating a gross fraud upon the assured.

With regard to the contention that the prosecution was out of time, it is sufficient to say that, in my view, the offence of insuring a child for a sum in excess of the lawful amount is committed on every occasion when a premium is paid and received in respect of such an insurance. For these reasons I think that the appeal should be allowed, and the case be remitted to the justices with a direction to convict.

AVORY, J.—To establish the offence charged in this case it was necessary to prove: (i) That an industrial assurance company in insuring a sum exceeding the sum of £10 payable on the death of a child under six years of age is contravening the provisions of the Industrial Assurance Act, 1923. (ii) That the respondents had, in the circumstances, insured a sum exceeding £10 payable on the death of a child under six years of age. (iii) That they had so insured on the date alleged in the information, namely, Oct. 18, 1926. On behalf of the respondents it was contended: (i) That s. 4 of the Industrial Assurance Act, 1923, extends to industrial assurance companies so much only of the provisions of s. 62 of the Friendly Societies Act, 1896, as relates to payments on the death of children, as distinguished from insurance. (ii) That, in the circumstances, the respondents had not insured a sum exceeding £10 payable on the death of a child under six years of age. (iii) That they had not insured on Oct. 18, 1926, but on the dates of the policies of insurance in 1921 and 1922, and that the provisions of s. 11 of the Summary Jurisdiction Act, 1848, applied as a bar to the proceedings.

As to the first point, in my opinion s. 2 of the Friendly Societies Act, 1924, substituting, as it does, the amended section therein enacted for s. 62 of the Act of 1896, in its application both to friendly societies and to industrial assurance companies, removes the difficulty which is suggested to arise from the fact that s. 4 of the Industrial Assurance Act, 1923, in terms, only extends to industrial assurance companies the provisions of the Friendly Societies Act, 1896, relating to payments on the death of children. In other words, the amended and substituted section is to be read as incorporated in s. 4 of the Act of 1923, and any breach of the amended section is a contravention of the Act of 1923. In view of this conclusion, it is not necessary to consider the contention of the appellant that the words "relating to payments" in s. 4 of the Act of 1923 are merely descriptive of the group of sections under that heading in the Act of 1896. I am not prepared, as at present advised, to adopt this construction of the section.

On the second point I have come to the conclusion that the respondents, having insured the life of the child in question by the terms of the three policies in the sums of £4 10s., £2 and £9 respectively in the event of its death under six years of age, had insured a sum exceeding £10 on the death of the said child under six years of age, notwithstanding the proviso in each policy that no greater amount than £6 should be paid on the death of the child under five years of age or £10 under ten years. Assuming in the respondents' favour that they only insured the amount which they agreed to pay according to the proviso, they would be liable on the three policies in the event of the child dying under six years of age to pay the several sums of £4 10s., £2 and £6, making a total of £12 10s., the limit of £6 applying to each policy separately; but it is at least open to doubt whether the application by the proviso of the provisions of a statute which were no longer in force in 1926 would have any effect on the liability of the respondents accruing in 1926, and in that view they would have been liable, as the appellant contended, to pay the sum of £15 10s. on the death of the child.

On the third point, the respondents' contention that they insured only on the dates of the policies cannot, I think, be supported. So long as the assured is not in default in the payment of premiums and the policies are in force, the respondents are continuing to insure, and were doing so on Oct. 18, 1926, and the insurance being for a sum exceeding £10 was in breach of the provisions of the section as amended in 1924, and in contravention of the Act of 1923. For these reasons I think the appeal should be allowed, and the case remitted to the justices to convict.

BRANSON, J.—I agree. I am satisfied for the reasons given by my Lord that it is an offence for an industrial assurance company to insure for a sum in excess of the statutory limit allowed for payment and also that the words “insure or pay” cover keeping insured, and therefore that the prosecution is not out of time.

The only point on which I desire to add anything is the question whether the respondents have insured for an amount in excess of the statutory limit. Clearly they have, unless proviso (2) operates contractually, (a) in the case of the third policy to cut down the amount specified in the policy itself, and (b) in the case of each policy to cut down the amount specified therein because of amounts insured by the other policies. Each policy contains a contract by the respondents to pay according to the schedule and the appropriate table; then comes proviso (1) which makes the schedule and the appropriate table part of the contract. Then follows proviso (2). All that it says is that the statutory provisions in question shall apply to the policy. Such a term in a contract can have no legal effect, for the statute operates of its own force and applies to the policy apart from any such term. The respondents seek to discard the natural meaning of the language used and to contend that the proviso should be construed as meaning that notwithstanding that a certain sum is specified in the table to be payable it shall not be paid if in the event which happens payment of that amount would be an infraction of the Act. The only ground for this contention of the respondents is that to confine the meaning of the proviso to the plain meaning of the language used would be to render it useless and inoperative. But the contract must be construed, if there is any ambiguity, contra proferentes, and I decline to depart from the plain meaning of the language used in order to enable the company to say that, though they have taken premiums under the third policy which according to the table incorporated therein entitled the assured to £9 on the death of the child between four and five, they are only liable to pay £6. The argument is *à fortiori* when it is sought to use the proviso in each policy to limit the amount, apparently payable under it apart from the proviso, by reference to amounts payable under other policies. I agree, therefore, that this contention of the respondents must also fail, and that the appeal must be allowed.

Solicitors: *Treasury Solicitor; Kingsley Wood, Williams & Co. for J. G. Cooper, Birmingham.*

[Reported by J. F. WALKER, ESQ., *Barrister-at-Law.*]

MANSFIELD v. ROBINSON

[KING'S BENCH DIVISION (Salter and Talbot, JJ.), April 19, 1928]

[Reported [1928] 2 K.B. 353; 97 L.J.K.B. 466; 139 L.T. 349; 92 J.P. 126; 44 T.L.R. 518]

Agriculture—Agricultural holding—Arbitration—Costs—Preliminary agreement by parties in regard to costs—No reference to agreement before arbitrator—Order for costs made by arbitrator—Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), s. 16, and Sched. II, para. 15.

Where a dispute under the Agricultural Holdings Act has been referred to arbitration, an agreement between the parties in regard to costs made before the proceedings is valid and enforceable, even though such agreement is not mentioned to the arbitrator at the hearing and the arbitrator makes an order for costs different from that agreed.

PER TALBOT, J.: The position is the same in the case of an agreement under the Arbitration Act.

Prince v. Haworth (1), [1905] 2 K.B. 768, applied.

Notes. The Agricultural Holdings Act, 1923, has been repealed and replaced by the Agricultural Holdings Act, 1948, s. 77 (1) of which corresponds to s. 16 (1) of the 1923 Act, and Sched. 6, paras. 21–23 of which make provisions as to costs similar to those in Sched. 2 to the 1923 Act.

As to costs of an arbitration under the Agricultural Holdings Act, see 1 HALSBURY'S LAWS (3rd Edn.) 329; as to agreements between parties as to the costs of arbitrators generally, see *ibid.* vol. 2, 46; for cases see 2 DIGEST (Repl.) 47; and for the Agricultural Holdings Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 67, 106.

Cases referred to:

- (1) *Prince v. Haworth*, [1905] 2 K.B. 768; 75 L.J.K.B. 92; 92 L.T. 773; 54 W.R. 249; 21 T.L.R. 402; 23 Digest (Repl.) 285, 3485.
- (2) *Lowther v. Clifford*, [1927] 1 K.B. 130; 95 L.J.K.B. 576; 135 L.T. 200; 90 J.P. 113; 42 T.L.R. 432; 70 Sol. Jo. 544; 24 L.G.R. 231, C.A.; 2 Digest (Repl.) 76, 425.
- (3) *Gray v. Lord Ashburton*, [1917] A.C. 26; 86 L.J.K.B. 224; 115 L.T. 729; 81 J.P. 17; 61 Sol. Jo. 129; 15 L.G.R. 9, H.L.; 2 Digest (Repl.) 720, 2325.
- (4) *R. v. Leicester Justices* (1827), 7 B. & C. 6; 9 Dow. & Ry. K.B. 772; 4 Dow. & Ry. M.C. 518; 108 E.R. 627; 42 Digest 711, 1288.
- (5) *Cole v. Greene* (1843), 6 Man. & G. 872; 7 Scott, N.R. 682; 13 L.J.C.P. 30; 2 L.T.O.S. 208; 8 J.P. 184; 134 E.R. 1145; 42 Digest 713, 1307.
- (6) *Waller v. Bewicke, Moreing & Co.* (1904), 90 L.T. 409, C.A.; 42 Digest 162, 1645.
- (7) *Farguharson v. Morgan*, [1894] 1 Q.B. 552; 63 L.J.Q.B. 474; 70 L.T. 152; 58 J.P. 495; 42 W.R. 306; 10 T.L.R. 240; 9 R. 202, C.A.; 2 Digest (Repl.) 46, 240.

Appeal from Great Grimsby County Court.

The plaintiff, who was the landlord of an agricultural holding, had certain disputes with his tenants, among whom were the defendants, in regard to the tenants' rights to compensation under s. 12 of the Agricultural Holdings Act, 1923, after receiving notice to quit. Before the commencement of the arbitration, the solicitors acting for the parties agreed by correspondence that "whoever the successful party may be, he shall be entitled to costs on the High Court scale." The fact of this agreement was not mentioned to the arbitrator at the hearing, and in the result he gave his award in favour of the landlord, and directed that each party should pay its own costs, and pay one-half of the arbitrator's costs of the award. The tenant's solicitors, on demand being made upon them for costs under the agreement, disputed its meaning, and contended that it was invalid. The landlord brought an action in the county court for the estimated amount of the costs after taxation under the above agreement. The county court judge found that the agreement contended for by the plaintiffs existed, but held that it was invalid, on the ground that s. 16 and para. 15 of Sched. II to the Act of 1923 placed the costs in the discretion of the arbitrator.

The plaintiff appealed.

By the Agricultural Holdings Act, 1923:

“Section 16 (1). Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under this Act . . . and any other question which under this Act is referred to arbitration shall be determined, notwithstanding any agreement under the contract of tenancy or otherwise providing for a different method of arbitration, by a single arbitrator in accordance with the provisions set out in the Second Schedule to this Act.

Sched. II, para. 15. The costs of and incidental to the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid . . .”

P. E. Sandlands, for the plaintiff, referred to *Lowther v. Clifford* (2), *Gray v. Lord Ashburton* (3), *Prince v. Haworth* (1), *R. v. Leicester Justices* (4), *Cole v. Greene* (5).

M. F. Healy for the defendants referred to *Walter v. Bewicke, Moreing, & Co.* (6), *Farquharson v. Morgan* (7).

SALTER, J.—This is an appeal from a judgment of the learned county court judge at Great Grimsby, who found for the defendants in an action to recover money alleged to be due under an agreement. The question is whether the agreement is valid and enforceable in law. The learned judge held it was not. The appeal raises a question of some general importance—namely, whether the parties to an arbitration under the Agricultural Holdings Act, 1923, can make a valid agreement between themselves governing the costs of such proposed pending arbitration notwithstanding that the statute provides that the costs of such an arbitration shall be in the discretion of the arbitrator.

The plaintiff is or was the landlord and the defendants the tenants of an agricultural holding, and certain differences arose between them. The only one with which we are concerned arose under s. 12 of the Act. The parties proceeded to arbitration under the Act; in default of their agreement the Minister appointed an arbitrator, and he made an award. Before the hearing the parties made an agreement which the learned judge found to be contained in three letters which he construed. It was contended that he had misread the letters. In my view he was entitled to find, as he did find, that the whole contract was contained in the three letters, and I agree with his finding as to their meaning. [His Lordship read the letters and continued:] The learned judge found as follows:

“Having considered these letters I have come to the conclusion that they constitute an agreement between the parties as follows: (i) That the successful party to the arbitration shall be entitled to the costs of the arbitration as between party and party; (ii) that in any event the costs shall be taxed on the High Court scale; (iii) that party and party costs shall run as from the 6th April, 1926; (iv) that the costs shall be taxed by the district registrar. Further I find that the plaintiff is the ‘successful party’ within the meaning of the agreement, and is entitled to have the agreement carried out unless the defendants are correct in their contention that the agreement is null and void and of no effect in view of s. 16 of the Act and para. 15 of the Second Schedule thereto.”

I agree with the learned judge’s reading of those letters. The arbitrator determined the dispute between the parties, which related to a question whether or not the tenants had been guilty of bad farming. The landlord was the successful party. With regard to costs the arbitrator said:

“I award and direct each party shall bear its own costs of and incidental to the arbitration and shall pay one moiety of my costs of this award which are as follows.”

Each party did pay one moiety. This action is now brought by the plaintiff upon the agreement contained in those letters to recover, subject to taxation, the costs which, in the event which has happened, were agreed to be paid by the defendants to the plaintiff,

A and the only question that arises is, as stated by the learned County Court judge, whether that is an enforceable agreement.

B One asks: Why is it not an enforceable agreement? In my view, it is not contrary to public policy; there is nothing, as I think, illegal or immoral about it. It is said that it is rendered unenforceable by virtue of the provisions of s. 16 of the Act, and of r. 15 and r. 16 of the second schedule thereto. Before I come to those points I may say in passing C it might, perhaps, have been argued that this was not an arbitration under the Agricultural Holdings Act at all. In *Lowther v. Clifford* (2), s. 16 was considered in the Court of Appeal and SCRUTTON, L.J., expressed the view that that section was only a procedure section which provided that those matters of dispute for which arbitration had been provided earlier in the Act should be dealt with by Arbitration according to the procedure laid down in s. 16. It appears that the actual dispute now in question between the D parties was not a dispute for which arbitration had been provided in the earlier sections, and it might therefore be questionable whether this was in truth an arbitration under the Act at all, but it was dealt with as such an arbitration and I do not in any way base my decision on that ground.

E The question is whether it is allowable to parties to an arbitration of this kind to make their own agreement in regard to costs. The arbitrator under the Act is not in the strict sense of the term an arbitrator, that is to say, he is not a person to whom the parties voluntarily refer a dispute and who derives his authority from their consent. They can select him but he is imposed on them by the law and not by their own wishes. In the case of an arbitration in the proper sense of the word there could be, I imagine, no question that the parties in submitting their dispute to an agreed arbitrator, notwithstanding the terms of the Arbitration Act which gives him a discretion in regard to costs, could make such agreement as they pleased about costs, but it is said that they cannot do so in this case where the arbitrator is imposed on them. I am unable to distinguish the position of such a so-called arbitrator from that of a judge in this respect. It is true that this statute says, in prescribing the procedure for arbitrations, that the costs shall be in the discretion of the arbitrator, who may, if he thinks fit, give directions about costs; but he is not bound to give any directions about costs. Counsel for the F defendants admitted that if the arbitrator had given no directions about costs this would have been a valid and enforceable agreement, but he says that as the arbitrator has made a decision the agreement cannot be enforced. In fact the agreement was never mentioned to the arbitrator at the hearing. With regard to the discretion of a judge in regard to costs, which is given by Ord. 45, r. 1, of the rules of the Supreme Court, it is common practice that parties constantly make their own agreements in regard to the G costs of proceedings in the High Court and county courts and such agreements are perfectly valid and enforceable. I am not able to see why the same principle should not apply to an agreement of this kind.

H The authorities seem to me to support the view which I am expressing. The learned judge seems to have been impressed by *Gray v. Lord Ashburton* (3), but in that case all that the House of Lords decided was that the discretion of an arbitrator under the Agricultural Holdings Act was not fettered or limited in the same way as the discretion of a judge is in some cases, but was entirely unlimited. I am not able to see anything in that case which is inconsistent with the view that I am expressing. *Prince v. Haworth* (1) is, as it seems to me, a very strong authority in favour of the present plaintiff. In that case the plaintiff had propounded a will in a probate action and Haworth had propounded an earlier will. Haworth represented the interests of an infant. During the course of I the proceedings a contract was made between the plaintiff, Haworth, and the infant. It was agreed that, whichever of the two wills was upheld, the costs of the plaintiff and of the defendant and of the infant should be paid out of the estate, whether the court so ordered or not. The court pronounced in favour of the earlier will, that was the will propounded by Haworth, and, on application made, refused to sanction the contract on behalf of the infant, and directed that the plaintiff should pay the costs of Haworth and the infant in the probate action. Notwithstanding that order the plaintiff sued to recover his costs against Haworth, and it was held that the contract was not illegal and the defendant was personally liable upon it. LAWRENCE, J., said:

“If all the parties to this agreement had been *sui juris*, can anybody doubt that they might have made it? Either party might then have charged or mortgaged his interest, such as it was, in the fund; he might even have conveyed it absolutely either to the party on the other side or to anybody else. There is a broad distinction between an agreement which tends to divert the course of justice and prevent it reaching its proper goal, and an agreement which merely regulates the rights of the parties after the course of justice has reached its proper goal. It is clear that an agreement of the latter kind is not merely, as such, void; if it were, every judgment of a court of justice would operate as a restraint on alienation of the property recovered. Then is there any special prohibition against a successful claimant to a fund or estate agreeing to pay out of the fund or estate, if and when recovered by him, the costs of the unsuccessful claimant? It is said that Order 65., r. 14a, makes such an agreement invalid. That rule provides that the costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of an estate unless the judge otherwise orders. But that is merely a rule of practice, indicating what order shall, under ordinary circumstances, be made in proceedings before the court; it does not in any way affect the conduct of the parties after the order of the court has been made. In other words, it is quite consistent with the judge’s order directing the costs to be paid by the parties that one party shall agree to pay the other party his costs, and pay them out of what fund he pleases. I come, therefore, to the conclusion that if the parties to this agreement were all of age there would be nothing to prevent them from making this agreement.”

Counsel for the plaintiff in the present case relied in the course of his argument on *Walter v. Bewicke, Moreing & Co.* (6). That was a case in which there had been certain interlocutory proceedings and orders made therein in regard to costs, that they should be paid by one party to the other in any event and so forth. The action was subsequently settled on the terms endorsed on counsel’s briefs, “Record withdrawn. No costs on either side.” Held (dismissing the appeal), that after the settlement of the action the defendants were entitled to taxation and payment of their costs of the interlocutory proceedings which the plaintiff had been ordered to pay. The court in that case merely had to construe the agreement which the parties had made and to decide what costs it covered and what costs it did not, but, in the course of giving judgment, LORD COLLINS, M.R., said:

“It appears to me that there is no ground whatever for this appeal. During the progress of the action orders were made that the plaintiff should pay costs to the defendants, in some cases ‘in any event.’ Those orders cannot be got rid of unless the parties have clearly agreed that those costs shall not be paid.”

It is therefore quite clear that the learned Lord Justice was of opinion that notwithstanding the orders which had been made the parties could, if they liked, by agreement have overridden those orders. With regard to *Farquharson v. Morgan* (7), to which we were referred, it appears to me that there is nothing to assist us in that case. That was a case in regard to prohibition. There was an error in law on the face of the award, and the Court of Appeal decided that they had no power to refuse prohibition.

As the matter that is relied on here is the provision in s. 16 of the Act giving discretion to the arbitrator in the matter of costs, I think it well to refer again and more fully to the observations of SCRUTTON, L.J., in *Lowther v. Clifford* (2) ([1927] 1 K.B. at p. 143). In the course of a review of the statute the learned Lord Justice says:

“So far, the Act has been establishing a series of rights to compensation which did not exist at common law, and the amount of which, with matters incidental thereto, has already been expressly directed to be referred to arbitration. One does not see, therefore, why it was necessary to refer them again to arbitration by s. 16; but one can see why, if it was not intended to proceed under the Arbitration Act, s. 16 was wanted to provide the method of arbitration, and of appeal, if any, therefrom. Section 16 does refer the matters it deals with to the arbitration of a single arbitrator according to the provisions of the Second Schedule, and does exclude the operation

A of the Arbitration Act, 1889, and does provide an appeal by way of special case to the County Court, and thence to the Court of Appeal. This forces on one's attention the possible construction that the questions and differences dealt with are only those on rights created by the Act and already by the Act referred to arbitration, and that the section is a procedure section providing how questions by other sections of the Act referred to arbitration are to be decided—namely, by a single arbitrator according to the Second Schedule. The framework of the section would then be 'Any question or difference (as described in detail) which under this Act is referred to arbitration shall be determined by a single arbitrator,' and so on.'

B The result in my view is that the learned judge was in error in holding that this was a void and unenforceable agreement. I can see no reason on principle and I can see nothing in authority to guide one to that conclusion. I think that these parties were quite entitled to make this agreement, and that it is an enforceable agreement. The appeal must be allowed, and judgment entered accordingly.

C **TALBOT, J.**—I am of the same opinion. The parties to this proceeding being in difference whether any compensation was payable by the plaintiff to the defendants in respect of one of the matters dealt with by the Agricultural Holdings Act, 1923, came, before the arbitration was heard in pursuance of the statute, to an agreement. The question has been raised here and was raised in the County Court what that agreement meant, but, looking, as we are bound to look, at the three letters in which the learned judge found as a fact that the agreement was contained, I confess I can see no ambiguity or obscurity in the agreement at all. I find it very difficult to believe that both the professional gentlemen, the solicitors for the parties, who made this agreement in writing, were not fully aware of what was being agreed.

E The agreement, putting it very shortly, was that whatever the issue of the arbitration was, that is to say, whichever party won, and whether or not the arbitrator made any order in regard to costs, or whatever order he did make, the unsuccessful party should pay the costs of the successful party on the High Court scale as between party and party, to be taxed on that footing by the district registrar. If I had any doubt at all what that agreement means, I think my mind would be completely set at rest by knowing that the fact was that, in pursuance of it and in reliance on it, both parties when they came before the arbitrator addressed no argument whatever to him on the subject of costs. Now that is a rational and businesslike agreement; the parties, in regard to costs, know exactly what they are and the position as between them is settled on what in nineteen cases out of twenty is a fair and reasonable basis—namely, that the party who succeeds on the issue between them should have his costs paid by the party who fails. Those who made this agreement knew, no doubt, perfectly well that agreements with regard to costs are constantly made in all forms of proceedings before the hearing takes place, and they knew also what the statute said with regard to costs and they undoubtedly contracted having both those matters in view.

G It appears to me to require something very definite indeed in the Act of Parliament to lead us to the conclusion to which the learned county court judge, in his very clear judgment, came—that this agreement is unenforceable in law. The argument is, and the ground on which he decided is, that under the Act and in the schedule to the Act which deals with this matter the costs of and incidental to the arbitration and award are placed in the discretion of the arbitrator and he is given power, in what I may almost call common form, to direct, if he thinks fit, by whom and in what manner the costs are to be paid. There are provisions for taxation and there are provisions relating to what he is to take into consideration in awarding costs, and, as has been decided in the House of Lords, his discretion is, in point of fact, practically unlimited. It appears to me that, in the absence of any words even tending to suggest that that is the result of it, it is impossible to say that because of the discretion conferred on the arbitrator and the incidental powers given to him for the exercise of that discretion it is beyond the powers of the parties to come to such an agreement as this. It is true, no doubt, that in the great majority of cases where parties have made an agreement in regard to costs they inform the tribunal of it so as to save the tribunal the trouble of going into the question,

but assuming that it is within the competence of the parties to make an agreement I cannot conceive how they can be under any legal obligation to communicate their agreement to the arbitrator. I cannot help thinking, having read the evidence, which appears to have been contradicted, before the learned county court judge, that it is tolerably clear why both parties, while the event was yet uncertain, thought it far more satisfactory to make this agreement, which could not do substantial injustice, instead of leaving the matter to the uncontrolled discretion of the arbitrator. It was tolerably evident that the arbitrator, no doubt from motives which are perfectly intelligible, and perfectly proper in one sense, might make an order which the successful party might consider very unfair to him, and make such order not because of anything special in the circumstances of this particular case, but because of some general practice which is not uncommon amongst lay arbitrators. I think that the defendant has altogether failed to show that there is anything illegal in this agreement or anything which violates the terms of the statute. I have nothing to add to what has already been said in the judgment which has been delivered with regard to the case generally or with regard to the authorities which have been cited. I entirely agree with all that has been said. I agree, therefore, with the conclusion that the judgment of the learned judge in the county court cannot stand, and that this appeal must be allowed.

Appeal allowed.

Solicitors: *G. Warr, Clarkson & Co.*, for *John Barker*, Great Grimsby; *Mott & Parkes*, for *H. K. & H. S. Bloomer*, Great Grimsby.

[*Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.*]

BARROW LANE AND BALLARD, LTD. v. PHILLIP PHILLIPS & CO., LTD.

[KING'S BENCH DIVISION (Wright, J.), December 4, 5, 1928]

[Reported [1929] 1 K.B. 574; 98 L.J.K.B. 193; 140 L.T. 670; 45 T.L.R. 133; 72 Sol. Jo. 874; 34 Com. Cas. 119]

Contract—Frustration—Sale of goods—Specific goods—"Perished"—Part stolen at time of contract—Sellers ignorant of theft—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 6.

The Sale of Goods Act, 1893, s. 6, provides: "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

Where there is a contract for the sale of a parcel of specified goods alleged to consist of a certain quantity, and at the date of the contract, unknown to either party, a portion of the parcel has perished, s. 6 of the Sale of Goods Act, 1893 applies, the risk falls on the seller, and the contract is void.

Goods have "perished" within the meaning of s. 6 if they have been stolen and taken away and cannot be followed or discovered.

Notes. The provisions of the Law Reform (Frustrated Contracts) Act, 1943, as to the adjustments to be made on frustration of a contract do not apply to contracts for the sale of specific goods: see the Act, s. 2 (5) (4 HALSBURY'S STATUTES (2nd Edn.) 662). This case, therefore, remains good law.

As to perishing of specific goods comprised in a contract of sale, see 29 HALSBURY'S LAWS (2nd Edn.) 48-49; and for cases on the subject, see 39 DIGEST 404-406. For the Sale of Goods Act, 1893, s. 6, see 22 HALSBURY'S STATUTES (2nd Edn.) 990.

Cases referred to:

- (1) *Martineau v. Kitching* (1872), L.R. 7 Q.B. 436; 41 L.J.Q.B. 227; 26 L.T. 836; 20 W.R. 769; 39 Digest 528, 1417.
- (2) *Behrend & Co. v. Produce Brokers' Co.*, [1920] 3 K.B. 530; 90 L.J.K.B. 143; 124 L.T. 281; 36 T.L.R. 775; 15 Asp.M.L.C. 139; 25 Com. Cas. 286; 39 Digest 589, 1897.

Action tried by WRIGHT, J., in the Commercial List.

In October, 1927, the plaintiffs bought 700 bags of Chinese ground-nuts lying at the National Wharves, London. On Oct. 11, 1927, the plaintiffs resold them to the defendants without removing the bags from the warehouse. In payment of the price the defendants accepted two bills of exchange to the order of the plaintiffs and handed them to the plaintiffs in exchange for a delivery order on Oct. 12, 1927. At the date of resale on Oct. 11, 1927, the fact that 109 bags had been made away with by someone at the wharf was not known to either the plaintiffs or the defendants. The defendants presented the delivery order at the wharf on Oct. 12, and, as no question was raised by the wharfingers, they assumed that everything was in order. The defendants did not inspect the goods but relied on the sample furnished by the plaintiffs. The defendants made a further resale contract, but the sub-purchasers were unable to complete. The defendants did not require the goods immediately and did nothing till Dec. 6, when they gave delivery orders for 150 bags, which were duly handed over. They again sent delivery orders for 135 bags on Dec. 12 and 13, 1927, but owing to irregular deliveries nothing of the parcel of 700 bags of ground-nuts remained, and the delivery orders were returned endorsed "Goods not available." The two bills of exchange when presented by the plaintiffs to the defendants were dishonoured by non-payment. The plaintiffs brought the present action on the bills of exchange and in the alternative for the price of goods sold and delivered. The defendants denied liability on the ground that the contract was for the sale of 700 bags and there had been a breach of the implied condition that there were 700 bags available at the wharf for delivery.

Rayner Goddard, K.C., and *A. E. Woodgate*, for the plaintiffs, referred to *Martineau v. Kitching* (1).

Le Quesne, K.C., and *D. B. Somervell*, for the defendants, referred to *Behrend & Co. v. Produce Brokers' Co.* (2).

WRIGHT, J.—This is one of those unfortunate cases in which one of two innocent parties has to suffer by the fault of a third party. The third party in this case is a firm of wharfingers in London, the National Wharves and Warehousing Co., Ltd., and the trouble has arisen because certain goods deposited in the ordinary course of business with the Wharves company had been fraudulently abstracted while in their possession. This is the first case in my experience in which wharfingers in London, in whom great confidence has always been reposed, have failed in their trust. I do not know what individuals were guilty of the fraudulent transaction, nor does it concern me. The wharfingers are now in liquidation and it appears from statements in a letter that any assets which they have are in the hands of the debenture-holders. When the loss was discovered and complaint was made to the wharfingers they sent a somewhat remarkable letter dated Dec. 13, 1927:

"With respect to your letter of this day we very much regret to inform you that owing to irregular deliveries by our wharf, the 500 bags claimed by your clients, Messrs. Phillip Phillips & Co., [the defendants] do not exist. The position of the company has been placed before the Midland Bank who hold debentures and we regret that we are unable to add anything further."

As between the plaintiffs and the defendants the matter arises in this way. The plaintiffs had purchased under a contract in writing dated Oct. 7, 1927,

"E. C. P. Lot 7, 700 bags (about 25 tons) Chinese ground-nuts in shell (about equal to sample) at £26 5s. per ton, ex Store London. Lying at National Wharves. . . . Prompt 4th July 1927, rent free to 4th Nov. 1927. Net cash against delivery order."

On Oct. 11, the same year, the plaintiffs entered into an oral contract with the defendants (and about which there is no dispute) by which they sold to the defendants

“700 bags marked E.C.P. and known as Lot 7 of Chinese ground-nuts in shell then lying at the National Wharves in London at the price of £28 per ton to be computed by reference to the gross landing weights previously ascertained when the said goods were landed and placed in store at the said wharves.”

The price was computed on the gross landing weights and amounted to £727 18s. 3d. and about that there is no dispute. In respect of that price and a further sum, which is not very material to this case, of £78 4s. for other goods sold by the plaintiffs to them, the defendants accepted two bills of exchange, one for £500 and the other for £306 2s. 3d., each dated Oct. 11, 1927, payable to the order of the plaintiffs. These bills of exchange were handed over to the plaintiffs on Oct. 12, 1927, in return for a delivery order.

At the last-mentioned date, in my judgment, it was intended that the property in the 700 bags should pass from the plaintiffs to the defendants. I regard this parcel as an indivisible parcel of goods within the description given by BAILHACHE, J., in *Behrend & Co. v. Produce Brokers' Co.* (2). In that case the parcel was a parcel of 200 tons of Egyptian cotton-seed and the learned judge there held, and I think rightly, that in commerce that was an indivisible parcel of goods. The same is certainly true, in my judgment, a fortiori of this specific parcel of 700 bags, the location of which was expressly defined in the contract.

The defendants on Oct. 12, 1927, presented their delivery order to the wharf, and as no question was there raised they thereupon assumed that the matter was in order. The defendants did not do anything to inspect the goods. They obtained a sample from the plaintiffs who had inspected and sampled the goods on Oct. 6, 1927, by their inspector and sampler, a gentleman who was called before me. He said that he went on Oct. 6 to the wharves and found the parcel and took samples in the ordinary way but did not count the bags, that that would have been a difficult thing to do owing to their position, and that he assumed that the parcel was intact. The defendants made a re-sale contract but the sub-purchasers were unable to complete and, as the defendants did not want the goods immediately, they did nothing further, resting on what they thought their legal position, until early in December when there were certain delivery orders given. The first was for 50 bags, the second was for 100 bags. In the ordinary course on Dec. 12 and 13 they sent delivery orders in favour of their carman, one for 100 bags and one for 35 bags. These were both returned endorsed, “Goods not available.”

It has now been ascertained and agreed that at the date of the contract on Oct. 11, 1927, there were not 700 bags in the parcel but only 591 bags, 109 having by that time been fraudulently abstracted or irregularly delivered. In the interval between Oct. 11 and Dec. 6th or 7th other bags had been taken, so that on Dec. 12 (apart from the bags delivered to the defendants) none were left at all. Now if the whole 700 bags had remained in the wharf on Oct. 11, 1927, and if the fraudulent abstraction had been subsequent to that date and the parcel had been intact on that date, there could be no question, I think, that the property must have passed on Oct. 12 from the plaintiffs to the defendants. But that in fact was not so. When the contract of Oct. 11 was made there was not in existence any parcel such as is described in the contract. There was a parcel of 591 bags, but there was not a parcel of 700 bags. If, on the other hand, the whole 700 bags had been stolen on Oct. 11, 1927, without the knowledge of either party, or if it had been destroyed by fire—if for any such reason it did not exist as a parcel at all on Oct. 11, there can be no doubt that s. 6 of the Sale of Goods Act, 1893, would have applied. [His Lordship read the section.] There is no contract in other words, because, the intention of both parties is completely frustrated; they are contracting about something which has no existence in fact and the law then says that, the contract having reference to specific goods and those specific goods not existing, there is nothing on which the contract can operate, and the rule has been established for many years that the seller is not treated as warranting the existence of those specific goods, but the case is one of failure of intention and mistake.

This case raises a further problem which so far as I know, and so far as learned counsel have been able to ascertain, has never come before the court before. The problem is this: Where there is a contract for the sale of specific goods, such as the parcel of goods in this case, and some of the parcel, but not all of the parcel, has ceased to exist at all times relevant to the contract, because they have been stolen and taken away and cannot be followed or discovered anywhere, what then is the position? Does the case come within s. 6 of the Sale of Goods Act so that it would be the same as if the whole parcel had ceased to exist? In my judgment it does. The contract here was for a parcel of 700 bags. A contract for a parcel of 700 bags is something different from a contract for 591 bags and, in my judgment, the position is no different from what it would have been if the whole 700 bags had ceased to exist. The result is that the parties are contracting about something which, without the knowledge or fault of either party, at the date of the contract does not exist, and to compel the buyer under those circumstances to take 591 bags would be to compel him to take something which he had not contracted to take, and would in my judgment be unjust.

There is, as I said, no authority on the point. There are, however, certain expressions which have been referred to during the argument, and in particular a note to s. 6 in CHALMER'S SALE OF GOODS ACT, 1893 (10th Edn.), p. 31. The passage is this:

"If a man contracts to sell five dozen of a particular brand of champagne, it would be immaterial if unknown to him his whole stock of wine had been destroyed by fire. He must procure five dozen of that champagne elsewhere or pay damages. A mixed case might arise which is not covered by the section. Suppose a man contracts to sell to B. 'five dozen of the '74 champagne now in my cellar,' not knowing that all but three dozen had been destroyed by fire. The question has not been decided, but probably the contract would be void."

I agree with that expression of opinion, and adopt it in my judgment, although, in my opinion, the case put by the learned author is not so strong as the present one, because the contract here was for an indivisible parcel of goods, and described in every particular. I have also been referred to certain passages in BENJAMIN ON SALE. I quote from the sixth edition, published in 1920. At p. 161 the author is dealing with a well-known case to which I need not refer, where the contract relates to a specific chattel which, at the date of the contract, did not exist without either party knowing of that fact, and, after stating the rule, he says:

"Pothier says: 'There must be a thing sold, which forms the subject of the contract. If, then, ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null, because the house, which was the subject of it, did not exist; the site and what is left of the house are not the subject of our bargain, but only the remainder of it'."

In the present case though the facts are different, in principle it is equally true that what was left of the parcel at the date of the contract—namely, 591 bags—was not the subject of the bargain. The subject of the bargain was the entire parcel of 700 bags. On the following page the learned author then deals with the perishing of part of the thing sold, and again says:

"Where two or more things are sold for an entire price, or otherwise under an entire contract, and one or more of them have perished at the date of the contract, it is conceived that the contract is also void as to the remainder."

That, in my judgment, for the reasons I have given, is an accurate statement. Then the author continues:

"This was, at least, the rule of the civil law which says, 'Si duos quis servos emerit pariter uno pretio, quorum alter ante venditionem mortuus est, neque in uno constat emptio,' and is in accordance with principle."

It may be said that there was an entire price, because there was a lump sum ascertained in accordance with the contract and represented by the bills of exchange; but, in any case, the contract, in my judgment, was an entire contract. The general principle is also discussed in *POLLOCK ON CONTRACTS* (9th Edn.) at pp. 530 and 531. A

It has been argued that the acceptance of the delivery order by the wharfingers without demur constituted an appropriation of the goods, and involved the passing of the property in the 591 bags, the remainder of the parcel. I do not think that that contention is sound, because there was no authority or intention on the part of either the plaintiffs or the defendants for an appropriation of anything but the 700 bags. The delivery order was for 700 bags, and the entry in the wharfingers' book would be in accordance with the delivery order, and there was no parcel of 700 bags which could be the subject of that delivery order or of that appropriation. B

It was further argued, though perhaps not very strongly, that as the defendants actually took 150 bags, a part of the 700 bags, the case came within s. 30 of the Sale of Goods Act, 1893, and was to be treated as one in which there was a tender of a wrong quantity—591 bags instead of 700 bags—and that thereupon the buyer had an option under that section of taking 591 bags, paying proportionately. That I understand to be the plaintiff's case, but in my judgment that argument is not sound. Section 30 is a section giving an option to the buyer when the seller does not fulfil his contract, because he tenders the wrong quantity. It is obvious that no one has an option unless he knows what is being done, and in this particular case there was no knowledge of that. However, this point cannot arise on my first conclusion that this contract is void. Equally, in my judgment, it cannot be said that any property passed to the buyers on the facts of this case by reason of any laches on the part of the buyers. It is true that the buyers, the defendants, did not inspect; it is true that they did not take the trouble to obtain actual delivery of the goods till December, but I am satisfied on the evidence that there was no unreasonable delay. But even if there had been, it would not have affected my conclusion that the contract is void and that there is no contract under which the property has passed. Still less can the position be changed by the fact that the defendants made a sub-contract under which no steps were taken to obtain any delivery of the goods. That sub-contract no doubt was equally void with the contract with which I am concerned in this action. C
D
E
F

The result is that in my judgment the plaintiffs fail in their claim on the bills of exchange, which I ought to have said were dishonoured. There has been a payment into court of £258 4s., arrived at in this way: There is owing from the defendants to the plaintiffs £78 4s., the balance of an account, and they have tendered before action brought, as I gather, the sum of £180 as representing the price of the 150 bags which they actually received. The plaintiffs, therefore, are entitled admittedly to the sum of £258 4s., which has been brought into court, and an order will be made for that sum to be paid to them. On the actual claim, however, there will be judgment for the defendants. G

Solicitors: *Burnie & Coleman; Keene, Marsland, Bryden & Besant.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.] H

A

BONHAM v. MAYCOCK

[KING'S BENCH DIVISION (Roche, J.), March 16, 1928]

[Reported 138 L.T. 736; 44 T.L.R. 387; 72 Sol. Jo. 254]

B

Mortgage—Repayment of principal—Authority of mortgagee's solicitor to receive—Receipt by solicitor of interest.

In the absence of express authority or holding out, the mere receiving of interest on a mortgage by the mortgagee's solicitor does not imply authority to receive the principal.

C

Wilkinson v. Candlish (1) (1850), 5 Exch. 91, and *Kent v. Thomas* (2) (1856), 1 H. & W. 473, followed.

Notes. As to persons authorised to receive payment of a mortgage debt, see 23 HALSBURY'S LAWS (2nd Edn.) 497; and for cases see 35 DIGEST 604-606; and as to the authority of a solicitor to close, see 31 HALSBURY'S LAWS (2nd Edn.) 114-116.

Cases referred to:

D

(1) *Wilkinson v. Candlish* (1850), 5 Exch. 91; 19 L.J.Ex. 166; 155 E.R. 39; 35 Digest 605, 3433.

(2) *Kent v. Thomas* (1856), 1 H. & N. 473; 156 E.R. 1287; 35 Digest 605, 3434.

(3) *Adams v. Malkin* (1814), 3 Camp. 534; 170 E.R. 1472; sub nom. *Malkin v. Adams*, 2 Rose, 28; 4 Digest 18, 87.

E

(4) *Henn v. Conisby* (1667), 1 Cas. in Ch. 93; 22 E.R. 710; 35 Digest 604, 3427.

(5) *Duchess of Cleveland v. Dashwood's Executors* (1701), Freem. Ch. 249; 22 E.R. 1189; 1 Digest 365, 740.

(6) *Martyn v. Kingsby* (1702), Prec. Ch. 209; 24 E.R. 102; 35 Digest 376, 1177.

Action tried at Worcester Assizes, judgment being reserved to be delivered in London. The facts and arguments are stated in the judgment.

F

Ralph Thomas for the plaintiff.

W. G. Earegey for the defendant.

ROCHE, J.—This is an action on a covenant in a deed of mortgage, and the claim is for £300 principal and interest thereon. The action was heard before me at the last Worcester Assizes, and I reserved judgment in order to consult the authorities quoted, as at first sight the case appeared to be one of hardship, but that has now not proved to be the case. The plaintiff is a tradesman in Banbury and the defendant had been house-keeper to her two uncles named Savage, who were farmers. Mr. H. C. Kilby was solicitor to both the plaintiff and defendant. The defendant's uncles wished to raise a loan, and at their request she approached Mr. Kilby. A mortgage was arranged for £300 on one of the farms. Before it was carried out one of the defendant's uncles died, leaving his interest in the farm to her. The mortgage of the farm in favour of the plaintiff was dated June 28, 1922, and the defendant covenanted to pay the £300 and interest. The solicitor, Mr. Kilby, took the instructions of both parties and carried the transaction through. He kept the deed and paid the interest to the plaintiff down to the end of 1925. In 1926 Mr. Kilby died, and the following facts came to light. In 1923 Mr. Kilby had received £309 from the defendant (then Miss Wrightson) and the surviving uncle, H. Savage, on account of mortgage money and interest, to be paid to Mr. Bonham, and had given a receipt for it in the following terms:

I

"July 21, 1923. Received of Miss Wrightson and Mr. H. Savage the sum of three hundred and nine pounds to mortgage and interest to be paid to Mr. E. E. Bonham of Banbury. H. CECIL KILBY."

The defence is based on this payment on the ground that Mr. Kilby was solicitor or agent of the plaintiff, and that he had express or implied authority to receive the principal. The question is, whose money had Mr. Kilby taken? Mr. Kilby had not in 1923 or at

any time paid the £300 he had received to the plaintiff, nor had he given up any deed to the defendant, but simply the receipt which I have read. No evidence was given of an express authority to receive the principal, and I find as a fact there was no holding out by Kilby to receive the principal. The payment of interest to him in the course of his business was in fact no such holding out that he was entitled to receive the principal. As regards the deeds, there was no evidence that the defendant knew where they were or that Mr. Kilby had them. I, therefore, hold there was no holding out. A

The question, quite apart from express authority or holding out, is whether there was an implied authority. I am quite satisfied there is no such implication. There is a short answer, viz.: Mr. Kilby did not receive the money as agent for the plaintiff, the form of the receipt shows he was agent of the payors and not of the payee. I will give my reasons. It was argued for the defendant that authority to receive interest or principal could be implied if the scrivener or solicitor was allowed to retain the security. But that argument depends on cases relating to scriveners, and that scriveners were on the same footing as solicitors. It appears that scriveners are an extinct race. Apparently the last of them was a contemporary of Dr. Johnson, for the following passage is to be found in BOSWELL'S LIFE OF JOHNSON, vol. 3, p. 20 (cited in *Adams v. Malkin* (3) (3 Camp. at p. 540): B

"Johnson:—It is wonderful, Sir, what is to be found in London. The most literary conversation that I ever enjoyed was at the table of Jack Ellis, a money scrivener behind the Royal Exchange, with whom I at one period used to dine generally once a week." C

Note by Boswell:

"This Mr. Ellis was, I believe, the last of that profession called scriveners, which is one of the London companies, but of which the business is no longer carried on separately, but is transacted by attornies and others. He was a man of literature and talents." D

As regards scriveners I need only mention the following: *Henn v. Conisby* (4), *Duchess of Cleveland v. Dashwood's Executors* (5), *Martyn v. Kingsby* (6). I wish only to cite a passage from *Adams v. Malkin* (3). In giving judgment in that case, GIBBS, C.J., refers (3 Camp. at p. 539) to the passage I have just read from BOSWELL'S LIFE OF JOHNSON, and adds: E

"At the present day, the banker occupies one department of the business of the scrivener, by being the depository of the money, and the attorney the other, by drawing the securities. The banker would not be an attorney, though he were occasionally to fill up bonds for his customers; nor does the attorney become a money scrivener, though on particular occasions he incidentally has the money of his clients to lay out for them. In order to make a man a money scrivener, he must carry on the business of being trusted with other people's moneys to lay out for them as occasion offers. . . . Nor if on one or two occasions money were deposited with him to lay out, would that constitute him a money scrivener. He must be carrying on generally the business of a money scrivener. That must be part of his known occupation." F

I should hold on the facts which I have learned from those cases that a solicitor is not a scrivener and they have no application to solicitors. But there are two decisions which directly govern this case. In *Wilkinson v. Candlish* (1), PARKE, B., said (5 Exch. at p. 96): G

"But an authority to receive the interest of a mortgage by no means imports an authority to receive the principal." H

To the same effect and even stronger in plaintiff's favour is *Kent v. Thomas* (2), where a solicitor received a part of the principal and did not pay the mortgagee, and WATSON, B., said: I

A “In this case he was the agent of the plaintiff to receive the interest, but as to the principal, PARKE, B., in *Wilkinson v. Candlish* (1), pointed out that an authority to receive the interest on a mortgage by no means imports an authority to receive the principal.”

My judgment, therefore, must be in favour of the plaintiff for £300 with costs.

B *Judgment for plaintiff.*

Solicitors: *Bristowes* for *Fairfax & Barfield*, Banbury; *James, Mellor & Coleman* for *Phipps & Troup*, Northampton.

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

C

VERNER-JEFFREYS v. PINTO

D

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), December 7, 10, 19, 1928]

[Reported [1929] 1 Ch. 401; 98 L.J.Ch. 337; 140 L.T. 360;
45 T.L.R. 163]

E *Moneylender—Agent or canvasser—Prohibition of introducing person to borrow money—Person acting as agent without authority of moneylender—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 5 (3).*

F By s. 5 (3) of the Moneylenders Act, 1927: “No moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender, and no person shall act as such agent or canvasser, or demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money.”

G **Held:** (LORD HANWORTH, M.R., dissenting): the words “no person shall act as such agent or canvasser” mean “no person may act as an agent or canvasser employed by a moneylender or any person on his behalf for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender,” and so the Act does not prohibit canvassing by a canvasser who acts without the authority of the moneylender to whom he is going to introduce the borrower.

H *Moneylender—Re-opening transaction—Loan at 48 per cent. interest—Ample security given for loan—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 10 (1).*

I A widow in receipt of a substantial income borrowed £500 at 48 per cent. per annum interest from a moneylender and gave the moneylender as security a bill of sale on her furniture, which was ample security for this sum. Before the loan the moneylender's brother, who was himself a moneylender, had introduced the borrower to the moneylender and had inspected and taken an inventory of the furniture.

Held: as the loan was amply secured, 48 per cent. was a grossly excessive rate of interest, and, therefore, the transaction was harsh and unconscionable, and should be re-opened by the court, and interest at the rate of only 15 per cent. per annum allowed.

Notes. As to restrictions on advertising and canvassing for moneylending, see 23 HALSBURY'S LAWS (2nd Edn.) 195–196; as to the relief of borrowers under the Moneylenders Acts, see *ibid.*, 201–206; and for cases see 35 DIGEST 212–217. For the Moneylenders Act, 1927, s. 5, s. 10 (1), see 16 HALSBURY'S STATUTES (2nd Edn.) 384, 392.

Case referred to:

- (1) *Kennedy v. De Trafford*, [1897] A.C. 180; 66 L.J.Ch. 413; 76 L.T. 427; 45 W.R. 671, H.L.; 35 Digest 504, 2356.

Appeal by the defendant, a moneylender, from the decision of CLAUSON, J., that a moneylending transaction whereby he had lent £500 to the plaintiff was illegal and void under s. 5 (6) of the Moneylenders Act, 1927, as the defendant had contravened s. 5 (3) of the Act, and that a bill of sale given to the defendant by the plaintiff as security for the loan was, therefore, void.

CLAUSON, J., after dealing with the above point, said: However, it may be that on the construction of this section I am wrong, and on that assumption it is right, for the assistance of any other court before whom the matter may come, that I should express my view as to the other part of the case. The other part of the case is this. It is suggested that this transaction, on any view of the matter, can be re-opened, because the interest charged was excessive and the transaction was harsh and unconscionable. There was the clearest evidence from the defendant's own witnesses that the £500 was amply secured by the bill of sale. The interest at which the £500 was advanced was 48 per cent. per annum. Now under the 1927 Act, s. 10, the legislature instructs me that I am to presume, unless the contrary is proved, that interest charged is excessive and the transaction is harsh and unconscionable, if it is found the interest exceeds the rate of 48 per cent. per annum. Accordingly the legislature instructs me that, if this transaction had been one without security, and the interest charged had been 48½ per cent. per annum, unless the contrary is proved, I must presume it to have been a harsh and unconscionable transaction by reason of an excessive rate of interest. If that is the position where there is no security at all, how can I possibly hold that interest at the rate of 48 per cent. per annum is not excessive interest where there is ample security for the sum advanced? However, the circumstances of this case are depressingly familiar. It is plain to me that this lady was a mere baby in the hands of those with whom she was so misguided as to deal. I have no hesitation whatever in saying that 48 per cent. was grossly excessive interest, having regard to the security that was being given. I have no hesitation in saying that it was so excessive that that of itself is sufficient to justify me in finding that the transaction was harsh and unconscionable. Accordingly, but for the decision I have already given that the whole matter is illegal, I should have felt it my duty to exercise the power vested in me by the Act to re-open this transaction and to allow the defendant interest on the actual sum advanced, which was admittedly £500, at the rate of 15 per cent. per annum, and he would on his counterclaim have obtained that relief.

The defendant appealed.

Edward Clayton, K.C., and *H. J. Wallington* for the defendant.

Malcolm Hilbery, K.C., and *F. G. Enness* for the plaintiff.

Cur. adv. vult.

Dec. 19. The following judgments were read.

LORD HANWORTH, M.R.—In this action the plaintiff claimed a declaration that a moneylending transaction, entered into by the plaintiff with the defendant on Jan. 9 and 10, 1928, was illegal and the bill of sale given by the plaintiff to the defendant in connection therewith, void. Alternatively, the plaintiff asks that the transaction should be re-opened as being harsh and unconscionable.

The relevant facts which it is necessary to recount in connection with this judgment are taken from the findings stated by the learned judge. It appears that the plaintiff is a widow, with children dependent upon her, and in possession of an income which, although not inconsiderable, has proved insufficient for her needs. She has, therefore, from time to time had recourse to moneylenders; and she had done so before December, 1927, when the incidents occurred which are the source of her present trouble. A lady moneylender in Golden Square in that month introduced her to Clive Everton, Ltd., moneylenders, and was paid £15 for the introduction. Mr. Harwood was the manager of this company, which following the learned judge, I will call Mr. Harwood's firm. By Dec. 21, 1927, Mr. Harwood's firm had made loans to the plaintiff of a total sum of

A £400 on a promissory note signed by the plaintiff, repayable by post-dated cheques falling due over a period of some months in this year, and had commenced to take an inventory of the furniture in the lady's house in Devonshire which was to be covered by a bill of sale as security for the loan. The plaintiff was anxious to get a loan not of £400, but of £500, and so she came to town on Jan. 9 and saw Mr. Harwood, who would not entertain a loan for £500 as he had a "prejudice" against bills of sale. But Mr. B Harwood "had a friend" who would be prepared to do the business. On this Jan. 9 the plaintiff signed a letter which was prepared for her signature in Mr. Harwood's office:

"Dear Sirs, Will you kindly introduce me to some person or moneylenders so that I may obtain an advance to enable me to pay you off the money I owe you, as I understand you are not prepared to let the same stand over."

C Mr. Harwood told the plaintiff that the business would be done by someone else and the plaintiff was taken by a clerk of Mr. Harwood's to a solicitor who would act for her in this intended business with the fresh moneylender. The latter was the defendant Pinto, and CLAUSON, J., finds it established that, at the time when the plaintiff went to the solicitor's office, an arrangement had been made with the defendant that he would carry out the loan of £500 to the plaintiff. This was done on Jan. 10. The bill of sale was completed; £500 was lent by the defendant to the plaintiff; £21 was paid to the solicitor for his services; Harwood was paid the £400 at a date before it was due, and the plaintiff was left with whatever balance remained after payment to Harwood, for a loan for which, as CLAUSON, J., finds, "she did pay very heavily indeed."

E The question to be decided is what is the true construction to be placed on s. 5 (3) of the Moneylenders Act, 1927, which had come into force on Jan. 1, 1928, and so was in operation when the transaction of this new loan of £500 by the defendant to the plaintiff was carried out. Harwood and the defendant Pinto are brothers, but CLAUSON, J., is not prepared to find as a fact that the defendant employed Harwood to act as his agent in the transaction; he does hold that Harwood acted as a canvasser or tout for the defendant, even though he had no master employing him at the time he acted as F such. I have given careful attention to the point raised by junior counsel for the defendant that Harwood acted as agent for the borrower and not for the lender, and that there was no evidence that the defendant ever employed or adopted Harwood as his agent. In view of the finding of CLAUSON, J., already referred to, that he was not prepared to hold that the defendant did employ Harwood, there is ground for the contention thus advanced by junior counsel for the defendant, but in my judgment that G question is not vital to the judgment. CLAUSON, J., does hold, as on the evidence he was entitled to hold, that Harwood acted as a tout or canvasser for the defendant or as an agent for him, using that word in its widest sense as I think it is used in sub-s. (3) of s. 5. The word "agent" is a much abused term, as was pointed out by LORD HERSHELL in *Kennedy v. De Trafford* (1) when he says ([1897] A.C. at p. 188):

H "A person may be spoken of as an 'agent' and no doubt in the popular sense of the word may properly be said to be an 'agent,' although when it is attempted to suggest that he is an 'agent' under such circumstances as create the legal obligations attaching to agency, that use of the word is only misleading."

I In my judgment, the word "agent" as used in sub-s. (3) is used in its widest popular sense and is little different from the word canvasser which is employed as an alternative term to it. I agree with the construction of the section adopted by CLAUSON, J., and I do not hold that the word "such" introduces the qualification that an agent employed by a moneylender, and only as and when employed by a moneylender, is intended. The word "such" relates back to the agent or canvasser whose purpose is to invite any person to borrow money, or to enter into any transaction involving the borrowing of money from a moneylender and not to the further limitation of actual employment in that purpose by a moneylender. The prohibition is not against being employed, but wider—"No person shall act" whether in actual employment or not. It includes those who act for the purpose of inviting any person to borrow money, &c., in the hope that

their actions will result in their obtaining a commission. The structure of the whole section makes that plain to my mind. It opens in sub-s. (1) with: "No person shall knowingly send," &c. Then in sub-s. (2): "No person shall publish." Sub-s. (3) follows: "No moneylender or any person on his behalf shall employ," and then reverts to the wider words, "No person shall act." The prohibition in sub-s. (3) may be split up into three parts: (a) No moneylender shall employ. (b) No person shall act. (c) No person shall demand any sum. The accusative to the verb employ is an agent or canvasser for the purpose, &c., and that accusative is what is brought forward by the word "such" into the second and wider prohibition. I agree, therefore, with the interpretation placed by CLAUSON, J., on the section, and also with his application of the section to the facts, and also with the observations that he makes in answer to the objection that the interpretation which he and I give to the section involves hardship on the moneylender. The result is that the transaction completed on Jan. 10 is rendered illegal. In my view, therefore, the appeal ought to be dismissed; but as unfortunately there is a difference of opinion between the members of the court, the order will be that which will be stated by LAWRENCE, L.J.

LAWRENCE, L.J.—This appeal raises the question what is the true meaning of the words, "and no person shall act as such agent or canvasser" in sub-s. (3) of s. 5 of the Moneylenders Act, 1927. This subsection contains three prohibitions: First, that no moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender; secondly, that no person shall act as such agent or canvasser; and, thirdly, that no person shall demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money. CLAUSON, J., has held that there has been no contravention of the first prohibition and that as no contravention of the third prohibition had been pleaded he had nothing to do with that prohibition. This case, therefore, is concerned only with the second prohibition, and the question is whether there has been any contravention of that prohibition. The learned judge, after stating that there was really no dispute whatever that Harwood had invited the plaintiff to borrow money from the defendant, held that the invitation so given constituted Harwood a canvasser for the purpose of inviting the plaintiff to borrow money from a moneylender within the meaning of the second prohibition, and that consequently there had been a contravention by Harwood of this prohibition, and further that, as the defendant had not proved that the contravention had occurred without his knowledge or connivance, the moneylending transaction between the plaintiff and the defendant was illegal by virtue of the provisions of sub-s. (6). In arriving at this conclusion the learned judge has, in my opinion, placed too restricted a meaning on the word "such" in the second prohibition and has in effect construed that prohibition as if it had been couched in the words "and no person shall act as an agent or canvasser for such purpose" instead of in the words actually used.

The point which arises is extremely narrow and not capable of much elaboration. The way it strikes me can be stated in a few sentences. The adjective "such" in its collocation in sub-s. (3) qualifies the nouns "agent or canvasser" and means "of the character before mentioned." It relates back to the first prohibition and carries with it all the characteristics of the agent or canvasser there mentioned. These characteristics are twofold: first, that he is employed by a moneylender or some person on his behalf, and secondly, that he is employed for the particular purpose there specified. No description of an agent or canvasser falling within the first prohibition would be complete unless it combined both these characteristics, each of which is an integral part of his description and the omission of one or other would result in an incomplete description. So far as I can see there is nothing in the context to restrict the operation of the word "such" to only one of these characteristics to the exclusion of the other, and in my opinion there is no valid ground or justification for any such restriction. For these reasons I am of opinion that the second prohibition means that no

A person shall act as an agent or canvasser employed by a moneylender or any person on his behalf for the purpose of inviting, &c. As I read the two prohibitions they are correlative and are aimed at hitting both parties to the same transaction so that in case of any contravention both the employer and the employee would incur the penalties imposed by sub-s. (5).

This really disposes of the appeal, but before parting with the case I desire to make a few observations on some of the arguments addressed to this court by counsel on either side. Counsel for the defendant in the course of his argument in support of the appeal, took two points, both of which deserve attention—namely, first that the words “agent or canvasser” in the second prohibition connote an employer; and secondly, that the expression “agent or canvasser for the purpose of inviting, &c.” (which according to the learned judge’s decision would be the description of a person acting in contravention to the second prohibition) is ungrammatical unless it be treated as elliptical. As to the first of these points, although no word is more commonly and consistently abused than the word “agent” and although many persons without a principal call themselves and are called by others “agents” (see per LORD HERSCHELL in *Kennedy v. De Trafford* (1), ([1897] A.C. at p. 188), yet I think that counsel for the defendant is right in his contention that the word “agent” is used in the second prohibition (as it undoubtedly is in the first) in its legal sense and connotes the existence of a principal, and further that the context indicates that the principal is the same as the one mentioned in the first prohibition—namely, a moneylender or some person on his behalf. As regards the word “canvasser,” although the verb “to canvass” is commonly applied to a person who solicits business on his own behalf, yet the noun “canvasser” in common parlance is more usually applied to a person canvassing on behalf of an employer and is, in my opinion, so used not only in the first, but also in the second prohibition, the employer indicated being, as in the case of the agent, a moneylender or some person on his behalf. As to the second point, I agree with counsel for the defendant that the expression “agent or canvasser for the purpose of inviting,” &c., is elliptical, and that in view of the context the part left out and to be implied would properly be culled from the first prohibition, and would be “employed by a moneylender or person on his behalf.” Turning now to some of the arguments advanced by counsel in support of the plaintiff’s case. First, as to the contention that on the defendant’s construction the antithesis between the words “employ” in the first prohibition and “act” in the second is lost. The answer to this contention is that these words are not set in opposition to each other, but, on the contrary, are complementary, the former being used to denote the act of the employer and the second being used to denote the act of the person employed in the same transaction.

Next as to the contention that the defendant’s construction is unnecessarily narrow and contrary to the spirit and intention of the legislature as shown by the rest of s. 5. In support of this contention it is pointed out that all the prohibitions contained in the section, except the first prohibition in sub-s. (3), commence with the words “no person shall,” and are thus addressed to every member of the public, whether a moneylender or not, and that this shows that the words “no person” in the second prohibition in sub-s. (3) are aimed at suppressing all touts, whether they be moneylenders or persons employed by moneylenders or free lances acting on their own account, and ought, therefore, to be construed as being impersonal and as having nothing to do with any employment by a moneylender. This contention, in my opinion, confuses the prohibited persons with the prohibited act. No doubt the second prohibition prohibits every person, whether a moneylender or not, just like the earlier subsections, but in each case the prohibition is directed against the doing of a particular act which is specifically defined and the question in this case is as to the scope of the act which is prohibited, not as to the persons who are prohibited from doing the Act. On the latter head there is no dispute that the prohibition embraces every member of the public. In this connection it is to be noted that the Act of 1927 does not prohibit a moneylender from orally inviting persons to borrow money from himself, indeed, had it done so it is difficult to see how a moneylender could have carried on his business at all. Yet the second prohibition, if construed as the learned judge has construed it,

would, in my opinion (by reason of its undoubtedly extending to moneylenders) indirectly operate to prevent a moneylender from orally soliciting business on his own account, as such solicitation would, according to the ruling of the learned judge, constitute the moneylender a canvasser for the purpose of "inviting a person to borrow money or enter into a transaction involving the borrowing of money from a moneylender." When this proposition was put to counsel for the plaintiff in the course of his argument he did not shrink from such a result, but, on the contrary, maintained that this was what the legislature intended. I cannot help thinking that if it had been the intention of the legislature to prohibit all touting at large (especially if such prohibition were to include the touting by a moneylender on his own behalf) the second prohibition would have been framed so as directly to prohibit any person from inviting, &c., instead of going about it in such a roundabout manner and purporting to effect the same result by prohibiting any person from acting as an agent or canvasser for the purpose of inviting, &c. Moreover, I do not think that the court ought to impute to the legislature an intention to create a criminal offence in such a dubious way.

The only other contention to be noticed is that the last sentence of sub-s. (6) would have no application to a contravention of the second prohibition if the defendant's construction were adopted. There is nothing in this contention. The section in question contains a general provision applicable to all the subsections, and it necessarily has no application whenever the contravention is brought about by an act of the moneylender himself; in any event, it never could have any application to the first prohibition. Lastly, I would observe that however vicious the system of passing on a borrower from one moneylender to another may be, and however desirable it may be to put a stop to such a system, I can find nothing in sub-s. (3) to prohibit it so long as the moneylender who passes on the borrower is not employed by the moneylender to whom the borrower is passed on, and so long as the former does not demand or receive any money or other valuable consideration for introducing or undertaking to introduce the borrower to the latter.

In the result, for the reasons stated, I am of opinion that this appeal ought to succeed and that the order of CLAUSON, J., ought to be discharged and that in lieu thereof an order should be made in the action declaring that the interest charged by the defendant was excessive and that the moneylending transaction between the plaintiff and defendant was harsh and unconscionable and ordering that the transaction be re-opened and that the rate of interest be fixed at 15 per cent. per annum and that on the counterclaim there should be an order for an account of what is due from the plaintiff to the defendant on the footing of the declaration and order made in the action, with liberty to apply to the court below for payment of the amount found due and generally. As each party has partially succeeded and partially failed, there should be no costs to either party of the action or counterclaim in the court below up to and including the hearing before CLAUSON, J., and the subsequent costs should be reserved to be dealt with in the court below. The plaintiff should pay the costs of this appeal.

RUSSELL, L.J.—The result of close argument on the hearing of this appeal was to reduce the points for decision to a single question, viz.: the construction of what was called during the discussion Part B of the third subsection of s. 5 of the Moneylenders Act, 1927. That subsection was treated, and I will for convenience treat it, as consisting of three parts, thus: (a) no moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender; (b) no person shall act as such agent or canvasser; (c) no person shall demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money.

The sole point of construction arises in regard to (b), and is this: Does it prohibit all persons from acting as agents or canvassers for the purpose of inviting, or does it only prohibit from acting as agents or canvassers for the purpose of inviting, persons employed by a moneylender or a person on his behalf as mentioned in (a). In other words,

A how much of the description or qualities or attributes to be found in (a) of the agent or canvasser mentioned in (a) are carried over into (b) by the use in (b) of the word "such." CLAUSON, J., has decided that all that is carried over into (b) by the word "such" is the feature (I use that as a convenient word to denote description qualities or attributes) of being an agent or canvasser for the purpose of inviting. So that (b), written out at length, would run: "No person shall act as an agent or canvasser for the purpose of

B inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender." If this is correct, then upon the facts found by the judge the transaction in suit was illegal under sub-s. (6) and the judgment under appeal must stand. The defendant, however, contends that you must carry over all the features of the agent or canvasser which are to be found in (a), and accordingly that (b), written out at length, would run:

C "No person shall act as an agent or canvasser employed by a moneylender or any person on his behalf for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender."

If this is correct, then on the facts found by the judge the transaction in suit was not illegal under sub-s. (6) and the judgment under appeal cannot stand.

D Section 5 contains many restrictions and prohibitions in regard to moneylenders. Subsection (1) prohibits (putting it generally) moneylenders' advertisements by means of circulars. It does so by forbidding knowingly sending or delivering moneylenders' circulars except in response to a written request, and the subsection is binding on everyone irrespective of any question of employment: "No one shall knowingly send." Subsection (2) prohibits (subject to a proviso) moneylenders' advertisements by means of newspapers or posters or placards. The proviso permits certain forms of moneylenders' advertisements by means of newspapers, posters or placards. That subsection is also binding on everyone irrespective of any question of employment: "No person shall publish." Subsection (3) deals with, or at all events includes, oral communications. I have already narrated its provisions. Subsection (4) provides how, in a document issued by or on behalf of a moneylender, the terms of interest proposed

E to be charged must be expressed. Subsection (5) provides that any person acting in contravention of any of the provisions of s. 5 shall be guilty of a misdemeanour and liable to imprisonment and a fine. Subsection (6) runs thus:

F "Where it is shewn that a moneylending transaction was brought about by a contravention of any of the provisions of this section, the transaction shall, notwithstanding that the moneylender was duly licensed under this Act, be illegal, unless the moneylender proves that the contravention occurred without his consent or connivance."

G It was argued for the plaintiff that, since the prohibitions in sub-ss. (1) and (2) applied to all persons irrespective of any question of employment by virtue of the words "No person shall," when you find in sub-s. (3), Part B the words "and no person shall" you should give them the same meaning and treat them as meaning and applying to all persons irrespective of any question of employment. This contention does not appear to me to advance the plaintiff's case, for it does not take into consideration the reference to employment in Part A of sub-s. (3) and the use of the word "such" in Part B. It was further argued for the plaintiff that the construction of the defendant cannot be correct, because if employment by a moneylender, or by some one on his behalf, is a feature of the agent or canvasser mentioned in Part B, then the last sentence of sub-s. (6) of s. 5

H can never come into operation in relation to Part B of sub-s. (3). This is true, and the argument would, I think, be of great weight if sub-s. (6) related only to contraventions of Part B of sub-s. (3), or even if it related only to contraventions of sub-s. (3); but the argument ceases to carry weight when it is realised that sub-s. (6) is in general terms and is applicable to all the provisions of s. 5.

I The question for decision is primarily one of grammar, but certain other considerations are relevant. This is a section a contravention of which is made a penal offence: it is a penal section constituting a new series of misdemeanours. So far as the language used in sub-s. (3), Part B, is susceptible of two readings, that version should, I think, be

chosen which lessens the new list of misdemeanours rather than that which increases it; and this upon the footing that assuming there is an ambiguous expression in a provision which creates a new offence, the benefit of the doubt should be given to the subject. If on the facts found in this case, Harwood were indicted for acting in contravention of the provisions of Part B of sub-s. (3), I find it difficult to believe that a defence of non-employment would not succeed, on the ground, putting it at the lowest, that it was not clear that employment was not a necessary ingredient of the offence. But apart from this consideration and without suggesting any ambiguity I differ from the construction adopted by CLAUSON, J., for the following reasons: (i) The natural meaning of the word "such" as I understand it, is "of the quality or kind already mentioned." If I am right in this, and you turn back to Part A to ascertain the quality or kind of agent or canvasser already mentioned you find language which shews that he is employed by a moneylender or some person on the moneylender's behalf. Now can I reject that particular feature, and hold that it is not to be applied to the agent or canvasser referred to in Part B? It is not enough to say that the word "such" can be made to operate and be given a meaning by reading into Part B the words from Part A "for the purpose of inviting" &c. The word "such," if given its natural meaning and operation, will include also the feature of employment and there is no reason or justification for restricting or cutting down its natural meaning and operation. (ii) In my opinion the words in Part A "for the purpose of inviting" &c., relate grammatically back to the word "employ," and that what Part A means is this: (I am paraphrasing) "No moneylender or person on his behalf shall employ for the purpose of inviting, &c., any agent or canvasser," and not "No moneylender or any person on his behalf shall employ any agent or canvasser whose function is inviting, &c." If this is the right construction of A, and in my opinion it is, then the feature of the employment is inevitably carried forward into Part B. (iii) Part B as construed by the learned judge involves a description of a person as being

"an agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender."

Such a description would be ungrammatical if it were not elliptical. The words "for the purpose of inviting" and the nineteen words which follow cannot be grammatically used to qualify or describe a noun. A composite sentence is not a participial adjective. Some participial adjective must be supplied. In the present case the word whose presence is necessary to make the description complete and grammatical can only (in view of Part A) be the word "employed."

For these reasons, I am of opinion that Part B of sub-s. (3) should be construed as though it ran:

"No person shall act as an agent or canvasser employed by a moneylender or any person on his behalf for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender."

The result is that on the facts as found there was no contravention of the provisions of Part B of sub-s. (3) and the appeal must be allowed. I agree with the order proposed by LAWRENCE, L.J.

Appeal allowed.

Solicitors: *W. H. Speed & Co.; Woolfe & Woolfe.*

[*Reported by* GEOFFREY P. LANGWORTHY, Esq., *Barrister-at-Law.*]

GREAT WESTERN RAIL. CO. v. JAMES DURNFORD & SONS, LTD.

[HOUSE OF LORDS (Viscount Sumner, Lord Warrington and Lord Atkin), March 2, 5,
22, 1928]

[Reported 139 L.T. 145; 44 T.L.R. 415; 33 Com. Cas. 251]

*Indemnity—Licence for gangway over railway premises—Indemnity by licensee against
“all claims and demands or liability whatsoever . . . arising out of or in connection
with the existence or user of the gangway”—Licensee’s lorry, while on gangway,
negligently struck by railway truck—Claim by licensee against railway.*

Builders’ merchants leased from a railway company premises adjoining the company’s sidings, and in order to load their goods direct into trucks on the sidings they built a portable gangway over the railway company’s land along which their lorries could run and tip their contents into the railway trucks below. By the licence granting the merchants permission to do this it was provided that the merchants “agree and undertake to indemnify the [railway company] against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connection with the existence or user of the said gangway.” The railway company negligently moved a box truck along the siding when the end of one of the merchant’s lorries was projecting over it, with the result that the truck struck and damaged the lorry. In an action by the merchants against the railway company for damages for negligence, the railway company counterclaimed on the indemnity.

Held: the indemnity did not apply because (i) the liability of the railway company to the merchants arose wholly out of its own acts or defaults and did not arise out of or in connection with the presence or user of the gangway; and (ii) the indemnity did not cover claims against the railway company by the merchants themselves.

Decision of Court of Appeal (1927), 138 L.T. 137, affirmed.

Notes. Distinguished: *London and North Eastern Rail. Co. v. Furness Shipbuilding Co.*, [1934] All E.R.Rep. 54. Considered: *London Passenger Transport Board v. T. Walton (London), Ltd.* (1934), 78 Sol. Jo. 224. Applied: *John Lee & Son (Grantham), Ltd. v. Railway Executive*, [1949] 2 All E.R. 230. Referred to: *The Carlton* (1931), 47 T.L.R. 517; *Great Western Rail. Co. v. Port Talbot Dry Dock Co.*, [1944] 2 All E.R. 328. As to extent of liability under an indemnity, see 18 HALSBURY’S LAWS (3rd Edn.) 534; and for cases see 26 DIGEST 233, 234.

Case referred to:

(1) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest 686, 5274.

Appeal by the defendants from the decision of the Court of Appeal (LORD HANWORTH, M.R., and SCRUTTON, L.J.; SARGANT, L.J., dissenting) (reported 138 L.T. 137).

The following statement of the facts is taken from the opinion of LORD WARRINGTON. Under a lease dated May 9, 1914, the respondents are the lessees under the appellants of a piece of land adjoining other land of the appellants alongside of certain sidings of theirs at Bristol. The respondents are merchants and dealers in builders’ materials and they send considerable quantities of such goods for conveyance by the appellants’ line. In the year 1921, being desirous of obtaining an easier access to the appellants’ sidings for the purpose of transferring materials for carriage from their own lorries into the appellants’ trucks, they obtained from the appellants permission to erect a portable gangway with brackets over a piece of the appellants’ land lying between their sidings and the land in the occupation of the respondents, and to use the gangway so erected by running their lorries along it and then tipping the contents directly into a truck upon the siding. When the gangway was thus in use the end of the lorry projected over the

siding. In consideration of the privilege so conceded the respondents signed a memorandum dated Sept. 24, 1921, endorsed on their lease. So far as it is material the memorandum is in the following terms:—

“In consideration of the within named company permitting the within named lessees to use the portable gangway with brackets recently erected by the said lessees upon the premises within described and projecting over the company's premises for the purpose of loading traffic into trucks on the sidings adjacent to the within described premises the said lessees hereby agree and undertake to indemnify the said company against all claims and demands or liability whatsoever whether in respect of damage to person or property arising out of or in connection with the existence or user of the said gangway and brackets and to remove the said gangway when not in actual use to such a position that the same shall not project from the premises within described.”

On Aug. 26, 1926, in the course of certain shunting operations, the appellants' servants negligently—as is assumed for the purpose of argument—caused a box truck to be moved along the siding over which the end of the respondents' lorry was projecting. The box truck struck the lorry, which was thrown to the ground and seriously damaged. The present action was brought by the respondents to recover damages for the injury to their lorry. The appellants in their defence, among other grounds, set up the above-mentioned memorandum as negating any liability to the respondents. They also pleaded it by way of counterclaim and thereby claimed a declaration that they were entitled to be indemnified by the respondents against all liability on their claim including liability in respect of damages, if any, awarded to the respondents, costs, if any, awarded to them, and their own costs as between solicitor and client incurred in defending the claim. The points of law raised by the defence and counterclaim were ordered to be set down and disposed of before the trial of the issue of fact, and the matter came before *MACKINNON, J.*, on May 17, 1927. Three points were argued:

(i) Whether the memorandum covered claims against the appellants by the respondents themselves. (ii) Whether—if this were answered in the affirmative—it covered a claim founded on the negligence of the appellants. (iii) Whether under the circumstances of the case the damage to the lorry is to be treated as damage “arising out of or in connection with the existence or user of the said gangway.” The learned judge decided the second and third points in favour of the appellants and the first point in favour of the respondents. The Court of Appeal by a majority (*LORD HANWORTH, M.R.*, and *SCRUTTON, L.J.*; *SARGANT, L.J.*, dissenting) affirmed the judgment of *MACKINNON, J.*, on the first point. They did not express an opinion on the second and third points inasmuch as in view of their opinion on the first point the others did not arise.

The appellants appealed.

W. A. Greene, K.C., *Wilfrid Lewis* and *J. A. Stainton* for the appellants.

Rayner Goddard, K.C., *E. H. C. Wethered* and *Erskine Harper* for the respondents.

The House took time for consideration.

March 22. The following opinions were read.

VISCOUNT SUMNER stated the facts and continued: This appeal raises a pure question of construction. Wide as many of the terms of the clause certainly are, they are, in two respects at any rate, brought within much narrower limits. Though the “indemnity” is to be against “all claims and demands or liability whatsoever,” the claims are only (a) claims “in respect of damage to person or property” and (b) such as “arise out of or in connection with the existence or user of the said gangway and brackets.” There would, therefore, be no indemnity against fines or penalties, nor, I suppose, against a contractor's claim for payment, if the railway company found it necessary to employ one to strengthen their road-bed so as to bear the thrust of the loaded wagon, when tipped. Wide as the words look at the outset, their context and purpose evidently subject them to several restrictions.

A With regard to the circumstances to which the agreement refers, I note, firstly, that the use of the gangway or brackets, which is not specifically confined to the tip lorry but would be available for other modes of loading, is itself part of a joint operation, in which the respondents furnish the materials to be carried and the vehicle which delivers them, and the appellants furnish the trucks and the motive power by which they are removed, while there is benefit out of it on both sides, the respondents getting their goods carried and the appellants their railway rates paid. I note, secondly, that the clause does not deal with any claims to be made against the respondents by the appellants for damage done to their property, in connection with the gangway or otherwise, these being left to the common law, and it only deals at most with such claims for damages to be brought by the respondents against the appellants as arise out of or in connection with the gangway. If the appellants stacked their builders' materials along the edge of the leased premises, so that they fell over on to the line, or if the respondents had a collision on the siding, which sent things flying on to the leased premises, so as to damage the stacks of builders' materials there, the clause would not apply in either case. It would, accordingly, seem to be a departure from the scheme to bring under the clause any questions arising on the simultaneous user of the gangway and of the sidings, and still more so, if the effect of the clause be to throw on one party all the liability so arising instead of leaving them, as the other questions are left, to be settled by the ordinary law. There is no doubt that an abundant content for the clause can be found in third-party liabilities without having recourse to liabilities between the contracting parties themselves. It is, therefore, on the wording of the clause and not on its scheme that the appellants must rely.

E At your Lordships' Bar it was recognised that the indemnity here is not matter of defence but of counterclaim, for it assumes liability which as such will fall on the appellant railway company, that is, a claim to which no defence is available, for otherwise no occasion would arise for calling on the respondents to hold the appellant company harmless under the indemnity. This distinction figures largely in the dissentient judgment of SARGANT, L.J., but hardly receives mention in any of the others, whether because it was not pressed or because its technical character seemed to make it of little weight in construing a working arrangement, I do not know. I think that the business object of the clause, if such a cause of action as the present was intended to come within it, must have been simply to ensure that the appellant railway company should not be troubled with claims. This could have been accomplished in more ways than one—by granting the licence at the licensees' risk exclusively; by inserting an undertaking not to sue as a part of the consideration for the licence; or by making the grant of the licence an accord and satisfaction for any torts thereafter to be committed by the appellant railway company—but in all forms the object is to stop the action on the claim, and to provide for a complete defence in limine. To resort to the circuitous course of including provision for a counterclaim against the respondent licensees in words primarily directed to enabling the appellant railway company to bring them by third-party notice into an action brought against them by third parties is not a thing to be reasonably regarded as part of the subject-matter of such a clause.

H The results of such a provision for a counterclaim for indemnity are odd. The indemnity would be one to which the insurer's right of subrogation could not be applied since the respondents could not stand in the shoes of the appellant railway company to sue them as the real tortfeasors, for they would have to do so in the appellant railway company's own name. If the respondents were insured elsewhere against their own liability to their servants, and the insurers, having paid, sued the appellant railway company as the negligent cause of the injury, the word "indemnity," now relied on, would defeat them, if they had not previously used it as a ground for defending the original claim on the policy. If the appellant railway company were sued by a third party, injured in an accident by the negligence of both the present parties, it could by third-party notice bring in the respondents and throw on them the whole burden of the claim, although if it had sought for contribution it would have failed, there being no contribution between joint tortfeasors. Even if the mere word "indemnity" would suffice for the appellants' purpose, the whole subject-matter appears to negative such

an application of the word. Again, the liability may arise out of or it may arise in connection with—but it must still arise, and for legal purposes that must mean arise causally, and, since the matter dealt with is a legal liability, that must mean in such casual connection as is required to make somebody liable, who has to be answerable for the apparatus. It is contemplated that the appellant railway company is liable and that its liability has been caused by the presence or the use of the gangway. In the present case the action of the engine-driver was what caused the appellant railway company to be liable. It is said that if the lorry had not been there—*à fortiori* if it had not existed—it would not have been knocked off the gangway, but for legal purposes the lorry was not a contributing cause of the injury to it, but only a *causa sine qua non*. Moreover, it was there pursuant to the terms of the licence for use in a joint operation with the appellant railway company and, as the clause in question is not a clause of defeasance or of exception but only a foundation for an independent cross-claim, I think that there was an implied contractual obligation on the appellant railway company to be reasonably careful not to injure it. Hence the negligence in itself formed a cause of action, and the damage to the lorry was merely the measure of the amount recoverable. The liability was, as a matter of causation, wholly due to the acts and defaults of the appellant railway company and did not arise at all out of or in connection with the presence or the user of the gangway.

If the appellants' construction be adopted I think it must follow that, however reckless the negligence of the engine-driver might be, all the liability thus arising would be covered by the respondents' indemnity. If shunting was carried on in such a manner that the lorry was frequently put out of action or that the respondent company could not prudently use the gangway, except when shunting was not going on at all, the business object of the licence would be greatly prejudiced, if not wholly defeated. The licence to place the lorry and use it in an overhanging position rests, as a practical matter, on the assumption that it will not be prevented from doing so by the mode in which the appellant railway company does its work. When such prevention is caused by carelessness of workmen, injunctions are of no use, and the only way to get it stopped is by suing for and recovering damages. The doctrine of *The Moorcock* (1) is, I am aware, apt to be overworked, but in this case I do not think I am straining it when I say that, even if the words of the clause, as words, would enable the counterclaim to succeed, such a construction in this case would defeat the manifest intention and object of the parties in entering into this arrangement and that accordingly the construction should be rejected. For these reasons, and without relying on rules of construction applicable to contracts to carry subject to exceptions or to contracts to carry safely at all events, I am of opinion that the appeal should be dismissed and I move your Lordships accordingly.

LORD WARRINGTON (read by **LORD ATKIN**) stated the facts as set out ante, and continued: In the argument in this House counsel for the appellants based their case wholly on the counterclaim, viz., granting that the terms of the memorandum did not afford an answer to the action, they rendered a judgment in favour of the respondents of no practical effect inasmuch as they would be bound to repay to the appellants the amount of any damages and costs and further to pay the costs of the defence as between solicitor and client. As to the point No. 2 above mentioned I agree with **MACKINNON, J.**, that, if the memorandum covers claims by the respondents themselves, it is wide enough to include claims founded on negligence. As to point No. 3, whether on the facts alleged the damage arose out of or in connection with the existence or user of the gangway and brackets, I have come to the opposite conclusion.

The damage certainly did not arise out of or in connection with the existence of the gangway and brackets. If the gangway had not been in use, even if it had been in position ready for use, the box truck would have passed clear and no damage would have been done. Did, then, the damage arise out of or in connection with the user of the gangway or brackets? Inasmuch as the respondents alone and persons authorised by them can lawfully use the gangway, the words seem to me to assume that it is an act of the respondents themselves in the course of or in connection with the user of the

A gangway from which the damage arises. In the present case the damage arose not from any act of the respondents in the course of or in connection with the user, but from that of the appellants' servants in driving the box truck against the overhanging lorry. It is true that if the lorry had not been there the damage would not have arisen, but on the other hand but for the act of the appellants' servants the lorry, though in its actual position, would not have been injured, and it seems to me that in determining the present question it is the *causa causans* alone which has to be regarded. If my view on this last point is correct it is sufficient to entail the dismissal of the appeal, and on the more general question I will only add that I agree with the views expressed by my noble and learned friend LORD SUMNER whose judgment I have read. For these reasons I am of opinion that the appeal fails and should be dismissed with costs.

C **LORD ATKIN.**—I have read the judgment of my noble and learned friend LORD SUMNER and I agree with it.

Appeal dismissed.

Solicitors: *A. G. Hubbard; Calder, Woods & Sandiford for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

E

Re ATLANTIC AND PACIFIC FIBRE IMPORTING AND MANUFACTURING CO., LTD. VISCOUNT BURNHAM v. THE COMPANY

F [CHANCERY DIVISION (Clauson, J.), July 5, 1928]

[*Reported* [1928] Ch. 836; 97 L.J.Ch. 369; 140 L.T. 18;
44 T.L.R. 702; 72 Sol. Jo. 598]

Limitation of Action—Acknowledgment—Specialty—Company's debt to debenture holder—Statement in balance sheet of principal and interest owing—Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), ss. 3, 5.

G

The balance sheet of a company which shows the liability of the company in respect of principal and interest due on its debentures is an acknowledgment of its indebtedness to the debenture holders, sufficient to take the case out of the scope of the statutes of limitation, even though the balance sheet is only sent to those debenture holders who are also shareholders in the company, and, therefore, in such a case any debenture holder can maintain an action on his debenture even though that action is begun more than the period of limitation after the debt from the company first became due.

H

Notes. The Civil Procedure Act, 1833, s. 3 and s. 5, were repealed by the Limitation Act, 1939, s. 2 (3) of which provides that an action upon a specialty shall not be brought after the expiration of twelve years from the date when the cause of action accrued.

I

Considered: *Jones v. Bellegrave Properties, Ltd.*, [1949] 2 All E.R. 198.

As to the period of limitation for actions of debt on a specialty, see 24 HALSBURY'S LAWS (3rd Edn.) 219 et seq.; and for cases see 32 DIGEST 394 et seq. For Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

- (1) *Moodie v. Bannister* (1859), 4 Drew. 432; 28 L.J.Ch. 881; 32 L.T.O.S. 376; 5 Jur.N.S. 402; 7 W.R. 278; 62 E.R. 166; 32 Digest 398, 776.
- (2) *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330; 76 L.J.Ch. 316; 96 L.T. 306, C.A.; 32 Digest 414, 919.

- (3) *Read v. Price*, [1909] 2 K.B. 724; 78 L.J.K.B. 1137; 101 L.T. 60; 25 T.L.R. 701, C.A.; 32 Digest 398, 771. **A**
- (4) *Re Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559; 65 L.J.Ch. 400; 74 L.T. 219; 44 W.R. 347; 12 T.L.R. 262; 40 Sol. Jo. 337; 3 Mans. 90; 32 Digest 493, 1546.

Adjourned Summons

The defendant company was incorporated in 1883. During the period covered by the years 1890 to 1902 it raised by the issue of debentures a total amount of £23,925 6s. 8d. All the debentures were of the same amount, viz., £1,110 11s. 8d., and the plaintiff received his debenture on Nov. 19, 1890. The debenture contained a covenant by the company to pay to the person named in the debenture or other the registered holder thereof for the time being interest at the rate of 10 per cent. per annum, payable by half-yearly instalments, and also for repayment, on a date two years after that of the debenture, of the principal sum. The plaintiff, who sued on behalf of himself and all the other debenture holders, contended that, in respect of the debentures, no payment whatever had been made by the company, by way either of principal or of interest. The company did not deny this, but did deny the plaintiff's further contention that in consequence the whole amount, both principal and interest accrued thereon, was owing by the company to the debenture holders. In the years 1907 to 1926 inclusive the company had issued balance sheets, in each of which the amount of £23,925 8s. 6d. was stated to be owing on debentures; and in the balance sheet for the year 1926 the sum of £80,733 2s. 7d. was entered as interest accrued due on the debentures. The plaintiff and some of the other debenture holders were shareholders in the company, and to all of them were sent notices and reports in which were included copies of the balance sheets signed by directors of the company, copies similarly signed being filed every year with the registrar of companies. The company, by its defence, alleged that the debenture holders' claim was barred by s. 3 of the Civil Procedure Act, 1833; in answer to this allegation, the plaintiff alleged that the balance sheets constituted an acknowledgment by the company that the moneys which he and the other debenture holders claimed were in fact due and owing. **B**

By the Civil Procedure Act, 1833: **C**

Section 3 "... all actions of covenant or debt upon any bond or other specialty ... shall be commenced and sued ... within twenty years after the cause of such actions or suits, but not after. ..." Section 5: "Provided always that if any acknowledgments shall have been made, either by writing signed by the party liable by virtue of such ... specialty ... or his agent, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due within twenty years after such acknowledgment by writing. ..." **D**

C. L. Fawell, for the plaintiff, referred to *Moodie v. Bannister* (1), *Re Lacey* (2) and *Read v. Price* (3). **E**

A. P. Vanneck, for the defendant company, referred to *Re Severn and Wye and Severn Bridge Rail. Co.* (4). **F**

CLAUSON, J., stated the facts and continued: The question to be decided is whether the statement in the balance sheets contained in the notices and reports constituted an acknowledgment within the meaning of s. 5 of the Civil Procedure Act, 1833. It was contended on behalf of the defendant company that it was essential, in order to take a case out of the operation of s. 3 of the Act, that the acknowledgment should be given to the obligee or person entitled to bring the action, and that as, in the present case, the reports containing the balance sheets were not sent by the company to all the debenture holders, there was no acknowledgment sufficient to satisfy the requirements of s. 5 of the Act. But that Act, dealing as it does with specialty debts, does not require in terms that the acknowledgment should be given to the claiming creditor, and the acknowledgment need not amount to a fresh promise to pay. In those respects an acknowledgment to be made under that Act differs from an acknowledgment which the Statute of Frauds Amendment Act, 1828, known as Lord Tenterden's Act, requires **G**

to be in writing—an acknowledgment of a simple contract debt with which the Limitation Act, 1623, was concerned. There it was essential that the acknowledgment should be made to the person claiming to enforce it, and should amount to a fresh promise to pay. The total amounts acknowledged in the balance sheet in the report for the year 1926, which is signed by the directors and the secretary of the company, to be liabilities of the company under the debentures are exactly the amounts actually due for principal and accrued interest at the rate of 10 per cent. to the holders of the debentures from the respective dates of their issue. In my judgment, the issue of the balance sheets constituted, in the circumstances, a sufficient acknowledgment of the company's indebtedness to the plaintiff and the other debenture holders under the debentures. There will be a declaration that their claims for principal and interest against the defendant company are not barred by any statute of limitations, and there will be liberty to apply.

Solicitors: *Alfred Cox & Son.*

[Reported by K. R. A. HART, ESQ., Barrister-at-Law.]

HART v. HUDSON BROS., LTD.

[KING'S BENCH DIVISION (Lord Hewart, C.J., Acton and Branson, JJ.), July 20, 1928]

[Reported [1928] 2 K.B. 629; 97 L.J.K.B. 804; 139 L.T. 663; 92 J.P. 170; 44 T.L.R. 820; 72 Sol. Jo. 584; 26 L.G.R. 565; 28 Cox, C.C. 550]

Weights and Measures—False or unjust scale—Proceedings against “actual offender” — Offence under Weights and Measures Act, 1878 (41 & 42 Vict., c. 49), s. 25—Applicability of Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. 5, c. 63), s. 12 (5), s. 15 (1).

The respondents, who were shopkeepers, had in their possession for use for trade a 20 lb. weighing instrument which was $\frac{1}{2}$ oz. deficient in weight. The respondents were summoned under s. 25 of the Weights and Measures Act, 1878, for having a false or unjust scale, and under s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, they brought before the court the shop manager as the person whom they charged as the actual offender. The justices found that the offence had been committed, but that the respondents had used due diligence to enforce the execution of the Act of 1878, and that the manager had committed the offence without their connivance or default. Being of opinion that s. 12 (5) of the Act of 1926 was applicable to the proceedings they dismissed the information against the respondents, and then dealt with the case against the manager.

Held: that as s. 15 (1) of the Act of 1926 provided: “This Act . . . shall be construed as one with the Weights and Measures Acts, 1878 to 1926,” the justices’ decision to dismiss the information against the respondents was right and must be affirmed.

Notes. Applied: *Phillips v. Parnaby*, [1934] All E.R.Rep. 267.

As to legal proceedings under the Weights and Measures Acts, see 33 HALSBURY’S LAWS (2nd Edn.) 702–705; and for cases see 44 DIGEST 133–136, 145. For the Acts see 26 HALSBURY’S STATUTES (2nd Edn.) 1214 et seq.

Cases referred to:

- (1) *Canada Southern Rail Co. v. International Bridge Co.* (1883), 8 App. Cas. 723, P.C.; 42 Digest 664, 745.
- (2) *Willingale v. Norris*, [1909] 1 K.B. 57; 78 L.J.K.B. 69; 99 L.T. 830; 72 J.P. 495; 25 T.L.R. 19; 7 L.G.R. 76; 21 Cox, C.C. 737, D.C.; 42 Digest 780, 2105.

Case Stated by justices for Surrey.

The respondents were charged at Sutton, Surrey, on an information laid by the appellant on behalf of the Surrey County Council with unlawfully having in their possession for use for trade a scale which was false or unjust, contrary to s. 25 of the Weights and Measures Act, 1878. At the hearing it was proved or admitted that on Feb. 3, 1928, an inspector of weights and measures visited the premises of the respondents at 40, High Street, Sutton, where he examined a 20 lb. price-computing weighing instrument which the respondents had in their possession for use for trade. It was found to be $\frac{1}{2}$ oz. deficient in weight. The respondents' manager in the shop agreed that that was so and at the inspector's request adjusted the scale with a balancing key. The inspector re-tested the instrument and found it correct. The respondents gave notice to the appellant under s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, that they intended to bring before the court at the time appointed for hearing the charge their servant, the manager of the branch shop where the offence had been committed, as the person whom they charged as the actual offender. After the commission of the offence had been proved to the justices' satisfaction the respondents proved to the justices' satisfaction that they had used due diligence to enforce the execution of the Weights and Measures Act, 1878, and that the manager had committed the offence in question without their consent, connivance, or wilful default.

The appellant contended that the procedure under s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, was not applicable to proceedings in respect of offences under the Weights and Measures Act, 1878, but that such procedure was applicable only to proceedings under the Act of 1926. The respondents contended that as, by s. 15 (1) of the Act of 1926, that Act was to be construed as one with the Weights and Measures Acts, 1878 to 1926, the provisions of s. 12 (5) of the Act of 1926 must be read into each and all of the earlier Acts so that the safeguards therein provided were applicable in respect of offences under all the Weights and Measures Acts. The justices found that the respondents had committed the offence charged, were of opinion that the provisions of s. 12 (5) of the Act of 1926 were applicable to the proceedings, and dismissed the information against the respondents. They also dismissed the case against the manager on payment of costs.

By s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926:

"Where an employer or principal is charged with an offence against this Act he shall be entitled on information duly laid by him, and on giving not less than three days' notice of his intention to the prosecution, to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence in question without his consent, connivance, or wilful default, the said other person shall be summarily convicted of the offence and the employer or principal shall be exempt from any penalty. . . ."

By s. 15 (1):

"This Act . . . shall be construed as one with the Weights and Measures Acts, 1878 to 1926. . . ."

H. D. Roome for the appellant.

Montgomery, K.C., and *Walter Frampton* for the respondents.

LORD HEWART, C.J., stated the facts and continued: It may be observed that the scale was unsatisfactory, not in the sense that it was wrongly constructed or inherently defective, but only that it was not adjusted by means of a key, a defect quickly remedied in the presence of the inspector. The argument for the appellant is that the procedure under the later statute is not applicable to proceedings taken under the earlier statute. But counsel for the appellant, with his usual candour, has directed our attention to the two cases which are most against him. In *Canada Southern Rail Co. v. International Bridge Co.* (1) **LORD SELBORNE** said (8 App. Cas. at p. 727):

A “It is to be observed that these two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy making it necessary to hold that the later Act has to some extent modified something found in the earlier Act.”

B “Some manifest discrepancy.” Applying that canon, I do not think that there is any manifest discrepancy in giving in the present case the kind of possible defence to the employer which was contemplated in s. 12 (5): see *Willingale v. Norris* (2) per LORD ALVERSTONE, C.J., and BIGHAM, J. It is expressly provided that “This Act [of 1926] shall be construed as one with the Weights and Measures Acts, 1878 to 1926.” Construing the Acts in that way, I find it impossible to say that the justices were wrong in law, and I have come to the conclusion, not without hesitation at first, that the appeal fails.

C The words of WALTON, J., in *Willingale v. Norris* (2) are applicable:

“This case is a striking example of the difficulties and obscurity which arise from legislation by reference to and incorporation of other statutes.”

ACTON, J.—I agree.

D BRANSON, J.—I agree.

Appeal dismissed.

Solicitors: *Wyatt & Co.*, for *Dudley Aukland*, Kingston-upon-Thames; *Smith & Hudson*.

[Reported by J. F. WALKER, Esq., Barrister-at-Law.]

E

F GOSSE MILLERD, LTD. v. CANADIAN GOVERNMENT MERCHANT MARINE, LTD. THE CANADIAN HIGHLANDER

[HOUSE OF LORDS (Lord Hailsham, L.C., Viscount Sumner and Lord Atkin), July 23, 24, 26, November 16, 1928]

G [Reported [1929] A.C. 223; 98 L.J.K.B. 181; 140 L.T. 202; 45 T.L.R. 63;
34 Com. Cas. 94; 17 Asp.M.L.C. 549]

Shipping—Carriage by sea—Negligence—Exclusion of liability—“Act in management of ship”—Act done for safety of ship—Repairs to ship—Misuse of tarpaulins protecting cargo from rain—Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5, c. 22), Sch., art III, r. (2), art. IV, r. 2 (a).

H By art. III, r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924: “Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.” By art. IV, r. 2: “Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.”

J Tinplates were shipped at Swansea in good order and condition on board the defendants’ steamship, the *C. H.*, in No. 5 hold under a bill of lading of which the plaintiffs were the holders, to be delivered by the defendants at Vancouver. After the tinplates had been taken on board, the steamer went to Liverpool to discharge certain lumber cargo. During the discharge of the lumber through the hatchway to No. 5 hold there was rain. While undocking the steamer collided with the dockhead and was damaged in consequence of which she had to be dry-docked and the tail shaft liner removed through a door leading to No. 5 hold.

While she was in dry dock more rain fell, and the learned judge who tried an action by the plaintiffs in respect of damage to the plates found that the damage was due to the wetting received from rain at Liverpool and in the dry dock, which, in turn, was due to the hatches being left open or tarpaulins being moved and not properly replaced. He, accordingly, held that the defendants had failed to carry out the obligation imposed on them by art. III, r. 2, of the Act of 1924, properly and carefully to load, handle, carry, keep, care for and discharge the goods carried, and gave judgment for the plaintiffs, but the Court of Appeal reversed his decision, holding that the defendants were excused from liability under art. IV, r. 2.

Held: "management of the ship" in art. IV, r. 2 (a), referred to an act done for the safety of the ship and not primarily in connection with the cargo; in the present case the cause of the damage was misuse of the tarpaulins which were used to protect the cargo; and, therefore, the defendants had failed to bring themselves within art. IV, r. 2 (a), and were in breach of art. III, r. 2, and the plaintiffs were entitled to succeed.

Notes. Considered: *Foreman and Ellams v. Federal Steam Navigation Co.*, [1928] 2 K.B. 424; *Silver v. Ocean Steamship Co.* (1929), 46 T.L.R. 78. Referred to: *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] All E.R.Rep. 480; *The Athelvictor*, [1946] P. 42; *G. H. Renton & Co. v. Palmyra Trading Corp'n. of Panama*, [1956] 3 All E.R. 957.

As to the carriage of goods under the Carriage of Goods by Sea Act, 1924, see 30 HALSBURY'S LAWS (2nd Edn.) 606 et seq.; and for cases see 41 DIGEST 433 et seq. For the Act of 1924, see 23 HALSBURY'S STATUTES (2nd Edn.) 884.

Cases referred to:

- (1) *The Ferro*, [1893] P. 38; 62 L.J.P. 48; 68 L.T. 418; 7 Asp.M.L.C. 309; 1 R. 562; 41 Digest 432, 2714.
- (2) *The Glenochil*, [1896] P. 10; 65 L.J.P. 1; 73 L.T. 416; 8 Asp.M.L.C. 218; 41 Digest 426, 2683.
- (3) *The Rodney*, [1900] P. 112; 69 L.J.P. 29; 82 L.T. 27; 48 W.R. 527; 16 T.L.R. 183; 9 Asp.M.L.C. 39, D.C.; 41 Digest 431, 2711.
- (4) *Rowson v. Atlantic Transport Co.*, [1903] 2 K.B. 666; 72 L.J.K.B. 811; 89 L.T. 204; 52 W.R. 85; 19 T.L.R. 668; 47 Sol. Jo. 738; 9 Asp.M.L.C. 458; 9 Com. Cas. 33, C. A.; 41 Digest 432, 2712.
- (5) *Brown & Co. v. Harrison* (1927), 96 L.J.K.B. 1025; 43 T.L.R. 633; sub nom. *Brown & Co., Ltd. v. Harrison*, *Hourani v. Harrison*, 137 L.T. 549; 17 Asp. M.L.C. 294; 32 Com. Cas. 305, C.A.; 41 Digest 433, 2720.
- (6) *Knott v. Botany Mills* (1900), 179 U.S. 69.
- (7) *The Germanic* (1905), 196 U.S. 589.

Appeal from an order of the Court of Appeal (SCRUTTON and SARGANT, L.JJ.; GREER, L.J., dissenting), reported [1928] 1 K.B. 717.

The plaintiffs, who were engaged in the canning industry in Vancouver, British Columbia, claimed damages from the defendants, alleging breach of duty or breach of contract in and about the carriage of tinplates in the defendants' steamer, *Canadian Highlander*. In February, 1925, the plaintiffs ordered about 20,000 boxes of tinplates from Messrs. Baldwins, Ltd., South Wales, and 5,808 of these tinplates were shipped at Swansea in the above-named steamship, under a bill of lading of which the plaintiffs were the holders, to be delivered by the defendants at Vancouver. After the tinplates had been taken on board at Swansea the steamer went to Liverpool to discharge certain lumber cargo, arriving there on Feb. 8, and on the following day the lumber cargo was discharged. On Feb. 10 the steamer collided with the dockhead while coming out of the dock and was damaged, in consequence of which part of the cargo had to be shifted and the steamer was kept in dock until April when she resumed her voyage, arriving at Vancouver on May 17. There was rain on some of the days when the repairs were being done at Liverpool, and the hatchways were sometimes left open, and when the cargo of tinplates was discharged it was found that a large quantity of them was rusty,

A stained and depreciated by contact with fresh water. The plaintiffs contended that the tinplates were in good order and condition when shipped, and that the damage was due to the defendants' failure properly and carefully to load, stow, carry, keep, care for and discharge the goods, or, alternatively, that the defendants were negligent in the loading, stowage, carriage, custody, care, and discharge of the goods. The defendants denied the plaintiffs' allegations and claimed immunity from responsibility for the damage, under art. IV, r. 2, of the schedule to the Carriage of Goods by Sea Act, 1924. WRIGHT, J., who tried the action, found on the evidence that the damage to the tinplates was due to the wetting received from rain at Liverpool which, in turn, was due to the hatches being left open, and that the defendants had failed to carry out the obligation imposed on them by art. III, r. 2, of the schedule to the Carriage of Goods by Sea Act, 1924, properly and carefully to load, handle, carry, keep, care for and discharge the goods carried, and gave judgment for the plaintiffs. The Court of Appeal (SCRUTTON and SARGANT, L.JJ., GREER, L.J., dissenting) held that on the facts found by WRIGHT, J., the damage to the cargo was due to the neglect or default of the servants of the carrier in the navigation or in the management of the ship within the meaning of art. IV, r. 2, of the schedule to the Carriage of Goods by Sea Act, 1924, and that the defendants were, therefore, immune from responsibility for the damage to the cargo. The plaintiffs appealed.

Jowitt, K.C., and *G. St. C. Pilcher* for the appellants.

Raeburn, K.C., and *Sir Robert Aske* for the respondents.

The House took time for consideration.

Nov. 16. The following opinions were read.

E LORD HAILSHAM, L.C.—This is an action brought by the appellants against the respondents, claiming damages for injury done to their tinplates on a voyage from Swansea to Vancouver in a ship belonging to the respondents and known as the *Canadian Highlander*. At the trial there was a great conflict as to the cause of the damage to the tinplates, but on the hearing before the Court of Appeal and at your Lordships' Bar both sides accepted the findings of fact of the learned trial judge; and it is therefore convenient to state these findings at once in order to formulate the questions of law which are raised in the appeal.

F Under a bill of lading dated Feb. 6, 1925, 5,808 boxes of tinplates belonging to the appellants were shipped at Swansea for carriage to Vancouver by the *Canadian Highlander*. The whole of these tinplates were stowed in No. 5 lower hold, which is the aftermost hold in the ship. After loading these tinplates the *Canadian Highlander* proceeded to Liverpool in order to discharge inward cargo and to load further outward cargo. On Feb. 9 certain lumber, forming part of the inward cargo, was unloaded from the No. 5 'tween decks at Liverpool. During the discharge of this lumber through the hatchway of No. 5 hold there was heavy rain. On Feb. 10, whilst undocking, the *Canadian Highlander* collided with a pier and damaged her stern. As a result, it became necessary to dry dock the vessel and to do extensive repairs. During the course of the repairs it was discovered that the tail shaft liner was cracked and it became necessary to remove the shaft in order that a new liner might be fitted to it; for this purpose it was necessary to shift some of the cargo in the No. 4 hold and to remove the tail shaft liner through a door leading from the tunnel recess into No. 5 hold. The repairs continued until April 4, when the *Canadian Highlander* was undocked and proceeded to Glasgow, and thence to Vancouver, where she arrived on May 17. On her arrival it was found that the appellants' tinplates had sustained serious damage by fresh water. The learned judge came to the conclusion that during the vessel's stay in dry dock there was carelessness in moving and replacing the tarpaulins which were supposed to cover the No. 5 hold when work was being done there, and that in consequence rain got into the No. 5 hold and did the damage; and that probably there was also carelessness with regard to the use of the tarpaulins on Feb. 9, when the lumber was being unloaded, and that on that occasion also some rain was admitted. The learned judge seems to have acquitted the ship's officers of any lack of care, and there

was no evidence to enable him to decide who were the persons responsible for the negligence which occasioned the damage. From time to time the hold seems to have been entered by the stevedores' men, by members of the crew, by surveyors, and by the men employed by the repairers; and it is easy to understand that one or more of these persons may not have been sufficiently scrupulous in replacing the tarpaulins on their entrance to, or exit from, the hold, or in preventing the water which had accumulated on the tarpaulins from finding its way into the hold. The appellants relied on r. 2 of art. III of the Rules relating to Bills of Lading contained in the schedule to the Carriage of Goods by Sea Act, 1924, which enacts as follows:

"Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

It was not suggested on either side that there were any provisions in the bill of lading material to be considered apart from the articles contained in the statute, but the respondents relied upon r. 2 of art. IV, which provides that

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

From the statement of the facts as found by the learned judge it could not be disputed that the respondents had failed properly and carefully to carry, keep, and care for the goods carried. But the respondents pointed out that the obligation imposed upon them was expressly made subject to the provisions of art. IV, and they claimed that the loss or damage complained of resulted from an act, neglect, or default of their servants in the management of the ship. The argument at the Bar turned mainly upon the meaning to be placed upon the expression "management of the ship" in that rule. The words in question first appear in an English statute in the Act now being considered, but nevertheless they have a long judicial history in this country. The same words are to be found in the well-known Harter Act, 1893, of the United States, and as a consequence they have often been incorporated in bills of lading which have been the subject of judicial consideration in the courts in this country. I am unable to find any reason for supposing that the words as used by the legislature in the Act of 1924 have any different meaning from that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date, and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion.

In 1893, in *The Ferro* (1), certain oranges had been damaged by the negligent stowage of the stevedore. It was held by the Divisional Court that the negligent stowage of the cargo was not neglect or default in the management of the ship. GORELL BARNES, J., says ([1893] P. at p. 46):

"I think it is desirable also to express the view which I hold about the question turning on the construction of the words 'management of the ship.' I am not satisfied that they go much, if at all, beyond the word 'navigation.'"

SIR FRANCIS JEUNE says ([1893] P. at p. 44):

"It would be an improper use of language to include bad stowage in such a term. It is not difficult to understand why the word 'management' was introduced, because inasmuch as navigation is defined as something affecting the safe sailing of the ship . . . it is easy to see that there might be things which it would be important to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation, for example, might be management of the ship, but would have nothing to do with the navigation."

In *The Glenochil* (2) the same two learned judges, sitting as a Divisional Court, held that the words did protect the shipowner for damage done by pumping water into the ballast tank in order to stiffen the ship without ascertaining that a pipe had become broken, and thereby letting water into the cargo. GORELL BARNES, J., says ([1896] P. at p. 19):

A "There will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.' "

B
C SIR FRANCIS JEUNE says ([1896] P. at p. 15):

"It seems to me clear that the word 'management' goes somewhat beyond—perhaps not much beyond—navigation, but far enough to take in this very class of acts which do not affect the sailing or movements of the vessel, but do affect the vessel herself."

C And referring to his own judgment in *The Ferro* (1), he says:

"It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of vessel indirectly affecting the cargo."

D The principles enunciated in this case have repeatedly been cited since with approval in this country and in America. The same two learned judges applied them in *The Rodney* (3), and they were accepted by the Court of Appeal in *Rowson v. Atlantic Transport Co.* (4). In that case the Court of Appeal held that carelessness in handling the refrigerating apparatus of the vessel, resulting in damage to the cargo, must be regarded as falling within the expression, on the ground that the refrigerating apparatus was used for the ship's provisions as well as for the cargo, and, therefore, that negligence in managing it was negligence in management of the ship. I do not think it necessary or desirable to discuss whether the Court of Appeal was right in their application of the principle in that particular case. I refer to the judgment only because it accepted as the basis of the decision the construction which had been placed upon the words in *The Glenochil* (2).

F In *Brown & Co., Ltd. v. Harrison, Hourani v. Harrison* (5) the Court of Appeal had to consider the meaning to be attached to the words of art. IV, r. 2, in a case in which loss was caused by the pilfering of the stevedore's men whilst the ship was being discharged. The court held that this did not fall within the expression "management of the ship"; but both BANKES, L.J., and ATKIN, L.J., discussed the meaning to be placed on the expression. BANKES, L.J., reviews the authorities both in this country and in the United States; he points out that the principle laid down in *The Glenochil* (2) has been accepted in the Supreme Court of the United States as being correct, and he adopts and applies that principle to the case which he is then considering. The learned judge expresses the distinction as being between damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing, as is sometimes said in some of the authorities, solely with the goods and not directly or indirectly with the ship herself. ATKIN, L.J., says:

"That there is a clear distinction drawn between goods and ship: and when they talk of the word 'ship' they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea."

I In my judgment, the principle laid down in *The Glenochil* (2) and accepted by the Supreme Court of the United States in cases arising under the American Harter Act, and affirmed and applied by the Court of Appeal in the *Hourani Case* (5) under the present English statute, is the correct one to apply. Necessarily, there may be cases on the border line, depending upon their own particular facts; but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as SIR FRANCIS JEUNE puts it, there ought not to be very great difficulty in arriving at a proper conclusion. I expressly refrain from a discussion of the cases of carelessness in handling refrigerating apparatus. It appears to me that if the test which I have extracted from the earlier cases is the correct

one, it follows that the appellants are entitled to recover in the present case. It is clear that the tinplates were not safely and properly cared for or carried; and it is for the respondents then to prove that they are protected from liability by the provisions of art. IV, r. 2 (a), and that the damage was occasioned through the neglect or default of their servants in the management of the ship. In my judgment, they have not even shown that the persons who were negligent were their servants; but, even if it can be assumed that the negligence in dealing with the tarpaulins was by members of the crew, such negligence was not negligence in the management of the ship, and, therefore, is not negligence with regard to which art. IV, r. 2 (a), affords any protection. It follows that the judgment of the majority of the Court of Appeal was wrong, that the appeal must be allowed with costs here and below, and that the judgment of the trial judge must be restored. I move your Lordships accordingly. My noble and learned friend **LORD ATKIN** desires me to say that he concurs in the judgment I have just delivered.

VISCOUNT SUMNER.—I agree, as the cargo in question was shipped in good order and condition and was delivered damaged, in a manner which was preventible and ought not to have been allowed to occur, there was sufficient evidence of a breach by the carrier of his obligations under art. III, r. 2, of the Act of 1924, to shift to him the onus of bringing the cause of the damage specifically within art. IV, r. 2, so as to obtain the relief for which it provides.

The trial judge's finding is not very explicitly given, and the evidence as to the precise way in which the damage occurred is not explicit at all, but I accept the view, on which the Court of Appeal proceeded, that the fresh water which wetted and damaged the tinplates got through the hatch of No. 5 hold into the shelter-deck and thence reached the lower hold; that it did so because from time to time during the various operations one or more sections of that hatch had to be raised to permit egress and ingress for men, some of whom were in the shipowner's employment and some not, who had to go below for these purposes, and because the ship's tarpaulins, which ought to have been placed, replaced, and kept in the proper position, so as to exclude the rain, were not so used by reason of neglect on the part of the ship's officers or some of them in the oversight of what was going on. It is not known exactly how the rain was suffered to get in or in what exact respect the handling and arrangement of the tarpaulins was insufficient, but it is assumed that more vigilant supervision would have prevented any material admission of the rain. What fell, while timber cargo was being discharged, is admitted to have been small in quantity and almost negligible in its effect, and, although the rain was more copious while the ship was in dry dock, no one can estimate in quantity or discriminate between damage, when the 'tween-decks were being chipped, caulked, and painted, and damage when the lower hold was being entered for various purposes. We, accordingly, approach the question whether this default on the officers' part was or was not default in the management of the ship without being able to distinguish the relative importance to the case in this connection of discharging cargo, of painting and caulking 'tween-decks, both being operations carried out by the crew, and of repairs and renewals to machinery and hull carried out by ship-repairers.

In the Court of Appeal **SCRUTTON** and **SARGANT, L.JJ.**, agreed that the exception of default in the management of the ship protected the shipowner in these circumstances, but on very different grounds. The former says ([1928] 1 K.B. at p. 726):

"Assuming that the words deal with the management of the ship as a physical entity, and not management of the cargo-carrying adventure, on which the shipowner and cargo-owner have agreed to use the ship, here what has been managed is the hatches of No. 5 hold, an essential physical part of the ship. I cannot understand why, on the words themselves, this is not negligence in the management of the ship, or a substantial physical part of the ship."

SARGANT, L.J., without agreeing that there is necessarily management of the ship so long as a physical part of the vessel is affected, says ([1928] 1 K.B. at p. 736) that the expression covers

A "operations with regard to the ship as a whole and for ship's purposes and not merely operations in relation to the cargo . . . although the result of the negligence may be limited to damage to cargo and may not imperil or injure the ship at all. . . . Here the operations were for the purpose of repairing damage to the structure of the ship and of scraping and painting parts of the ship, and had nothing at all to do with the care of the cargo. . . . The primary, or rather the sole, nature and purpose of the operations in which the negligence occurred concerned the ship as a whole."

For the following reasons I am unable to accept either of their views. I concur in the judgment of GREER, L.J. The intention of this legislation in dealing with the liability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain under which he should be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship. Obviously his position was to be one of restricted exemption. If management of the ship includes any part of the ship or any operation with regard to the ship as a whole, which is carried out for ship's purposes and not merely in relation to cargo, I think that the shipowner's position would be certainly no less favourable than it was before under voluntary bills of lading, and probably more so, for on this construction the obligation of art. III, r. 2, to take charge of the cargo is practically eviscerated and its business efficacy is frustrated. In every set of circumstances, of common occurrence at any rate, the shipowner would be relieved. Considering the provisions of the Act of 1924 and the circumstances in which it was passed, such an interpretation is admissible only if the words used are clear to that effect, and to my mind they are not.

When the legislature gave effect in 1924 to the labours of the International Conferences on Maritime Law of 1922 and 1923, it must be taken to have been aware of the English decisions, which from *The Ferro* (1) in 1893 onwards had construed the words reproduced in art. IV, r. 2, and as that line of decision had covered some thirty years and the clause had remained in general use in bills of lading, I think it must be taken that the legislature intended to confirm the construction thus judicially arrived at, except in so far as, by introducing variations in the language used, it clearly made a change. Of foreign decisions, of course, the legislature is not deemed to take notice, and, although the conference was doubtless well acquainted with the United States cases, it has not yet been held that the legislature of this country is deemed to know what those whose reports or conventions it affirms have been familiar with. *Primâ facie*, therefore, the interpretation of the words in question, which had been laid down in the English decisions before 1924, had the approval of the legislature and is not to be doubted. Now, *The Ferro* (1) had decided that negligent stowage was not neglect in the management of the ship, and the succeeding cases had brought acts, which certainly seem to strain the word "management" to the utmost, within the scope of the clause simply because they were done for the safety of the ship herself, regarded as a ship and not as a cargo carrier, and were not done primarily in the interest of some particular cargo. It seems to me that the view of SCRUTTON, L.J., involves a dissent from these decisions, and he expressly says of United States cases, which follow the same line, that he would have decided several of them otherwise. I do not think this is competent, unless the language or the structure of the new legislation clearly departs from the words of the old clauses. By forbearing to define "management of the ship," though "ship" is specially defined with reference to the function of carrying cargo (art. I), and making the obligation of care in art. III, r. 2, expressly subject to the provisions of art. IV, the legislature has, in my opinion, shown a clear intention to continue and enforce the old clause as it was previously understood and regularly construed by the courts of law.

If one examines the language of the article apart from any previous decisions, I think one fails to find in it words to support the view of SCRUTTON, L.J. The ship is the subject both of navigation and of management, and this lends little support to the

construction that management of any part of a ship will satisfy the words. It is the whole ship that is navigated and not any part of it, even though the neglect or default may directly operate upon only a particular part of the ship or its equipment. Why should it be otherwise with management, or why in the case of management is the clause to be read as "of the ship or any part thereof," but in the case of navigation to be read simply as it is expressed? In neither case is it material to know what the thing negligently dealt with may be, provided the operation in which the neglect occurs is either "navigation or management" but in both cases alike "of the ship." The words "of the ship" are otiose, if it is the negligent navigation or management alone that matters. If any effect is to be given to them, they qualify and define the navigation and the management referred to, and do so in each case in the same way. If the navigation is of the entire ship, so must the management be. Of course, in both cases alike some one, and, perhaps, very subordinate, part of the ship or its equipment may be the object which is immediately dealt with negligently, but neglect in regard to that object must still be neglect in the management of the ship if it is to avail the shipowner as a defence.

In adopting this view of the words of the Act and of their correspondence with the construction put upon the old bill-of-lading clause from *The Ferro* (1) to *Rowson v. Atlantic Transport Co.* (4) I am fortified by the weighty judgments of the Court of Appeal in *Hourani v. Harrison* (5) and by a series of recent decisions in the High Court. I think it is of importance to notice how uniformly since 1893 the English courts have interpreted the decisions, down to and including *Rowson's Case* (4), in the sense I have ventured to suggest, and how generally a similar interpretation of similar words has been adopted in the United States. Hardly anywhere, and nowhere with real authority, has SCRUTTON, L.J.'s construction been laid down. So uniform a current of decision can only be departed from now upon the clearest grounds. The respondents' counsel laid great stress in argument on the language used in *Rowson's Case* (4), especially by KENNEDY, J., and by VAUGHAN WILLIAMS, L.J., and on some differences between the English decisions and those in the United States, notably between *The Glenochil* (2), on the one side, and *Knott v. Botany Mills* (6) and *The Germanic* (7) on the other. These seem to me to be differences in the wording of the reasons given, but not in the principle or in the view taken of the particular facts to which the claim is applied. No one can profess that the language used in the different judgments has been uniformly happy. No one can deny that wide differences of view may well be taken of the matters of fact which arise in this class of case, even though between them there is a strong similarity. The management of the ship "as a ship" or "quâ" ship or "quado" ship, and "primary object" and "secondary bearing" are expressions of which I may be, perhaps, allowed to speak with cold acquiescence without presuming to better them, and as for the facts it is never wise to try to decide case B because the part of the ship mishandled is "like" the part mishandled in case A. In *Knott's Case* (6) the cargo should never have been so stowed that, if the ship got down by the head for a short time, the sugar would wet the wool, nor should the cargo in *The Germanic* (7) have been discharged, regardless of compensatory adjustment, so as to upset the previous stability of the ship and damage the cargo. Both cases follow *The Ferro* (1). As for *Rowson's Case* (4), I do not think the expressions relied on really differ from those of JEUNE, P., and BARNES, J., nor, as it seems to me, did the learned judges think they were differing from their predecessors. As to the facts of that case and the way in which the Court of Appeal regarded them, I am quite willing to defer any observations till an opportunity arises of considering refrigerating machinery as a whole, though the view I have formed of the general meaning of the clause must, so far as I am concerned, remain.

The view of SARGANT, L.J., seems to me to have been based on a misunderstanding of the facts. Because the operations were repairing damage and scraping and painting 'tween-decks, and so had nothing to do with the cargo, he considered that the neglect or default occurred in the management of the ship as a whole, though incidentally it was the cargo that suffered by them. This is not how WRIGHT, J., regarded the case, nor, in my opinion, do the facts bear it out, but, as far as the interpretation of the

- A** clause goes, the learned lord justice accepts the current of authority and not the construction of SCRUTTON, L.J. What did the damage was misuse of the tarpaulins. Now the tarpaulins were used to protect the cargo. They were put over the hatch, as they always are, to keep water out of cargo holds. They should have been so arranged, when the hatch boards were taken off, as to prevent water from getting to the cargo. It was not a question of letting light into the 'tween-decks; they were lit by electricity.
- B** There is no evidence that an amount of water entered that would have done any harm to an empty hold or to the ship as a ship. Water sufficient when soaked into the wood of the boxes to rust the tinplates in the course of a voyage through the tropics might well have been harmless if it merely ran into the bilges. There is neither fact nor finding to the contrary. I think it quite plain that the particular use of the tarpaulins which was neglected was a precaution solely in the interest of the cargo. While
- C** the ship's work was going on these special precautions were required as cargo operations. They were no part of the operations of shifting the liner of the tail shaft or scraping the 'tween-decks.

- I would add one thing more. Even if the contention was right in fact, it does not cover the damage done by the admission of rain water while the hatches were off solely for the purpose of discharging cargo. WRIGHT, J., seems to have found, though not
- D** with much confidence, that some damage was done then. He did not say how much, for the evidence did not enable him to do so. It is true that counsel for the appellants admitted, and the Court of Appeal thought, that it was much less than the damage done afterwards; but unless it be held that negligence merely in discharging cargo is negligence in the management of the ship it is incumbent on the shipowner, on whom the whole burden of proving this defence falls, to show how much damage was done in
- E** the subsequent operations, because it is only in respect of them that he can claim protection. This he has failed to do, and in consequence he has failed to show to what extent in money his *primâ facie* liability for the whole damage ought to be reduced.

Appeal allowed.

Solicitors: *William A. Crump & Son; Botterell & Roche.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

A

WOOLLATT *v.* STANLEY

[KING'S BENCH DIVISION (Salter, J.), February 14, 15, 1928]

[Reported 138 L.T. 620]

Bill of Exchange—Alteration—Apparent alteration—Test to be applied—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 64 (1).

B

By the Bills of Exchange Act, 1882, s. 64 (1) "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration and subsequent endorers. Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to the original tenour."

C

An alteration is "apparent" within the meaning of s. 64 (1) if it is of such a kind that it would be observed and noticed by an intending holder scrutinising the document with reasonable care.

D

Dictum of DENMAN, J., in *Leeds and County Bank, Ltd. v. Walker* (1883), (1), 11 Q.B.D. at p. 90, not followed.

Per *Curiam*: The onus is on the person who seeks to bring himself within the above proviso to show that the alteration is not apparent.

Notes. As to alteration of a bill of exchange or of its acceptance, see 3 HALSBURY'S LAWS (3rd Edn.) 231; for cases see 6 DIGEST 372-386; and for the Bills of Exchange Act, 1882, s. 64 (1), see 2 HALSBURY'S STATUTES (2nd Edn.) 539.

E

Case referred to:

(1) *Leeds and County Bank, Ltd. v. Walker* (1883), 11 Q.B.D. 84; 52 L.J.Q.B. 590; 47 J.P. 502; 3 Digest 130, 57.

Action tried before SALTER, J., without a jury.

F

The plaintiff Woollatt and the defendant Dutton were co-trustees of a trust fund settled by one Stanley. Certain advances were made by the trustees out of the trust moneys at Stanley's request to relieve Stanley of financial difficulties in which he found himself. The plaintiff eventually protested against this course, and Stanley and Dutton accordingly endeavoured to raise money by means of a bill of exchange. On Sept. 7, 1926, a bill of exchange for £200 payable at three months was drawn by Dutton, and accepted by Stanley. The bill was dated Sept. 7, 1926, and was payable three months after date. The bill was endorsed by two persons, named Burton and Andrews, as accommodation parties, on Sept. 7 and 8 respectively. Dutton and Stanley together attempted to get the bill discounted, but in this they failed. At some date before Sept. 30 the bill was altered by the drawer Dutton, at the acceptor Stanley's request, by the insertion of the figure 1 before the figure 7, and the figure 1 was at a later date, but still prior to Sept. 30, altered into the figure 2. On Sept. 30 an interview between the plaintiff Dutton and Stanley took place. The plaintiff agreed that he would be a party to a further loan of £197 from the trust fund if the bill were delivered to him and further agreed, as his lordship found, that he would keep the bill till its maturity, and not present it beforehand. The bill was dishonoured on presentation, and the plaintiff then sued the acceptor Stanley, the drawer Dutton, and the two endorers Andrews and Burton. After the commencement of the action the plaintiff invited Dutton to join with him as co-plaintiff in his capacity as drawer, but he refused, and accordingly remained a defendant. The acceptor Stanley did not contest the action. The drawer Dutton contended that there had been a collateral agreement that the bill should be held by the plaintiff merely as security for the advance and should not be negotiated at all, but the judge found as a fact that no such agreement had taken place. The two endorers contended that they had been induced to endorse by reason of fraudulent statements made to them by Dutton and Stanley, but the judge found that

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- A** this was not the case. The endorsers further relied on the alteration of the date of the bill, and on s. 64 of the Bills of Exchange Act, 1882.
- A. Hildesley (E. W. Cave, K.C., with him) for the plaintiff.*
Ifor Lloyd for the defendant drawer.
J. J. Cremllyn for the defendant endorsers.
- B** **SALTER, J.**, found the facts to be as above set out and continued: I pass to the question of alteration with which I now deal. The two defendants are accommodation parties and liable as such under s. 28 of the Bills of Exchange Act, 1882, and the plaintiff is holder in due course under s. 29 and, therefore, if the endorsements were not obtained by fraud [as his lordship had already found to be the case] the plaintiff is entitled to all the powers of a holder as a holder in due course.
- C** Therefore, apart from the question of the alteration of the date, I should give judgment for the plaintiff against all three defendants. On the question of the alteration there is curiously little authority. Section 64 (1) of the Bills of Exchange Act first sets out the old common law:
- D** “Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorised, or assented to the alteration and subsequent endorsers.”
- The defendant Dutton, the drawer, cannot avail himself of the section as he actually made the alteration himself at the request of the acceptor. Section 64 (1) contains, however, besides the statement of the old common law, a proviso in favour of holders in due course as follows:
- E** “Provided that—Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenour.”
- There is no doubt that the bill of exchange in this case has been altered and altered materially. The question is whether the alteration is “not apparent.” The onus is on the plaintiff who seeks to bring himself within the proviso to show that the alteration is not apparent. Now, what is the meaning of an “apparent” or “not apparent” alteration? The alteration of a document may be apparent to a young man with good sight and may not be at all apparent to an old man with dim sight; it may be apparent by daylight and not apparent by artificial light; what is apparent at a glance to an expert may not be apparent to an ordinary reader.
- G** I have not here got to decide whether this is a question for a jury or for the judge. In this case the question whether the alteration is an apparent alteration is a question of fact for me. Now the only authority to which I have been referred, and apparently the only authority that there is on the question, is a short passage in the judgment of **DENMAN, J.**, in *Leeds and County Bank, Ltd. v. Walker* (1), in which he uses these words (11 Q.B.D. at p. 90):
- H** “By the word ‘apparent’ I do not think it is meant that the holder only should not have had the means of detecting the alteration. If the party sought to be bound can at once discern by some incongruity on the face of the note, and point out to the holder that it is not what it was, that is to say, that it has been materially and fraudulently altered, I think the alteration is an ‘apparent’ one, even if it is not an obvious one to all mankind.”
- I** With very great respect, I am not at all sure that **DENMAN, J.**’s test would apply in a case of this sort. It is suggested that the test would be for the party who is to be held liable to examine the bill, and if he can then point out to the holder that it has been altered and if the holder agrees after it has been pointed out to him, then that constitutes an apparent alteration. The person who is called upon to pay, on looking at the document presented to him, will see that the document is dated and may then be able to see that there has been an alteration, but it does not necessarily follow that this is an apparent alteration. The test which ought to be employed is this:—is the

alteration of such a kind that it would be observed and noticed by the intending holder when he scrutinises the document which he is contemplating taking and examines it as a negotiable instrument? A negotiable instrument is an important document and a person who proposes to become holder would naturally scrutinise it with reasonable care. If the intending holder on scrutinising the document with reasonable care, would observe that it has been altered, then that constitutes an apparent alteration.

In this case, I am of the opinion that the alteration is a most apparent alteration. I think that anyone looking at this document in the most cursory manner would see first that the date has been altered. One can see that the date has been Sept. 7, and that it is now Sept. 27, the figure 2 having been added. If one looks with a little more care, one can see that it was originally Sept. 7, that then a figure 1 has been in front of the figure 7 and later the figure 1 has been altered into the figure 2, making the date the 27th. The next thing I ask myself is, if this is an apparent alteration, what is the result? The result is that the holder is not able to enforce the bill as against the two endorsers, but as against Dutton, the drawer, only.

I therefore give judgment for the plaintiff against the defendant Dutton and judgment for the defendant endorsers, Burton and Andrews.

Solicitors: *Lea & Lea*; *W. Foley for Doughty & Fraser*, Manchester.

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

CANNON BREWERY CO., LTD. v. SIGNAL PRESS, LTD.

[KING'S BENCH DIVISION (Humphreys, J.), April 18, 1928]

[Reported 139 L.T. 384; 44 T.L.R. 486; 72 Sol. Jo. 285]

Landlord and Tenant—Notice under Law of Property Act, 1925—Service—Notice left with person on premises—Adequacy of service—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 196 (3).

By the Law of Property Act, 1925, s. 196 (3): "Any notice required or authorised by this Act to be served shall be sufficiently served if it . . . in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage. . ."

Where a notice addressed to the lessee is left with a person on the premises, and there are reasonable grounds for supposing that that person will pass it on to the lessee, the notice is "sufficiently served" within the meaning of s. 196 (3).

Notes. As to service of such notices, see 23 HALSBURY'S LAWS (3rd Edn.) 676; for cases see 31 DIGEST (Repl.) 542; and for the Law of Property Act, 1925, s. 196 (3), see 20 HALSBURY'S STATUTES (2nd Edn.) 819.

Action tried before HUMPHREYS, J., without a jury.

The plaintiffs, the Cannon Brewery Co., Ltd., were the reversioners expectant upon a lease of premises known as No. 170, St. John Street. The premises were let by an indenture made June 23, 1876, by the plaintiffs' predecessors in title to one Lemaitre. The indenture contained lessee's covenants to keep all buildings at all times during the term in good and substantial repair, and to remedy all wants of reparation within three calendar months after service of a notice of dilapidations. There was a proviso for re-entry for breach of any lessee's covenant. The defendants were in possession of the premises by themselves or their tenants as underlessees by way of mortgage, Lemaitre having mortgaged his term by a sub-lease, and the mortgage having subsequently been assigned to the defendants. On Jan. 14, 1927, a schedule of dilapidations, addressed to John B. Lemaitre, had been handed, by a clerk of the plaintiffs' solicitors,

A to a forewoman of the firm in occupation of the premises. On an action for possession being brought by the plaintiffs against various defendants as occupying the premises by themselves or their tenants, the action was contested only by George Lewis and Percy Lewis as trustees of the estate of one Joseph Lewis, deceased. They contended, first, that the payment of a yearly rent by them to the plaintiffs instead of the original lessee created by implication a new yearly tenancy, so that they were not bound by the covenant to repair contained in the lease; and, secondly, that there had been no valid service of the notice of dilapidations.

Cartwright Sharp and E. H. Blain for the plaintiffs.

C. L. Henderson for the defendants George Lewis and Percy Lewis.

C **HUMPHREYS, J.**—In this action the plaintiffs claim possession of certain premises on the ground of breach of covenant to keep the same in good and substantial repair. It is not disputed that the plaintiffs are entitled to the reversion of the interest created in June, 1876, by the lease of the premises to one Lemaitre, and the defendants are admittedly the landlords of the persons at present in possession. It is also admitted that the defendants are in possession in virtue of a mortgage, by way of underlease, granted by Lemaitre in 1884 to certain persons from whom Mr. Joseph Lewis, of whose D estates the present defendants are trustees, derived his title. Further, it is not disputed that there has been a breach of the covenant to repair contained in the lease, and that a breach of that covenant entitles the plaintiffs to ask for possession of the premises.

The plaintiffs say that they are entitled to possession, inasmuch as they have served a notice to repair as prescribed by s. 146 of the Law of Property Act, 1925, which is a condition precedent to such a claim, and the defendants have not complied with that E notice. The defendants contend that no valid notice has been served. The notice, which was addressed to John B. Lemaitre, the original lessee of the premises, was in fact taken by a clerk of the plaintiffs' solicitors, and handed to a forewoman of the firm now in possession on the premises. The question is, Does such service amount to a good service of the notice? The notice was admittedly correct in form. Lemaitre was not in possession, and it is common ground that, so far as these premises are concerned, F he had disappeared a substantial time ago. Section 196 of the Act of 1925 prescribes the method in which the notice may be served, and by sub-s. (3) of that section the notice is deemed to be sufficiently served if it is affixed or left for the lessee on the land or any house or building comprised in the lease. Counsel for the defendants argued that the notice must be physically affixed to the building or physically left on it in the sense of being left on one of the walls or on the floor, or possibly on a table resting on G the floor of the building, and that it is not sufficient that the notice should be left with any person at all other than the lessee, unless that person has been specifically authorised by the lessee to accept service. In my view, the expression "left for him" includes the case of a notice which is left in the hands of some person who is in fact on the premises, and in regard to whom there is reasonable ground for supposing that he or she will hand it to the lessee, if the lessee should be available for that purpose. I H do not say that there is necessarily a good service of a notice if it is left in the hands of a person who, to the knowledge of the parties, is a mere visitor to the premises and happens at the moment to be leaving the house. On the facts of this case, however, I am satisfied that the notice was left for the lessee and was left for him on the premises.

I A further point was taken by counsel for the defendants, that the facts of this case showed that the defendants Lewis were yearly tenants holding from the plaintiffs. Counsel said that that must be assumed and implied in law from the fact that they regularly paid rent to the plaintiffs who accepted it from them and, indeed, from time to time sent them the ordinary printed form which one would expect to be kept in a large concern like the plaintiff company for the purpose of reminding persons who hold property from them that the rent is due. I do not think, either in law or as a matter of common sense, that that is the finding at which I ought to arrive. I think the position is that at some time the late Mr. Joseph Lewis, or his predecessor in title, lent money to Mr. Lemaitre and obtained these premises by way of security. The defendants

Lewis are, no doubt, accurately described in the defence as holding these premises as under-lessees. That being so, why ought I to assume that the original lease to Mr. Lemaitre has been determined, and that there has been something in the nature of a yearly tenancy created between the plaintiff company and the defendants Lewis? The sole ground on which this contention was put is that there has been a regular quarterly payment of rent. That fact is not in the least inconsistent with the supposition that the defendants Lewis were and remained underlessee of the premises, and paid rent to the plaintiffs not as yearly tenants, but because they had covenanted with Lemaitre that, instead of sending it to Lemaitre, who of course was liable to the plaintiffs for it, they would send it direct to the plaintiffs.

The result is that there must be judgment for the plaintiffs for possession, with costs. It is, however, a proper case for relief from forfeiture to be granted on certain terms, and if these cannot be agreed by the parties, the case can be mentioned to me again.

Judgment for plaintiffs.

Solicitors: *Boulton, Sons & Sandeman; Field, Roscoe & Co.*

[Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.]

JAMES FINLAY & CO., LTD. v. N. V. KWIK HOO TONG HANDEL MAATSCHAPPIJ

[COURT OF APPEAL (Scrutton, Greer and Sankey, L.JJ.), December 13, 14, 1928]

[Reported [1929] 1 K.B. 400; 98 L.J.K.B. 251; 140 L.T. 389;

45 T.L.R. 149; 34 Com. Cas. 143; 17 Asp.M.L.C. 566]

Sale of Goods—C.i.f. contract—Seller's obligation to deliver accurate documents to buyer—Bill of lading inaccurate as to date of shipment—Breach of contract—Measure of damages—Buyer's duty to mitigate—Resultant injury to reputation.

The plaintiffs, as buyers, claimed damages against the defendants, as sellers, under three c.i.f. contracts made in January and February, 1920, for 300 tons of Java sugar for each of the months July, August and September, 1920, c.i.f. Bombay. The plaintiffs, in the ordinary course of their business, entered into sub-contracts with buyers in Bombay at various prices higher than the prices in the contract between themselves and the defendants. These sub-contracts were also c.i.f. contracts and provided for equal shipments in July, August and September of certain quantities of sugar, and it was provided by cl. 7 in each of the sub-contracts that "the bill or bills of lading shall be conclusive evidence of the date of shipment." The defendants duly delivered the July and August instalments and arranged to ship the September instalments in a steamship which arrived at Cheribon, the loading port, on Sept. 30, 1920. Loading commenced on Oct. 1 and continued on Oct. 2, and the vessel sailed for Bombay on Oct. 3, 1920, arriving there on Nov. 9. The price of sugar in Bombay had fallen, and the buyers under the sub-contracts refused to take delivery, alleging that the goods tendered were not a September shipment. The plaintiffs sold the sugar by auction at a loss. In fact, the bills of lading, which were signed by the ship's agents, bore date Sept. 30, 1920, and purported to show the goods as "shipped in good order and condition [by the defendants] on board the steamship *Sealdah* lying in the port of Cheribon for carriage to Bombay." As above stated, however, no goods were shipped on that date.

A **Held:** (i) it was an essential part of a c.i.f. contract that accurate documents relating to the goods covered by the contract should be furnished to the buyer; in the present case the bill of lading was inaccurate in relation to the date of shipment; and, therefore, the defendants were in breach of the contracts between them and the plaintiffs; (ii) the measure of the damages to which the plaintiffs were entitled for the breach was the difference between the market price received by them for the goods and the price paid or payable by them under the contract between them and the defendants; (iii) the plaintiffs were not under a duty to minimise the damages by suing their sub-contractors and insisting on the provisions of cl. 7 of the sub-contracts when they knew that the date stated in the bill of lading was untrue, for no person was obliged to take steps to minimise damages if by so doing he would be likely materially to injure his commercial reputation.

C **Notes.** Applied; *Chao v. British Traders and Shippers, Ltd.*, [1954] 1 All E.R. 779. Considered: *Chao v. British Traders and Shippers, Ltd.*, [1954] 3 All E.R. 165. Referred to: *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K.B. 48; *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1932] All E.R.Rep. 181; *The Edison* (1932), 147 L.T. 141; *Biggin & Co., Ltd. v. Permanite, Ltd.*, [1950] 2 All E.R. 859.

D As to c.i.f. contracts generally, see 29 HALSBURY'S LAWS (2nd Edn.) 209 et seq. (as to damages for breach, see p. 225); as to mitigation of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 289-293. For cases see cases cited in 29 HALSBURY'S LAWS at pages mentioned above, and 17 DIGEST (Repl.) 106 et seq.

Cases referred to:

- E** (1) *Williams Bros. v. E. T. Agius, Ltd.*, [1914] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 30 T.L.R. 351; 58 Sol. Jo. 377; 19 Com. Cas. 200, H.L.; 39 Digest 670, 2571.
- (2) *R. and H. Hall, Ltd. v. W. H. Pim Junior & Co., Ltd.* (1927), 32 Com. Cas. 144; sub nom. *Re R. and H. Hall, Ltd. and W. H. Pim Junior & Co.*, 137 L.T. 585, C.A.; 39 Digest 675, 2612.
- F** (3) *Bowes v. Shand* (1877), 2 App. Cas. 455; 46 L.J.Q.B. 561; 36 L.T. 857; 25 W.R. 730; 5 Asp.M.L.C. 461, H.L.; 39 Digest 425, 564.
- (4) *Rodocanachi v. Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp.M.L.C. 100, C.A.; 39 Digest 669, 2570.
- (5) *Slater v. Hoyle and Smith*, [1920] 2 K.B. 11; 89 L.J.K.B. 401; 122 L.T. 611; 36 T.L.R. 132; 25 Com. Cas. 140, C.A.; 39 Digest 481, 1026.
- G** (6) *Taylor & Sons, Ltd. v. Bank of Athens, Pinnock Bros. v. Same* (1922), 91 L.J.K.B. 776; 128 L.T. 795; 25 Com. Cas. 142; 39 Digest 479, 1016.
- (7) *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co., Theodor Schneider & Co. v. Burgett and Newsam*, [1916] 1 K.B. 495; 85 L.J.K.B. 665; 114 L.T. 152; 32 T.L.R. 186; 60 Sol. Jo. 156; 13 Asp.M.L.C. 235; 21 Com. Cas. 174, C.A.; 39 Digest 578, 1813.

H **Appeal** against an order made by WRIGHT, J. ([1928] 2 K.B. 604).

The facts appear in the judgments.

Jowitt, K.C., and *Van den Berg* for the sellers.

Le Quesne, K.C., and *D. B. Somervell* for the buyers.

SCRUTTON, L.J.—If we were going to differ from the view of the learned judge below, I should prefer to take time to consider the form in which I should put my judgment, and if we were obliged to accede to the invitation of counsel for the sellers to explain how the House of Lords, who decided *Williams Bros. v. E. T. Agius, Ltd.* (1), also came to decide *Re R. and H. Hall, Ltd.*, and *W. H. Pim Junior & Co.* (2), again I should think it respectful to that tribunal very carefully to consider the language in which my judgment should be put. But as we propose to affirm the judgment of the learned judge below, and as, in my view, the question of the reconciliation of *Re R. and H. Hall, Ltd.*, and *W. H. Pim Junior & Co.* (2) and *Williams Bros. v. E. T. Agius, Ltd.* (1), only arises very indirectly, if at all, in this case, I will give my judgment at once.

The point is a comparatively short, interesting, and possibly difficult one as to the measure of damages, and it arises in this way. The sellers sold sugar to an English firm carrying on business in India, James Finlay & Co. The contract was for shipment of a quantity of sugar in three months, one-third of it to be in September, 1920. The question only arises as to the September shipment, and it is well settled since *Bouves v. Shand* (3), that these conditions as to the time of shipment are vital conditions with regard to the sale of goods. It is useless, if you have contracted to sell a September shipment, to tender goods shipped in October and to say that that difference in time is only a very little one. The term as to the time of shipment is of the essence of the contract. On Sept. 30 the sellers had sugar which would have satisfied this contract ready for shipment at a port in Java, and the ship in which they were going to ship it arrived on that date at the port and lay there, but none of the sugar was shipped on board the ship during the month of September. Consequently, the sellers broke their contract of sale with Messrs. Finlay. But more happened than that, because, this being a c.i.f. contract, the sellers had not only to ship the goods under a contract that they should be carried to the port of destination named in the contract, but they had also to furnish the buyer with certain documents. In the first place, they had to furnish him with a contract of carriage relating to the goods specified in the contract, so that, if these goods were lost during the voyage by matters for which the shipowner was responsible, the buyer would be able to recover his loss from the shipowner. They had also to furnish to the buyer a policy of insurance covering goods which were goods complying with the contract, so that, if the goods were lost during the voyage by matters coming within the policy, the buyer could recover their value from the underwriters. It is as much a part of the contract that the seller should ship the goods as that he should provide the buyer with the documents. It is not necessary to discuss whether it is accurate to say that a c.i.f. contract is a sale of documents or a sale of goods. In view of the fact that the goods may be lost before the documents are tendered and before the property has passed, there is a good deal to be said for the view that at any rate a very large proportion of the contract is a sale of documents. But at any rate it is an essential part of the contract that accurate documents relating to goods complying with the contract should be furnished to the buyer.

After and possibly before the war of 1914-18 a very lax practice had been growing up, by which goods that should be shipped at the end of the month, and were, in fact, shipped after the end of the month, had provided for them a bill of lading dated in the month of shipment, when it should have been dated after the month of shipment. Sometimes that was done because the shipper gave an indemnity to the shipowner, and the shipowner did what he ought not to have done honestly, and, relying on the letter of indemnity, misdated the bill. Sometimes it was done by alleging that there was a custom that you might in certain circumstances describe goods as shipped in September which were not shipped in September, but which were ready for shipment or were in lighters to be shipped, or other varieties of custom. But whatever was the reason of the practice it was a most undesirable one. It is not one that I should suspect a well-known company like the British India Steam Navigation Co. of approving for a moment, and I have no doubt that they dealt properly with what has been disclosed in this case as to the action of their servants. But for some reason or other the people who shipped on behalf of the sellers, actually, I think, the Handels Bank, got mate's receipts dated Sept. 30, although the goods were not in the custody of the ship on that day, took from the ship a bill of lading dated Sept. 30, although no goods were shipped on board the ship on that date. Under their contract with their buyers, Messrs. Finlay, they had to provide them with documents. They had to provide them with the bill of lading so that they might get delivery from the ship, they had to provide them with a bill of lading, also attached to the draft, so that payment might be made against documents showing that the goods shipped were goods complying with the contract; and the sellers, through the bank who discounted the draft to them, sent forward to India, so that the people in India might get delivery of the goods, a bill of lading wrongly dated. The result was that Messrs. Finlay received a bill of lading apparently in order, apparently showing goods shipped during September, and they paid the contract price. The

A market had fallen heavily, and consequently they paid much more than the market value of those goods at that time; if the bill of lading had been truly dated, they would have rejected the goods and kept the price of them in their pocket, being a considerable sum more than the value of the goods which were tendered to them owing to the fall in the market. Messrs. Finlay had, in fact, sold some part—how much is not quite clear—of the 300 tons of the three September shipments, and when they tendered B the bills of lading to their sub-purchasers the latter refused to take them on the ground that the goods had not been shipped in September. Whether the sub-purchasers had any information which justified that view, or whether they merely refused them because the market had fallen and they had a general and possibly well-founded suspicion of all bills of lading dated on the last day of the month owing to the practice that had been C prevailing, does not appear, but they did reject the bills of lading, and so far as these goods were concerned they were right, because the goods were not shipped in September and they were not goods that they were obliged to take. In the sub-contracts there were provisions that in the case of rejection the goods should be sold by auction, and the price obtained should be the measure of damage as compared with the contract price, and, accordingly, under the sub-contracts Messrs. Finlay might sue the sub-purchaser. But there were circumstances giving rise to suspicion, Messrs. Finlay D sued the sellers for breach of contract, and the learned judge came to the conclusion that the suspicions of the Indian firms were well founded, and that the goods had not been shipped in September. The judge gave the buyers as damages, the difference between the price that they had paid under the contract and the value of the goods at the time of delivery in Bombay.

The argument on the other side was: "That is quite a wrong measure of damages. E The learned judge should have approached the problem in this way: The value of October shipment and September shipment was the same, and you have lost nothing because you have got goods of exactly the same market value as you would have got if the goods had been shipped in September." The learned judge rejected that view, and took the view that it was a condition vital to the contract, not only that the sellers should ship goods in September, but that they should deliver to the person whom you F asked to pay for those goods genuine documents, such as bills of lading, showing the right day of shipment—that is to say, a shipment in September. As I understand, he took this view: "If you had complied with your contract and tendered bills of lading giving the true date of shipment, namely, October, Messrs. Finlay would have been entitled to reject them, and quite rightly. If they did, they would have kept in their pocket the price that they had to pay under the contract, and the loss of the market G would very properly fall upon the sellers because they had not complied with the conditions which would have enabled the buyers to get the contract price. The buyers would not have paid the contract price, because the contract had not been fulfilled and they were not called upon to pay it, and the money would stay in their pocket; and it is because the difference between the contract price and the market price has not stayed in their pocket, but has gone to the sellers, they having broken their contract by presenting H a bill of lading which was not a genuine document in the sense that it accurately represented goods complying with the contract, that that is the amount which necessarily follows from your breach of the contract." I think I have correctly stated the view that the learned judge has taken, and I agree with it, and should have stated it in the same way myself.

I The buyers, Messrs. Finlay, are not claiming the difference between the market value of the goods delivered and the price they would have got under their sub-contracts. If they had been claiming that, then I think the question which has been discussed between counsel and the court as to the exact meaning of *Re R. and H. Hall and W. H. Pim Junior & Co. (2)*, as compared with *Williams Bros. v. E. T. Agius, Ltd. (1)*, would have been interesting, and we might have been compelled to give counsel for the buyers the amount for which he asked. But as the buyers are not claiming the difference between the market price and the sub-contract price, but are only claiming the difference between the market price and their contract price with the sellers, it appears to me that that question does not directly arise, and the only way in which it may arise is that it may be,

and is said, in fact: "When we broke our contract by delivering to you wrong bills of lading, it was your duty to minimise the damages, and one of the ways in which you could minimise the damage was that you had a contract with sub-contractors under which you could have passed off these goods at a price which would have left you with no damage." Messrs. Finlay's answer to that is: "It is quite true that we had a contract under which our buyers were bound to accept the date in the bill of lading as conclusive, but for us to bring an action against the Indian buyers to recover the price of goods that we knew not to be in accordance with the contract, because of that term, would not be in the ordinary course of business and would ruin our credit in India, and as a matter of business, and of the standard of morality which should attach to an English firm of standing, we decline to bring an action against Indian firms to compel them to take goods which we know are not in accordance with the contract." It would be different if we did not know, and it was in doubt, and we could say: "We do not know which way it is, and you do not know, but here is a contract by which (cl. 7) 'the bill or bills of lading shall be conclusive evidence of the date of shipment.' That would be a different matter." I personally cannot think that a man who has broken his contract can compel his buyer who has not broken his contract to take action to minimise the damages of a person who has broken his contract, by claiming money to which he knows he is not entitled, which would ruin his credit in the business world.

Therefore, it appears to me that it is impossible to say that there was a duty to minimise these damages by resorting to the contract with the sub-buyers. I hope that the House of Lords, who alone can do it, may soon get an opportunity of explaining how their decision in *Re R. and H. Hall and W. H. Pim Junior & Co.* (2) is to be reconciled with their decision in *Williams Bros. v. E. T. Agius, Ltd.* (1). The House of Lords cannot overrule its decisions. There is an interesting passage in one of LORD SUMNER'S judgments which says that there are many unreported judgments of the House of Lords which people are violating every day, but that these judgments of the House of Lords remain law and cannot be altered even by the House of Lords itself. Before the decision in *Re R. and H. Hall and W. H. Pim Junior & Co.* (2), I had been brought up, as most of the members of the Bar have been brought up, to understand that as a general rule you could not use a sub-contract entered into by a buyer either to increase or to minimise the damages he claimed; it was an accidental matter with which the seller had nothing to do. I found it in *Rodocanachi v. Milburn* (4) which was a decision of the Court of Appeal. Some people doubted it, and I found that the House of Lords affirmed it in *Williams Bros. v. E. T. Agius, Ltd.* (1). In an unreported case in which my brother, GREER, L.J., was counsel, they again repeated the language of *Williams Bros. v. E. T. Agius, Ltd.* (1), and affirmed *Rodocanachi v. Milburn* (4) and in *Slater & Co. v. Hoyle and Smith, Ltd.* (5), the same principle was applied, that unless you could get the seller contemplating, so that he makes himself liable to pay, the possibility of a sub-contract under which a claim may be made on the buyer, you would have to disregard that sub-contract, as being an accidental matter with which the seller had nothing to do, whether it was used to increase or to diminish the sum claimed. It was one of the many instances in English law where the measure of damages by law did not award the real loss that the plaintiff had suffered, but it was still a rule of English law. It appears to me at present, although it is not necessary to express any final opinion on the matter, and *Re R. and H. Hall and W. H. Pim Junior & Co.* (2) can only be explained in connection with *Williams Bros. v. E. T. Agius, Ltd.* (1) by the particular terms of the contract in that case. It is well known to anyone who is concerned with commercial affairs that many of the trade associations have set up and recognised a form of dealing with a number of purchasers and sub-purchasers which it is quite difficult to relate to any legal principles, and that when A. sells to B., and B. then sells those goods to C., and so on through the rest of the alphabet, the trade associations have set up a form of contract by which Z., at the end, can sue A., Z. having no contract with A. whatever. That is very difficult to fit in with legal principles, but when you get a contract between A. and B., drawn up by the Corn Trade Association, a number of terms are introduced as to what C., D., E. and F., up to Z., can do, and it is quite possible to say to A.; "You must have contemplated that B. was going to re-sell,

A because a number of terms are agreed as to what is to happen to the rest of the alphabet who have bought from B." So far as I can understand at present, you can only justify *Re R. and H. Hall and W. H. Pim Junior & Co.* (2), after the decision of *Williams Bros. v. E. T. Agius, Ltd.* (1) and the other Court of Appeal decisions, by saying that it is founded upon the fact that the contract entered into by the seller contemplated a series of "string" contracts with subsequent sub-purchasers, and that A. must, therefore, be
B taken to have contemplated that the result of his breach of his contract with B. might lead to claims on B. by sub-purchasers, although as a matter of fact with the machinery of the Corn Trade Association it would not lead to a claim on B., but would lead to a claim by Z. on A., the seller. As I have said, it does not seem to me, in the view that I take of the way in which the learned judge has arrived at the damages, to be necessary to say anything final about that in the present case, but that seems to me at present to
C be the only way in which the decision in *Re R. and H. Hall and W. H. Pim Junior & Co.* (2) can be justified, having regard to the two previous decisions of the House of Lords of which I have spoken. For those reasons, I think that the view taken by the learned judge below was right, and that the appeal should be dismissed with costs.

GREER, L.J.—I agree. This appeal raises a question as to the measure of damages
D arising out of the breach of three contracts whereby the defendants in the action sold to the plaintiffs certain quantities of Java sugar, to be shipped in the months of July, August and September, 1920. Taking the three contracts together, the contracts called for the shipment in each month of 300 tons of Java sugar, to be shipped to a port in India. The contracts were contracts on what are known as c.i.f. terms, the price being given at a price per hundredweight, cost, insurance and freight, shipment during the
E months of July, August and September, 1920. The terms of payment were that the buyers were to open a credit or credits on Messrs. Finlay & Co., London, which credit was to be confirmed by the bank at buyers' expense, by cable if necessary, and the sellers or their agents were to draw thereunder in three months' sight drafts, for the due payment of which drafts at maturity buyers remained responsible. The terms as to payment were slightly modified by a letter which records the terms of an agreement
F authorising the sellers to "value on the buyers at three months' sight, payable in London for the invoice cost of the following lots of Java sugar," and then it mentions these contracts.

"Bills of lading of such shipments are to be filled up to the order of Messrs. James Finlay & Co., Ltd., Bombay, and certificates of origin and bills of lading in duplicate to be forwarded direct to Messrs. James Finlay & Co., Ltd., Bombay. All the
G drafts are to be advised to, and the remaining bills of lading and invoices delivered up to us against our acceptance. And it is hereby agreed with you and as a separate engagement with the bona fide holders respectively of the bills drawn in accordance with this credit that the same shall be duly accepted on presentation and paid at maturity."

H The effect of these terms was that the bill of lading was to be made out to the purchasers, and the sellers were to be in the same position, as if they had received cash at the time that the bill of lading was made out, because they had a guarantee that the bills would be accepted.

I The goods included in the September shipment were not shipped in September; they were shipped on Oct. 1 or 2, and in some way or other, which is unexplained, mate's receipts were made out dating the shipment as on Sept. 30. How that came to be done we do not know, and it would not be right to assume for the purposes of this case that that was done for any purposes of fraud by the people who in fact did procure those mate's receipts. We know nothing about it, and I agree with the argument of counsel for the buyers that it is not right that any court should deal with a matter of that sort on the assumption that it is fraudulent, when fraud is not proved, and the people charged with the fraud have not had the opportunity of dealing with it. But that, I think, is immaterial to the result of this case, because in fact the result of the mate's receipts being wrongly dated was that, when the agent of the ship at Samarang came to draw up the bill of lading, he took from the mate's receipt a date which was wrong.

Whether he knew it to be wrong or not we do not know, and it must not be assumed that he did know that there was anything wrong with the date on the mate's receipts. That being the case, it is quite clear that the bills of lading contained a false date, and a date which was not only inaccurate, but was false in a material respect having regard to the terms of the contract, which called for shipment in September. I am not prepared to say at present what I would hold if the question were whether the buyer is entitled to reject a cargo of goods bought because the bill of lading mentions the fifth day of the month, whereas it was in fact the sixth day of the month when the goods were shipped; but I am clearly of opinion that a buyer would be entitled to reject, if he knew of it, on a contract of this sort which called for September goods, a bill of lading which falsely stated that the goods were shipped in September when in fact they were shipped in October, and that is as far as it is necessary to go for this case.

We have listened to a vigorous and very lucid argument from both counsel for the sellers to the effect that the learned judge has taken the wrong measure of damages, and that if he had taken the right measure of damages he would have given merely nominal damages. The plaintiffs put their case in this way. They say in their pleadings: "It was an express or implied term of the contracts that the bill or bills of lading tendered thereunder should be correctly dated, namely, on the completion of the shipment of the said goods," and in the second part of the statement of claim they claim the difference between the contract price and the value of the goods which were in fact delivered to them and for which they accepted the bills of lading upon the assumption that the bills of lading correctly stated the date of shipment. The plaintiffs say: "The defendants' position is this. There is in this contract not merely a promise to ship in September, but there is a distinct and separate promise to hand to us a bill of lading which will truly state that the goods have been shipped in September; and our claim is not merely a claim for damages for breach of contract to deliver to the ship during the agreed month, but it is also a claim for damages for breach of the promise to give us a true bill of lading." It seems to me that that is the answer to the argument of counsel for the sellers—that the two things which you have to compare are the condition in which the buyers would be so far as money is concerned if the whole of the contract were performed, on the one hand, and the condition in which they would be if the whole of the agreement or contract were not performed, on the other hand. I think that what you have to compare is what would have been their best position, as far as money is concerned, if the particular term of the agreement which is relied upon had been performed, and what would be necessary to put them, so far as money is concerned, in the same position, by awarding damages for the breach of contract. The learned judge has acted in accordance with that measure. He has said:

"If the promise that there should be truly stated in the bill of lading the date of shipment had been kept, we should have been, say the plaintiffs, in this position, that we should have known that we were entitled to reject the goods, and anybody in our position would have rejected the goods. By that breach of contract in sending forward a bill of lading making a false statement as to the shipment, you have deprived us of that position."

I suggest to the sellers that, if the promise with which I have been dealing to tender a true bill of lading had been in a separate contract, the position would have been unarguable. It seems to me that it makes no difference that the term is in the same contract as contains the obligation to ship in September. I agree with counsel for the sellers that the result of this is to give to the buyers exactly the same damages as they would have received if they had successfully brought an action for damages for fraudulent misrepresentation, but it does not follow that there may not be terms in a contract which put the plaintiffs in the same position, if those terms are broken, as that in which they would be if they were entitled to base their claim upon false representation. However, that is the view which commends itself to my mind, though I must say, not without hesitation, and I have listened with great interest to the vigorous argument which has been put forward to the contrary. I ought to say that, in my judgment, although the view that we are adopting in this case may seem to be inconsistent with the judgment

A of McCARDIE, J., in *Taylor & Sons, Ltd. v. Bank of Athens, Pinnock Bros. v. Same* (6) it may be that that case is distinguishable upon the ground that the claim which the buyers took to arbitration was not based upon a breach of contract in putting forward a bill of lading with a wrong date, but one which is stated in these words (128 L.T. at p. 795):

B “The buyers went to arbitration upon their claim for breach of contract against the sellers. The arbitrators have rightly found that the sellers committed a breach of contract in not shipping the goods within the proper period.”

I agree that if there were no question involved of a distinct breach of contract in tendering a wrongly dated bill of lading, the position would be quite different; and the argument of counsel for the sellers convinced me that in those circumstances and in respect C of such a claim, nothing but nominal damages would be recoverable. That would be in accordance with the view taken by McCARDIE, J., in the case which I have just mentioned.

But there is another point upon which it is necessary to say something. I agree with my Lord that once you get the position of the buyers as I have stated it, it does not seem necessary to go any farther and consider the sub-contracts at all, because, if the D term of the contract which requires a true bill of lading had been duly performed, there never would have been any question of having any goods to use for the purposes of the sub-contract. But counsel for the sellers says: “At any rate you have to consider it from the point of view of minimising damages, and, assuming that the measure would be otherwise correct, still, the plaintiffs, having taken the goods, must do their best to minimise the damages, and they ought, therefore, to have forced their sub-purchasers

E to take these goods and pay for them, or if they would not do that, then the plaintiffs ought to have brought the sub-purchasers into court and made them pay the damages which necessarily resulted from their refusal.” For myself, I have come to the conclusion that the sub-contractors would have had no answer to the claim if it had been made, but I do not say that the claim is necessarily one that ought to be regarded by everybody as a claim which could not receive any answer, and Messrs. Finlay were faced

F with the position that in order to recover these damages and so minimise the damages recoverable from the defendants, they would have had to embark upon litigation in India. I see nothing immoral or unconscientious in an endeavour, if it had been made, to hold the Indian purchasers to their bargain. They had, in my judgment, bought goods on different terms from the terms under which Messrs. Finlay had bought them; they had bought them as goods certified by a bill of lading to be delivered in September;

G and they would have been perfectly entitled, as a matter of business morals, to have said: “You made that bargain, and you must stick to it, and if you do not you must pay damages.” But I think at the same time it is a wholly unreasonable thing to say that that would be the ordinary course of business, which they ought to pursue in order to diminish the damages. People have not got to consider merely what is right in a strict court of conscience, but they have got to consider what is the effect of their conduct

H upon their business relations with other people, and I can have very little doubt that it would not have suited their business to have taken the extreme course which is suggested; and, in my judgment, it is not in the reasonable course of business to require them to do what is suggested in order to diminish damages, if *primâ facie* they are entitled to recover damages from the defendants.

I have had the same difficulty as SCRUTTON, L.J., has, of knowing what is the right way to reconcile the two judgments of the House of Lords in *Williams Bros. v. E. T. Agius, Ltd.* (1) and *Re R. and H. Hall and W. H. Pim Junior & Co.* (2), which are apparently in conflict, but I have little doubt that when the question comes before the House of Lords they will be able to reconcile those apparently irreconcilable decisions. I do not imagine that they are really irreconcilable; but fortunately this case does not call upon us to enter upon that not very easy question, and therefore I say nothing about it except this, that I should like to say that the judgment in *Hall's Case* (2) commends itself to my mind as containing a reasonable and sound view of what ought to be the law on the subject of taking into account such contracts in estimating damages

arising out of the breach of the principal contract. For those reasons I agree with my lord that this appeal should be dismissed with costs. A

SANKEY, L.J.—I agree. By a contract of Jan. 30 and Feb. 2, 1920, the plaintiffs agreed to buy, and the defendants agreed to sell, certain quantities of white Java sugar for shipment from Cheribon to Bombay. It was a c.i.f. contract, and not only are c.i.f. contracts contracts for the sale of goods, as has been decided in *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* (7), but everyone knows that there are certain specific documents which are part of this contract, one of which is the bill of lading, and there is an obligation under such a contract to give an accurately dated bill of lading. In the present case, by some unfortunate circumstances which we do not know, the bill of lading which was given was inaccurately dated. It was dated Sept. 30, whereas the goods were not put on board until the month of October. No fraud can be imputed to the sellers; they are not charged with fraud; it is not suggested that they did anything wrong; and I assume for the purposes of my judgment that they are blameless in that matter. But it is admitted, and it has to be admitted, on their behalf, that they did break one of the fundamental conditions of the contract, namely, the condition or obligation to give an accurately dated bill of lading. In this case I think it is easier to go to first principles, perhaps, than to go to decided cases. What happened? As a result of the inaccurately dated bill of lading the purchasers took the goods. The sugar in question came into their possession; but, although they paid for what they contracted to get, they did not get what the sellers had contracted to give them. They got something different; they got October sugar instead of September sugar. One might illustrate it by putting the case of some entirely different article, as, for example, the case suggested during the argument, of a man who, having purchased a pair of trousers, when he opened the parcel got a hat. But in this case the buyers had paid the sellers for something which, although they had contracted to get, the sellers did not deliver to them. In those circumstances, what is their remedy, or what is the measure of damages? They, in fact, sold what was delivered to them, although it was not the sugar that they actually contracted to buy, and which the buyers had contracted to deliver to someone else, and they obtained a certain price for it. B

What is the position? The sellers have got the full price of the article, and they have delivered something which is of far less value; the learned judge has said that the measure of damages is the difference between the sum which the purchasers got for the article which they actually had delivered to them, and the price that they paid for the article which under contract the sellers were bound to give them. I think that is right, and I think the measure of damages in a case like this is the difference between what the buyer had in fact paid or had to pay to the seller and the market price he obtained for the article in question. I think that must be so, having regard to the incidence of a c.i.f. contract. I do not think, in deciding that, that we are in any way in conflict with any of the cases which have been decided. With regard to *Taylor & Sons v. Bank of Athens* (6), which was a decision of my brother McCARDIE, J., as pointed out by GREER, L.J., there the cause of action sued upon was entirely different from the cause of action sued upon in the present case. The cause of action in the present case is damages for not having what the contract gave the buyers the right to have, namely, an accurately dated bill of lading. C

One point that has pressed me throughout has been the question whether the plaintiffs were not under an obligation to minimise the damages, and that to some extent lets in the vexed point about the measure of damages, which I suppose most people thought had been finally laid to rest in *Williams Bros. v. E. T. Agius, Ltd.* (1), where LORD HALDANE said: D

"In the judgment delivered by LORD ESHER in *Rodocanachi v. Milburn* (4) he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, a contract entered into by the plaintiff with a third party." E

Certainly the recent case of *Re Hall and Pim Junior & Co.* (2) might appear to be in conflict with that. It was a case which, if I may recall the picturesque language of

A counsel for buyers, has "astonished the Temple and surprised St. Mary Axe." I am not quite sure whether that is correct when I look at the ground upon which that case was decided. It seems to me to be a case which was decided upon the particular and peculiar facts set out there. For example, LORD HALDANE said:

B "I think further that the contract and the conditions which it incorporates show that it was contemplated that the cargo might be passed on by way of sub-sale if the buyer did not choose to keep it for himself, and that the seller contracted to put the buyer in a position to fulfil his sub-contracts if he entered into them."

Again, although not quite as strongly, LORD DUNEDIN says the same thing, and LORD SHAW says:

C "My principal reason is that I think that the two parties had actually provided for the very case of sub-sales, which has caused the extra losses."

LORD PHILLMORE puts it even more strongly when he says:

"This being so, the respondents as sellers must be taken to have consented to this state of things and thereby [and this perhaps is the strongest expression] to have made themselves liable to pay to the appellants their profit on a re-sale."

D Speaking personally, I am not at all sure that all those things could not have been said in *Williams Bros. v. E. T. Agius Ltd.* (1) as well, but, at any rate, the latest decision, as it appears to me, does proceed upon those specific facts, and those specific terms in the contract entered into between the parties. But, even if that is not so, I do not find myself in agreement with counsel for the sellers that in this case the purchasers were bound to sue their sub-contractors and rely upon the "conclusive evidence" clause. I ventured to put to him, in the course of the argument, certain considerations whether a person would be entitled to refuse to plead the Statute of Frauds or the Statute of Limitations. Those cases are rather different. There a person is relying upon a statutory enactment; but in the present case I do not think it would have been reasonable to ask the purchasers to sue their sub-contractors, and to insist upon the "conclusive evidence" clause, when, by the hypothesis, they knew by that time that it was quite untrue. It might have minimised the damage to this extent, that the Indian sub-purchasers would have had no defence, but I do not think that a person is obliged to minimise the damage on behalf of another who has broken his contract, if by taking steps to minimise the damage he would—as I think he might probably have done in this case—materially injure his commercial reputation. I do not think you can ask A. to minimise damages to B., who has broken his contract, if by so doing A. is going to—
F I will not say ruin himself, but get a deservedly bad name in the trade. I have come to the conclusion, in a really difficult case, that the learned judge was perfectly right, and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Ballantyne, Clifford & Co.; Sanderson, Lee & Co.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

A

CONQUER v. BOOT

[KING'S BENCH DIVISION (Sankey, L.J., sitting as additional judge, and Talbot, J.),
November 30, December 1, 1927, March 19, 1928]

[Reported [1928] 2 K.B. 336; 97 L.J.K.B. 452; 139 L.T. 18;
44 T.L.R. 486]

B

*Res Judicata—Breach of contract—Damages recovered for several particulars of breach
—Second action in respect of other particulars.*

The defendant contracted to build a bungalow for the plaintiff and to complete the same in a good and workmanlike manner. The plaintiff brought an action in the county court for breach of that contract, setting out in his particulars of claim a number of matters which, he alleged, had not been properly executed and were required to be done in order to bring the bungalow to the contract standard. He recovered damages. Later, he brought another action for breach of the same contract, setting out a different list of particulars of deficiencies.

C

Held: the plaintiff's cause of action was a breach of the contract to construct the bungalow in a good and workmanlike manner; damages for that breach must be assessed and recovered once and for all; and, therefore, the plaintiff, having recovered in one action in respect of one set of particulars of breach, could not maintain a second action in respect of a further set of particulars.

D

Rule laid down by BOWEN, L.J., in *Brunsdon v. Humphrey* (1) (1884), 14 Q.B.D. 141, applied.

Bristowe v. Fairclough (2) (1840), 1 Man. & G. 143, distinguished.

E

Notes. Followed: *Rowntree & Sons, Ltd. v. Frederick Allen & Sons (Poplar), Ltd.* (1935), 41 Com. Cas. 90. Considered: *H. E. Daniels, Ltd. v. Carmel Exporters and Importers, Ltd.*, [1953] 2 All E.R. 401. Referred to: *E. E. and Brian Smith* (1928), *Ltd. v. Wheatsheaf Mills, Ltd.*, [1939] 2 All E.R. 251.

As to *res judicata*, see 15 HALSBURY'S LAWS (3rd Edn.) 184 et seq.; and for cases see 21 DIGEST 159 et seq.

F

Cases referred to:

- (1) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; 53 L.J.Q.B. 476; 51 L.T. 529; 49 J.P. 4; 32 W.R. 944, C.A.; 21 Digest 207, 480.
- (2) *Bristowe v. Fairclough* (1840), 1 Man. & G. 143; 1 Scott, N.R. 161; 9 L.J.C.P. 245; 133 E.R. 281; 21 Digest 202, 457.
- (3) *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; 55 L.J.Q.B. 529; 54 L.T. 882; 51 J.P. 148; 2 T.L.R. 301, H.L.; 17 Digest (Repl.) 85, 62.
- (4) *Gibbs v. Cruikshank* (1873), L.R. 8 C.P. 454; 42 L.J.C.P. 273; 28 L.T. 104, 735; 37 J.P. 744; 21 W.R. 734; 17 Digest (Repl.) 85, 59.
- (5) *Death v. Harrison* (1870), L.R. 6 Exch. 15; 40 L.J.Ex. 26; 23 L.T. 495; 21 Digest 212, 510.
- (6) *Newington v. Levy* (1870), L.R. 6 C.P. 180; 40 L.J.C.P. 29; 23 L.T. 595; 19 W.R. 473, Ex. Ch.; 21 Digest 177, 291.
- (7) *Serrao v. Noel* (1885), 15 Q.B.D. 549; 1 T.L.R. 581, C.A.; 21 Digest 212, 511.
- (8) *Clegg v. Dearden* (1848), 12 Q.B. 576; 17 L.J.Q.B. 233; 11 L.T.O.S. 309; 12 Jur. 848; 116 E.R. 986; 34 Digest 726, 1077.
- (9) *Howell v. Young* (1826), 5 B. & C. 259; 2 C. & P. 238; 8 Dow. & Ry.K.B. 14; 4 L.J.O.S.K.B. 160; 108 E.R. 97; 32 Digest 342, 250.
- (10) *Bagot v. Williams* (1824), 3 B. & C. 235; 5 Dow. & Ry.K.B. 87; 107 E.R. 721; 21 Digest 153, 148.

G

H

I

Appeal from Brentford County Court.

In July, 1924, the defendant, Boot, contracted to build for the plaintiff, Conquer, a bungalow at Greenford, Middlesex, and to complete the same in a good and workmanlike manner. In November, 1926, the plaintiff sued the defendant in the county court for breach of this contract. The particulars of claim were as follows:

A "The plaintiff's claim is against the defendant for the sum of £24 10s. for breach of contract to complete in a good and workmanlike manner a bungalow known as Fauld's Hope, Millet Road, Greenford, in the county of Middlesex,"

and particulars were given of a number of deficiencies of which the plaintiff complained. The plaintiff recovered judgment for the amount claimed. In May, 1927, the plaintiff brought a second action against the defendant, the particulars of claim in which were as follows:

B "The plaintiff's claim is against the defendant for the sum of £75 14s. for breach of contract to complete a bungalow known as Fauld's Hope, Millet Road, Greenford, Middlesex, in a good and workmanlike manner and with proper materials. The plaintiff also claims the sum of £6 6s. as damages for linoleum ruined through dampness arising from the said negligence."

C The plaintiff was asked to give further and better particulars of his particulars of claim, and did so as follows:

D "(1) The contract referred to in the particulars of claim is the contract which was entered into on or about July 17, 1924, proved in an action entitled *Conquer v. Boot*, which was tried at the Brentford County Court on Nov. 5, 1926, of which the plaint number was F. 2623. (2) The defendant is in breach of the said contract by reason of the fact that he failed to complete the work hereby contracted to be done in a satisfactory and workmanlike manner."

Then followed a list of particulars different from those set out in the earlier action. Among other defences to this second action the defendant relied on that of *res judicata*. E On this point the county court judge decided as follows:

F "As to the plea of *res judicata*, I allowed this so far as the claim in respect of the manhole and airbricks was concerned, because these defects were obvious at the time of an earlier action in November, 1926, between the same parties. So far as the bulk of the claim is concerned, I disallowed it as the state of dampness and rottenness of the premises, and particularly of the floor, was not apparent at the time of the earlier action."

He gave judgment for the plaintiff for £81 19s. The defendant appealed.

F. J. Powell for the defendant.

A. M. Trustram Eve for the plaintiff.

Cur. adv. vult.

G Mar. 19. The following judgments were read.

H **SANKEY, L.J.**—This is an appeal from the learned judge of the county court of Middlesex holden at Brentford in a case where a Mr. Conquer was the plaintiff and Mr. Boot was the defendant. The learned judge at the conclusion of the case, and after hearing arguments on points of law, gave judgment for the plaintiff for £81 19s., and it is from that judgment that the present appeal is brought on a variety of grounds, one of which is that the matter was *res judicata*, or, in other words, that the plaintiff had already brought an action in respect of the matters complained of, and had judgment given in his favour, and that that precluded him from bringing a second action in respect of the matter. The only point argued has been *res judicata*, which goes to the whole of the appeal, and we thought it better to have that point argued first.

I The present action was started in the county court by particulars of claim. [The learned judge read the particulars as set out hereinbefore, and continued:] Pausing there for a moment it is obvious, on the plaintiff's own particulars, that in each action he was suing on the same contract. I am not at all saying that that is an impossible position in law so far as one contract may give rise to several causes of action; but I do desire to point out that the effect of what the plaintiff has done is to obtain in the two actions—that is, the action with which we are now concerned and the previous action—a sum which is beyond the jurisdiction of the county court, and, if his contentions are right, I can see no reason why on some future occasion he may not bring another action on the same contract in the same county court. It, therefore, becomes

necessary to look at the particulars of the first action. [The learned judge read them and continued:] The particulars, therefore, are precisely the same in both actions, the only difference being that in the second action the words "and proper materials" are added. The plaintiff, in the first action, gave particulars of a number of matters which he stated constituted a breach of contract to build in a good and workmanlike manner. These particulars are fairly numerous and are set out with great particularity. In the second action the particulars are of similar character, they also are fairly numerous and are set out with great particularity. But so far as this claim is concerned it appears to me to be identical in both cases; it is for breach of contract to complete in a good and workmanlike manner the bungalow in question. That was a matter which obviously struck the learned judge; in the first action he went into the matter and he found a sum of money to be due to the plaintiff by reason of the defendant's failure to complete the bungalow in a good and workmanlike manner. When he came to the second action he was faced with the difficulty that this point, *res judicata*, was taken, and this is his judgment:

"As to the plea of *res judicata*, I allowed this so far as the claim in respect of the manhole and airbricks was concerned, because these defects were obvious at the time of an earlier action in November, 1926, between the same parties. So far as the bulk of the claim is concerned I disallowed it as the state of dampness and rottenness of the premises, and particularly of the flooring, was not apparent at the time of the earlier action."

The question remains whether this is a correct determination in point of law.

With regard to the plea of *res judicata* a great number of cases have been cited to us, the most informative of which is that of *Brunsdon v. Humphrey* (1). It will be observed that in that case there was one wrongful act, but there were two distinct causes of action, namely, the injury to the cab and the injury to the man's person, and BOWEN, L.J., says this (14 Q.B.D. at p. 147).

"It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all."

Pausing there for a moment and taking *Brunsdon v. Humphrey* (1), on my view of that case it would have been impossible for the plaintiff to bring several actions in respect of the damage to his cab. He could not have sued one day for a broken wheel and next month for a broken shaft and later for a broken window, and so forth, and so, too, with regard to the personal injuries, it would have been impossible for the plaintiff to sue one day for the loss of a leg and another day for the loss of another leg, and later to sue because he had lost his fingers or had injured his head. One knows that in personal injury cases damages are assessed once for all. This may be a difficulty to a plaintiff in a personal injury case, but I am not so sure that in this case a like difficulty could have arisen. BRETT, M.R., said in that same case (14 Q.B.D. at p. 145):

"Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action,"

and then he discusses the sort of evidence which would have to be given to prove injuries to the cab and injuries to the person.

In the present case, adopting the same analogy, it seems to be quite impossible here to say that in the first month of the year the plaintiff could have brought his action for failure to complete in a proper and workmanlike manner the dining-room and next month for failure to complete the drawing-room, and so forth. If that could be done I do not at all see why any of these cases should ever be brought in the High Court, because all the plaintiff would have to do would be to issue separate complaints for damages up to £100, and try the whole in a county court. Counsel for the plaintiff, in his excellent argument, referred us to what appeared to me to be the strongest case in his favour, *Bristowe v. Fairclough* (2). I need not go into all the facts of the case because the difference is set out in the well-known judgment of TINDAL, C.J. He says (1 Man. & G. at p. 152):

A “The plaintiff, it seems, brought an action in the Court of Exchequer upon the agreement, in which the breach assigned was the not giving the note for £730; and it appears that an order was made in that action, whereby the defendant was directed to give to the plaintiff a note for £505. In the present action a second and a different breach is alleged, namely, that although the mortgage money had been called in, the defendant had neither paid the balance nor obtained another loan for the plaintiff. The answer set up by the plea is that the present action is brought upon the same agreement, and to recover the same damages as the suit in the Exchequer. The plaintiff replies, that although it is true that the action is on the same agreement, yet he does not sue for the same breach, but for another and different breach. It seems to me that this is a good answer to the plea, which *primâ facie* would lead the plaintiff to suppose that it alleged that he was suing for the same cause of action.”

B I do not think those words can apply to circumstances like those of the present case. If they were carried to the extremity, the failure to put proper material into the house might be so construed that an action could be brought in respect of each bad brick that was put into the house, on the ground that each bad brick was a separate cause of action. I think that the present case falls within the rule laid down by BOWEN, L.J., in *Brunsdon v. Humphrey* (1) to which I have already referred. The cause of action here is (i) the contract to complete in a good and workmanlike manner a bungalow; and (ii) the breach of it. I do not think that every breach of it—every particular brick or particular room that is faulty—gives rise to a separate cause of action. I am of opinion that the cause of action here was the contract and the breach of it, which had been assigned in the original action. I do not think it is possible to say that every one of these breaches is a separate cause of action. In that I am confirmed by the notes in BULLEN and LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn., 1868) 625, where, in my view, the law is correctly stated as follows:

E “Where the plaintiff has recovered judgment in a previous action for part only of the amount claimed, the judgment affords a good defence to a subsequent action for the same claim.”

F Numerous cases are there cited which show it is quite impossible to treat every breach of contract of this sort as giving rise to a separate cause of action. The cases are all discussed in SPENCER BOWER'S book on RES JUDICATA ((1924) at p. 192), and he quotes *Brunsdon v. Humphrey* (1), which lays down that there may be two actions in respect of the same facts where the facts give rise to two distinct causes of action. G In my view, the plaintiff, having recovered on the contract for the breach he alleged, cannot recover in another action upon precisely the same particulars of claim, but adding further particulars of damage only. Having recovered judgment in the one action he is debarred from bringing a second action. For these reasons I am of opinion that the judgment of the county court judge was wrong and that this appeal should be allowed.

H **TALBOT, J.**—The plaintiff, in 1926, by action in the county court, recovered from the defendant damages for breach of contract to complete a bungalow for him at Greenford in a good and workmanlike manner. The particulars of claim in that action set out certain matters as needing to be done in order to make the bungalow what the defendant had contracted to make it. In 1927 the plaintiff brought a second action expressed I to be for breach of the same contract (adding the words “and with proper materials”) but with another list of particulars. Among other defences the defendant raised in the county court the defence of *res judicata*, or judgment recovered, on which the judge decided against him. The defendant appeals to this court, and the question is whether the judge ought to have entered judgment for him.

The rule of law on which the defendant relies is thus stated by BOWEN, L.J., in *Brunsdon v. Humphrey* (1) (14 Q.B.D. at p. 147):

“It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all,”

and by LORD HALSBURY in *Darley Main Colliery Co. v. Mitchell* (3) (11 App. Cas. at p. 132):

"No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever."

See the form of plea in BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) 624. The defendant contends that there is here but one cause of action, namely, that the defendant, having promised properly to complete a bungalow for the plaintiff for a sum of money to be paid on completion, has failed to do what he promised, and that the particulars subjoined in the two actions are mostly details of the manner in which he has failed to perform the one contract, and of the damages payable for his breach of it. The plaintiff, on the other hand, says that the first action was brought for the various breaches of contract specified in the particulars, that each of them is a separate breach of a separate contract and a separate cause of action, and that, therefore, the former judgment is no answer to the present action.

It appears to me that in this the defendant is right, and that the cause of action sued on in the second action is the same as that sued on in the first. It is the same in point of form. The form is substantially that in BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) 271, and the precedents there referred to. It is the same also in substance. The contract is an entire contract. No claim for payment could have been made by the defendant unless and until he had finished the bungalow. There is one contract and one promise to be performed at one time, although no doubt the defendant may have failed to perform it in one or in many respects. There may, of course, be many promises in one contract, the breach of each of which is a separate cause of action. An example is to be found in *Bristowe v. Fairclough* (2), quoted by counsel for the plaintiff in his excellent argument. There the contract contained two separate promises by the defendant to be performed at different times and in different events; and it was accordingly decided that judgment in an action for breach of one was no bar to an action for breach of the other. The period of limitation would be different for the two. Here there is but one promise, to complete the bungalow; and the question whether or not it has been performed is to be decided by the state in which the bungalow was when it was handed over by the defendant to the plaintiff as complete. From the moment the Statute of Limitations began to run in regard to the whole, the plaintiff could not alter the fact that he was recovering damages for the breach of this single promise by failing to specify in his action all the particulars of the breach and all the damages to which he was entitled.

"The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same": per BOVILL, C.J., *Gibbs v. Cruikshank* (4) (L.R. 8 C.P. at p. 460). If this were not so, the rule would be nullified.

The plaintiff relied on the judgment of BRETT, M.R., in *Brunsdon v. Humphrey* (1), which mentions as a test for deciding whether two causes of action are the same the consideration whether the same evidence will support both; and he urged that on his first action no evidence would have been admitted of breaches of contract by the defendant other than those specified in the particulars. But the question is not whether, as the action was actually brought, the plaintiff could or could not go into certain matters, but whether he could, if he had given the proper particulars, have proved the whole of what he claims in the second action under the cause of action for which he sued in the first: see *Death v. Harrison* (5), especially the judgment of CLEASBY, B., and *Newington v. Levy* (6). He could not justify an action for the loss of an eye by the defendant's negligence when he had already recovered for the loss of a foot by the same negligence, by saying that in the first action he gave particulars only of the loss of his foot. No more can judgment be recovered in one action for breach of a single promise in ten respects and in another for breach in ten other respects of the same promise. The giving of such particulars as are necessary to enable the defendant to know what case he has to meet is merely incidental to the bringing of the action, and a plaintiff cannot give himself a right to bring an action which otherwise he could not

A bring by failing to specify all the matters which go to make up his one cause of action, or to claim all the relief to which he is entitled in respect of it. This is well illustrated by *Serrao v. Noel* (7). There the plaintiff alleged that the defendant was detaining certain shares, the plaintiff's property. He first brought an action in the Chancery Division claiming an injunction to restrain the defendant from parting with the shares. In this action the defendant consented for an order for the delivery of the shares to the plaintiff. The plaintiff afterwards sued in the Queen's Bench Division for damages for the detention. It was held that he could not recover since the damages could have been claimed in the former action, injunction and damages being only different forms of relief applicable to the same cause of action. BOWEN, L.J., said (15 Q.B.D. at p. 559): "The principle is, that where there is but one cause of action, damages must be assessed once for all," and this was enforced, although in the former action damages had not been claimed, and consequently could not be assessed.

C There are many authorities on this subject or connected with it, but they all come back to the same test: Is the cause of action in the second action the same as that for which the plaintiff had judgment in the first? If it is, the second action cannot be maintained, and, speaking generally, it is immaterial whether the plaintiff knew or might have known, when he brought the first action, the facts on which he relies in the second: see *Clegg v. Dearden* (8), and the judgment of HOLROYD, J., in *Howell v. Young* (9). In *Bagot v. Williams* (10) the knowledge of the plaintiff or his agent of what was owing to the plaintiff when the first action was brought was considered, not because a plea of judgment recovered would not have been good, although when the first action was brought the plaintiff did not know of the debt sued on in the second action, but in order to ascertain for what debts in fact the former action (in an inferior court in which there were no pleadings) was brought.

E I think, therefore, that the plea of *res judicata*, or judgment recovered, is an answer to the whole of this action, and that the defendant is entitled to judgment. This being so, it is unnecessary to consider the other points which the defendant takes in his notice of appeal, and on which we have heard no argument.

Appeal allowed.

F Solicitors: *Champion & Co.* for *Turberville, Smith & Co.*, Uxbridge; *J. Mackie.*

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

Re BATES. MOUNTAIN v. BATES

[CHANCERY DIVISION (Eve, J.), May 16, 1928]

[Reported [1928] Ch. 682; 97 L.J.Ch. 240; 139 L.T. 162;
72 Sol. Jo. 468]

Settlement—Capital or income—Payment to shareholders out of profit on sale of capital assets—No capitalisation of profit.

By his will a testator gave the residue of his estate to trustees upon trust for his wife for life, and then to divide the corpus among his children. When he died he was the holder of shares in two companies engaged in the fishing industry, both of which had sold fishing vessels in excess of the values attributed to them in the books and balance sheets of the companies. The surplus in each case was invested and appeared in a suspense account in the companies' balance sheets. The companies made payments to the shareholders out of this surplus, stating that such payments were made out of capital, and the executors of the testator received an amount of these payments proportionate to the testator's shareholding.

Held: the surplus fund, not having been capitalised, retained its character as a distributable profit; no change in that character could be brought about by the company's expressed intention to distribute any part of it as capital; and, therefore, in the administration of the testator's estate it was to be regarded as capital and not as income.

Notes. Approved: *R. A. Hill v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] All E.R.Rep. 87. Referred to: *Re Doughty, Burridge v. Doughty*, [1947] 1 All E.R. 207; *I. R. Comrs. v. Reid's Trustees*, [1949] 1 All E.R. 354; *Re Duffs Settlement Trusts, National Provincial Bank, Ltd. v. Gregson*, [1951] 2 All E.R. 534.

As to the income to which a tenant for life is entitled, see 29 HALSBURY'S LAWS (2nd Edn.) 644 et seq.; and for cases see 40 DIGEST (Repl.) 707 et seq.

Cases referred to:

- (1) *Bouch v. Sproule* (1887), 12 App. Cas. 385; 56 L.J.Ch. 1037; 57 L.T. 345; 36 W.R. 193, H.L.; 40 Digest (Repl.) 725, 2152.
- (2) *Cross v. Imperial Continental Gas Association*, [1923] 2 Ch. 553; 93 L.J.Ch. 49; 129 L.T. 558; 39 T.L.R. 470; 10 Digest (Repl.) 1250, 8802.
- (3) *Maclaren v. Stainton* (1861), 3 De G.F. & J. 202; 30 L.J.Ch. 723; 4 L.T. 715; 7 Jur. N.S. 691; 9 W.R. 908; 45 E.R. 855, L.J.J.; 40 Digest (Repl.) 719, 2114.

Adjourned Summons

When he died on Feb. 25, 1919, the testator was the holder of sixty-three shares of £10 each in the Anchor Steam Fishing Co., Ltd., and fifty-six shares of £10 each in the Atlas Steam Fishing Company, Ltd. The shares were worth more than par and for the purposes of probate were valued at £18 each. The material facts were common to both companies, and, therefore, only those relating to the Anchor company need be referred to. This company was incorporated with a capital of £30,000 in 3,000 shares of £10 each, of which 1,500 were issued and fully paid up. The company owned certain steam fishing vessels some of which were sold at prices considerably in excess of the values attributed to them in the books and balance sheets, with the result that the company, with its capital still intact, became possessed of a surplus in cash which was invested in war stock and other securities. These investments appeared on the assets side of the balance sheet, and on the other side was a suspense account made up of two items, one the surplus proceeds of vessels sold in preceding years, and the other the surplus proceeds of vessels sold in the particular year to which the balance-sheet had reference. In the meantime the company's business was being carried on at a substantial profit, and in 1919 two distributions were made, the one a dividend of 30 per cent. upon the paid-up capital representing profits earned, and the other a payment out of the suspense account of a sum equivalent to £10 a share. The executors of the testator received in respect of this latter distribution the sum of £630. In subsequent

years further distributions by way of annual dividends and further payments out of the suspense account were made, and, prior to the dissolution of the company, the executors received out of the suspense account sums amounting in all to £2,589. When making these payments the company stated that they were made out of capital. By his will the testator gave the residue of his estate to trustees on trust for his widow for life and on her death among his children in specified proportions. In the administration of the trust the question arose whether the payments made by the companies out of their suspense accounts were to be treated as capital or income. The assets of each company exceeded its liabilities by a sum which was larger than its suspense fund, no part of which, therefore, was required to repay the capital or satisfy creditors.

de Montmorency for the summons.

Howard Wright, for the trustee in bankruptcy of a son of the testator, referred to *Bouch v. Sproule* (1), *Cross v. Imperial Continental Gas Association* (2) and *Maclaren v. Stainton* (3).

H. Johnston for the representatives of the tenant for life.

Turnbull for the remaindermen.

EVE, J.—The question I have to decide is whether the £2,589 is to be regarded as income to which the late tenant for life, the testator's widow, was entitled, or whether the moneys or any part of them belong to those entitled to the capital after her decease. The company undoubtedly, both in anticipation of the distributions and when they were respectively made, was desirous of protecting the shareholders from any claims which might be made for income or supertax on the amounts so distributed and to that end, alike in the circular letters notifying the intention to distribute as in those accompanying the warrants for the payments, prominence was given to the statement that the payments were being made out of capital and were not in the nature of a dividend or bonus upon the shares. That, no doubt, was done with the intent, which was indeed expressed, to protect the recipients from liability to taxation, but the mere impressing of these distributions with the appellation of "capital distribution" cannot, in my opinion, determine their true character. One must inquire a little closer for the purpose of ascertaining whether they were in fact distributions of capital or distributions of something which, although in one sense capital, in that it originated by the realisation of assets and not from the ordinary income of the company's business, could not properly be regarded as capital for all purposes. The suspense account represented realised profit on the company's capital assets, and, inasmuch as the equilibrium between capital and liabilities, on the one side, and assets, on the other, was maintained without any necessity to resort to this fund, it represented what I think is spoken of in one of the cases as "the total appreciation of the capital assets"—that is to say, if you take on one side the liabilities of the company and on the other the whole of its assets, the latter exceed the former by a sum which is in excess of the whole of this suspense fund, or, in other words, no part of it is required to satisfy either the creditors or shareholders of the company. In this state of affairs it was a fund which the company could treat as available for dividend and could distribute as profits, or, having regard to its power to increase capital, could apply it to that purpose by, for example, increasing the capital, declaring a bonus, and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proper proportion of the bonus so declared. Unless and until the fund was in fact capitalised it retained its characteristics of a distributable profit, and on the authority of the passages from LORD HERSCHELL'S speech in *Bouch v. Sproule* (1) which have been read the only method by which a company with power to increase its capital can capitalise such a fund is to increase its capital by an amount equivalent to the sum sought to be capitalised. No such procedure was adopted here, and, in my opinion, no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital. It remained an unc capitalised surplus available for distribution either as dividend or bonus on the shares, or as a special division of an ascertained profit derived, not from the trading of the company, but from a fortunate appreciation in value of some or other of

its capital assets, and in the hands of those who received it, it retained the same characteristics. In these circumstances I think the case falls within rule B, stated in JARMAN ON WILLS at p. 1224, and applied in *Maclaren v. Stainton* (3), and must be treated as income, and in so far as it was distributed during the life of the tenant for life, constitutes income receivable by her under the trusts of the will.

Solicitors: *Gamlen, Bowerman & Forward*; *Williamson, Hill & Co.* for *Bates, Mountain & West*, Grimsby; *Tarry, Sherlock & King*.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

Re NATIONAL UNION OF SEAMEN. WILSON v. NATIONAL UNION OF SEAMEN

[CHANCERY DIVISION (Romer, J.), November 28, 1928]

[Reported [1929] 1 Ch. 216; 98 L.J.Ch. 401; 141 L.T. 294;
45 T.L.R. 92]

Trade Union—Rules—Construction—Objects—“To promote and to provide funds to extend the adoption of trade union principles”—Provision of funds to promote miner’s non-political unions—Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), ss. 1, 2.

One of the objects of a registered trade union, as set forth in its rules, was “to promote and to provide funds to extend the adoption of trade union principles, and to affiliate with such other trade unions and federations of trade unions as in the opinion of the executive council may appear desirable.”

Held: the trade union had power to provide funds to promote the establishment and growth of non-political trade unions among miners.

Notes. The Court of Appeal in *Cotter v. National Union of Seamen*, [1929] All E.R. Rep. 342, have also held that rule 3 (1) authorised the provision of funds to promote the miners’ non-political movement.

As to the construction of particular trade union rules, see 32 HALSBURY’S LAWS (2nd Edn.) 495; and for cases on the subject, see 43 DIGEST 103. For the Trade Union Act, 1913, s. 1, s. 2, see 25 HALSBURY’S STATUTES (2nd Edn.) 1270.

Adjourned Summons as to the construction of the rules of the National Union of Seamen, a registered trade union.

Rule III (1) defined one of the objects of the union as

“To promote and to provide funds to extend the adoption of trade union principles, and to affiliate with such other trade unions and federations of trade unions as, in the opinion of the executive council, may appear desirable.”

This summons was taken out by the general treasurer of the union to determine whether the union had power under its rules to provide funds to promote the establishment and growth of non-political trade unions among miners.

Luxmoore, K.C., and *R. F. Roxburgh* for the applicant, the general treasurer of the union.

H. Everett for the trade union.

G. B. Hurst, K.C., and *R. J. White* for a member of the union representing a class.

ROMER, J.—The summons asks whether the plaintiff union has power under its rules to provide funds to promote the establishment and growth of non-political trade unions among miners. *Primâ facie* the answer to that question must be found in the rules of the union. But before referring to those rules, it is desirable to call attention

A to the Trade Union Act, 1913, which enables trade unions, so long as they are formed for the purposes of carrying into effect what in the Act are called statutory objects, to take power to carry out any other transaction which is not in itself illegal. By s. 1 (1) of that Act it is provided as follows:

B "The fact that a combination has under its constitution objects or powers other than statutory objects within the meaning of this Act shall not prevent the combination being a trade union for the purpose of the Trade Union Acts, 1871 to 1906, so long as the combination is a trade union as defined by this Act, and, subject to the provisions of this Act as to the furtherance of political objects, any such trade union shall have power to apply the funds of the union for any lawful objects or purposes for the time being authorised under its constitution."

C Then sub-s. (2) of that section defines what is meant by the phrase "statutory objects," and enacts:

D "For the purposes of this Act the expression 'statutory objects' means the objects mentioned in section sixteen of the Trade Union Act Amendment Act, 1876, namely, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business and also the provision of benefits to members."

By s. 2 (1), the expression "trade union" for the purposes of the Trade Union Acts is defined as meaning any combination the principal objects of which are under its constitution statutory objects. The National Union of Seamen is a registered trade union, and without any question has been formed for the purpose of carrying into effect the statutory objects. That being so, anything not in itself unlawful which it takes power to do by its rules cannot be said to be ultra vires the trade union.

E With those preliminary observations I now refer to the rules of the society. Rule III states the objects of the union, and the first of those objects, and, indeed, the only one with which I am concerned on this summons, is this:

F "(1) To promote and to provide funds to extend the adoption of trade union principles, and to affiliate with such other trade unions and federations of trade unions as, in the opinion of the executive council, may appear desirable."

Counsel for a member says, and I agree with him, that the phrase, "trade union principles," there used, is referring to the statutory objects of trade unions. But, accepting that, it appears to me impossible to say that it would be ultra vires this union to promote or to provide funds for the promotion of any trade union amongst any particular class of workers, seeing that a trade union would necessarily have among its objects the statutory objects. Supposing, for instance, that there was a body of workmen for whom no union had been provided, could it possibly be said that it was ultra vires the Seamen's Union to promote the establishment of a trade union for those workers? The answer to that, it appears to me, must necessarily be in the negative. It is impossible to say that that would not be within r. III, sub-r. (1), of the rules of this union. If, therefore, the question put to me were whether the union has power under its rules to provide funds to promote the establishment and growth of trade unions among miners the answer would be in the affirmative. But if it is not ultra vires the trade union to promote the establishment and growth of trade unions among miners, it cannot be ultra vires for them to promote the establishment and growth of trade unions among miners which have a certain complexion.

I In my opinion, when once it is conceded, as I think it must be conceded, that to promote the establishment of a trade union among miners is within the powers of this union, it is impossible to say that it is not within their powers to provide funds for the establishment of trade unions which have this particular feature that they are non-political. The reasons for selecting non-political unions are set forth in an affidavit made by the treasurer of the union, and I am satisfied that in so doing the union are

bona fide endeavouring to extend the adoption of trade union principles within the meaning of rule III, sub-r. (1). There will, therefore, be a declaration that the defendant union has power under its rules to provide funds to promote the establishment and growth of non-political trade unions among miners.

Declaration accordingly.

Solicitors: *Vizard, Oldham Crowder & Cash; Daphnes.*

[Reported by J. S. SCRIMGEOUR, ESQ., Barrister-at-Law.]

FOSTER v. DRISCOLL
LINDSAY v. ATTFIELD
LINDSAY v. DRISCOLL

[COURT OF APPEAL (Scrutton, Lawrence and Sankey, L.JJ.), October 29, 30, 31, November 1, 2, December 13, 1928]

[Reported [1929] 1 K.B. 470; 98 L.J.K.B. 282; 140 L.T. 479;
45 T.L.R. 185]

Contract—Illegality—Public policy—Breach of international comity—Commission of criminal offence in foreign and friendly country—Parol evidence to prove illegality.

Five persons entered into an agreement under which they were to buy whisky in Great Britain and, directly or indirectly, obtain its importation into and sale in the United States where at all material times such importation and sale was a criminal offence.

Held (SCRUTTON, L.J., dissenting): the agreement, involving as it did, the commission of a criminal offence in a foreign and friendly country and so a breach of international comity, was void as being against public policy, even though the parties had not succeeded in carrying out their enterprise and no such criminal offence had, in fact, been committed, and though, in a certain event, there might be alternative modes or places of performing the contract which would permit its being performed legally.

Per LAWRENCE, L.J.: It is settled law that the existence of the illegality of a transaction evidenced by documents may be proved by parol evidence notwithstanding the apparent legality of the documents before the court.

Bill of Exchange—Avoidance—Alteration without assent of parties liable—Bill invalid as inland bill—Alteration to constitute valid foreign bill—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 64.

A bill of exchange, which had been accepted, but did not bear the drawer's name, had "London" lithographed on it as its place of origin. If the name of the drawer had been inserted without more, the bill would have been invalid as an inland bill on unstamped paper, but the bill was sent to the drawer in Switzerland and at Lausanne he inserted his name as drawer, struck out "London" on the bill, and substituted "Lausanne."

Held, by SCRUTTON, L.J.: when the document was altered it was not a bill, but was being completed to become a valid foreign bill; s. 64 of the Bills of Exchange Act, 1882, which provides that where a bill is materially altered without the assent of all parties liable on it it is avoided, did not apply to such a transaction; and, therefore, the alteration did not avoid the bill.

Bill of Exchange—Avoidance—Date—Bill expressed to be payable at fixed period after date—Bill issued undated—Date of beginning of period fixed by agreement—Another date inserted in bill—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 12.

A Section 12 of the Bills of Exchange Act, 1882 (which provides that where the holder of a bill, which is expressed to be payable at a fixed period after date and is issued undated, in good faith and by mistake inserts a wrong date, the bill shall not be avoided thereby), does not apply to a case where an agreement provides the date from which the bill is to run, irrespective of the date or sight of the bill, as, e.g., "ninety days from Nov. 26" and a date which is not "Nov. 26" is inserted in the bill as the date from which the ninety days are to run, and, therefore a bill so dated was **held** to be void as against the acceptor, by SCRUTTON and SANKEY, L.JJ.

B

Notes. Distinguished: *Koch v. Dicks*, [1932] All E.R. Rep. 476; *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1954] 3 All E.R. 88. Approved: *Regazzoni v. K. C. Sethia (1944), Ltd.*, [1957] 3 All E.R. 286. Referred to: *Carling Export Brewing and Malting Co., Ltd. v. R.*, [1931] A.C. 435.

C

As to contracts contrary to public policy and extrinsic evidence to prove illegality, see 8 HALSBURY'S LAWS (3rd Edn.) 130-136, 147; as to the dating of a bill of exchange, see *ibid.*, vol. 3, 148, 149; as to alteration of a bill, see *ibid.*, vol. 3, 228, 231-234. For cases see respectively 12 DIGEST (Repl.) 269 et seq., 324; 6 DIGEST 50 et seq., 372 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

D Cases referred to:

(1) *Holman v. Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, 2404.

(2) *Clugas v. Penaluna* (1791), 4 Term Rep. 466; 100 E.R. 1122; 11 Digest (Repl.) 441, 829.

(3) *Ralli Bros. v. Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 15 Asp.M.L.C. 33; 25 Com. Cas. 227; sub nom. *Sota and Aznar v. Ralli Bros.*, 36 T.L.R. 456; 64 Sol. Jo. 462, C.A.; 11 Digest (Repl.) 435, 791.

E

(4) *Waugh v. Morris* (1873), L.R. 8 Q.B. 202; 42 L.J.Q.B. 57; 28 L.T. 265; 21 W.R. 438; 1 Asp.M.L.C. 573; 12 Digest (Repl.) 264, 2041.

(5) *The Argos (Cargo Ex.)*, *Gaudet v. Brown*, *The Hewsons*, *Geipel v. Cornforth* (1873), L.R. 5 C.P. 134; 42 L.J.Adm. 1; 28 L.T. 77; 21 W.R. 420; 1 Asp.M.L.C. 519, P.C.; 41 Digest 494, 3236.

F

(6) *Collins v. Blantern* (1767), 2 Wils. 341; 95 E.R. 847; 12 Digest (Repl.) 290, 2229.

(7) *Stewart v. Gibson* (1838), 7 Cl. & Fin. 707.

(8) *Armstrong v. Armstrong*, *Lewis v. Armstrong* (1834), 3 My. & K. 45, L.C.; 12 Digest (Repl.) 301, 2319.

G

(9) *Everet v. Williams* (1725), Lindley on Partnership (9th Edn.) 124, n.; Law Quarterly Review, Vol. 9, p. 197; 2 Pothier on Obligations by Evans, p. 3, n.; 36 Digest (Repl.) 581, 1390.

(10) *Re Grazebrook, Ex parte Chavasse* (1865), 4 De G.J. & Sm. 655; 6 New Rep. 6; 34 L.J.Bey. 17; 12 L.T. 249; 11 Jur.N.S. 400; 13 W.R. 627; 2 Mar.L.C. 197; 46 E.R. 1072, L.C.; 12 Digest (Repl.) 300, 2312.

H

(11) *De Wutz v. Hendricks* (1824), 2 Bing. 314; 2 State Tr.N.S. 125; 9 Moore, C.P. 586; 130 E.R. 326; sub nom. *De Witts v. Hendricks*, 3 L.J.O.S.C.P. 3; 12 Digest (Repl.) 307, 2358.

(12) *Pellecat v. Angell* (1835), 2 Cr.M. & R. 311; 1 Gale, 187; 5 Tyr. 945; 4 L.J.Ex. 326; 150 E.R. 135; 12 Digest (Repl.) 308, 2365.

I

(13) *Lightfoot v. Tenant* (1796), 1 Bos. & P. 551; 126 E.R. 1059; 11 Digest (Repl.) 441, 833.

(14) *Simeon v. Bazett* (1813), 2 M. & S. 94; 105 E.R. 317; 29 Digest 216, 1732.

(15) *Sumner, Permain & Co. v. Webb & Co.*, [1922] 1 K.B. 55; 91 L.J.K.B. 228; 126 L.T. 294; 38 T.L.R. 45; 66 Sol. Jo. W.R. 18; 27 Com. Cas. 105, C.A.; 39 Digest 451, 788.

(16) *Pearce v. Brooks* (1866), L.R. 1 Exch. 213; 4 H. & C. 358; 35 L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Jur.N.S. 342; 14 W.R. 614; 12 Digest (Repl.) 294, 2264.

- (17) *Cannan v. Bryce* (1819), 3 B. & Ald. 179; 106 E.R. 628; 12 Digest (Repl.) 319, **A**
2459.
- (18) *M'Kinnell v. Robinson* (1838), 3 M. & W. 434; 1 Horn & H. 146; 7 L.J.Ex. 149;
2 Jur. 595; 25 Digest 415, 185.

Appeals from orders made by WRIGHT, J., in three actions tried together without a jury.

In the first action the plaintiff, Sir Harry Seymour Foster, a financier, claimed a declaration that a bill of exchange for £5,500 drawn by him was void. He also claimed repayment of £1,000, which he had advanced to secure the steamship *Wearholme* to take a shipment of whisky to the United States, and repayment of a sum of £575, which he had advanced to pay off a charge on the whisky. The appellant, Lindsay, one of the defendants in the first action, counter-claimed for payment of the bill of exchange for £5,500. Lindsay, who was a distiller, carrying on business in Edinburgh, and was the plaintiff in the second and third actions, was, under the scheme which is mentioned below, to sell the whisky to Messrs. Driscoll and Miller, shipbrokers, described as the Tower Trading Syndicate. In the second action, Lindsay sued Sir Harry Foster and one Attfield, whose part in the scheme was to arrange for placing the whisky in the United States, on the bill. In the third action, Lindsay sued Driscoll, Miller and Attfield on a second bill of exchange for £4,812.

The parties, Foster, Driscoll, Miller, Lindsay and Attfield, entered into a partnership in this country to carry out a scheme for the importation of whisky into the United States of America, such importation being by the law of the United States, a criminal offence. It was proposed to load a steamship with a cargo of whisky to be conveyed across the Atlantic to be sold in the United States, if possible, or if that were not possible, in Canada, or Nova Scotia, or at some point on the high seas from which it could be smuggled into the United States to be sold there in violation of the laws of that country. It was proposed that Lindsay should provide the whisky, that Driscoll and Miller should find the steamer, that Foster should finance the scheme, and that Attfield should go to the United States to arrange for the disposal of the whisky there and collect the proceeds. Lindsay provided 7,500 cases of whisky, which were stored in a bonded warehouse in Edinburgh. On Oct. 7, 1927, the steamship *Wearholme*, 625 tons gross, was purchased by the syndicate for £2,565, of which sum Foster advanced £256 10s. as a deposit. On Oct. 26, 1927, the following memorandum of agreement was drawn up between Foster, of the first part, Lindsay, of the second part, and Driscoll and Miller (therein referred to as the syndicate), of the third part.

"(1) The said F. A. Lindsay agrees to sell and the syndicate agrees to buy 7,000 to 7,500 cases of Scotch whisky (quantity at Mr. Lindsay's option), twelve bottles in each case of 24 U.P. guaranteed all over two years and averaging over three years old at the price of 27s. 6d. per case f.o.b. Leith or Glasgow. . . (4) If 7,500 cases are prepared for shipment payment to be made by a bill for £5,500 at ninety days sight from Nov. 26, 1927, drawn by the said Sir H. S. Foster on and accepted by James Herbert Attfield and endorsed to the said F. A. Lindsay, such bill to bear no interest and a bill for £4,812 10s. at ninety days sight from Nov. 26, 1927, without interest accepted by the said J. H. Attfield, J. D. Driscoll and A. S. Miller, both the said bills to be drawn and accepted on the signing of this agreement and handed to F. A. Lindsay to hold as security until the said F. A. Lindsay hands to the syndicate the mate's receipt or shipping documents or delivery order from bond on or before Nov. 26 next.

On the same day, in consideration of Foster completing the memorandum of agreement of Oct. 26, 1927, Driscoll and Miller jointly and severally agreed that the first proceeds of the sale up to £11,000 should be remitted to Foster to be applied by him in meeting the bill for £5,500 and repaying himself £1,000 which he had lent to the "syndicate" on the security of a mortgage of the ship, and that the balance of £4,500 should be retained by Foster for his services in connection with the agreement. On the same day, in intended pursuance of the principal agreement, two documents, undated and purporting to be bills of exchange, though written on unstamped paper, were sent to

A Lindsay's representatives in London. One of these purported to be a bill of exchange for £5,500 payable ninety days after date, accepted by Attfield and indorsed by Foster; the other purported to be a bill of exchange for £4,812 10s. payable ninety days after date, accepted by Attfield and the syndicate, but bearing no name of a drawer. These documents were sent to Lindsay, who was then at Lausanne. They both bore the lithographed heading "London." On Feb. 2, 1928, Lindsay struck out "London" from each of the documents and substituted "Lausanne" as the place of origin. Then he added the date, Dec. 3, 1927, to each of them, and signed his name as drawer to the second and stamped them as foreign bills. The bills were presented for payment on Mar. 5, 1928, dishonoured, and duly protested.

The Bills of Exchange Act, 1882, provides:

C Section 12: Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly. Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

D Section 64: (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers. Provided that . . . (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

E WRIGHT, J., gave judgment for Foster in the first action, for the declaration claimed, and for the delivery up of the bill for cancellation, and he also gave judgment for Foster on the counter-claim. In the second action he gave judgment for the defendants on F the ground that the bill was drawn, accepted, and indorsed in this country on unstamped paper. In the third action he gave judgment for the defendant Attfield on the ground that the condition precedent for the bill beginning to mature had never been performed. Lindsay appealed in the three actions.

Schiller, K.C., and *Macaskie* for Lindsay.

James Dickinson and *C. R. Williams* for Foster.

G *Pritt, K.C.*, and *Harold Simmons* for Attfield.

Cur. adv. vult.

Dec. 13. The following judgments were read.

H **SCRUTTON, L.J.**—This is a case of great difficulty, if the court has to ascertain the legal results of the complicated facts. My brothers, however, take the view that the whole transaction is illegal, and that the court should set aside the judgment of WRIGHT, J., and make no order in favour of, or against, any of the parties, or give anyone any costs. While I should like to arrive at the same result, I think that on legal principles, as the adventure could be carried out legally, or illegally, and the parties have not agreed how to carry it out, the court can deal with the legal results on the hypothesis of the adventure being carried out in a legal manner. I, therefore, endeavour to state I the view which I take of the other questions of law which may arise in the case.

The appeals in these three cases arise out of a complicated transaction relating to 7,500 cases of whisky which I have no doubt it was expected would ultimately be brought into the United States of America in breach of the United States laws. A number of parties are concerned and the transaction is not very creditable to any of them, least of all to the member of the English Parliament who plays a prominent part in the story. Shortly the position is this. Mr. Lindsay, a Scottish distiller, was to sell 7,500 cases of whisky, then at Edinburgh at a price of 27s. 6d. per case f.o.b. Leith or Glasgow. The whisky cost him about £6,500, and the price to the syndicate would be some £10,312.

He was also to provide £2,500 for the purchase, equipment and disbursements of a small steamer called the *Wearholme*, to be secured by a first mortgage on the ship and to bear interest, as to the first £1,000 at 8 per cent. and as to £1,500 at 40 per cent. Though it is not expressly stated, and though the agreement does state that the whisky was to be shipped in a regular liner, it is obvious that at some stage the whisky was to be transferred to the *Wearholme* for some voyage not described. The nature of the voyage can be gathered from a term in the contract that, if a policy for £1,000 against the risk of seizure or confiscation of the ship by any government could not be effected at a premium of 30 guineas per cent. or less, Lindsay and Foster would underwrite the confiscation risk jointly. Lindsay on the face of the agreement was to sell the whisky to Driscoll and Miller, trading as the Tower Trading Syndicate. These gentlemen carried on a shipbroking business, and were apparently to manage the shipbroking part of the unspecified adventure. They agreed to provide an additional £1,600 as funds for the equipment of the *Wearholme*, and according to their evidence were ultimately to get about £10,000 out of the profits of the adventure. The price of the whisky was presumably to be paid by the syndicate. Actually it was to be paid in the first instance by two bills. The first bill, part of the subject-matter of the first and second actions, was to be drawn by Foster, and accepted by Attfield. Foster was a party to the agreement with regard to the sale of the whisky and purchasing and financing of the *Wearholme*; indeed he was "the party of the first part." Attfield was not a party to that agreement. Foster, in addition to drawing the bill, under the agreement was to lend the syndicate £1,000, partly for the deposit on the purchase of the *Wearholme*, interest at 40 per cent.—the loan to be secured by a second mortgage on the *Wearholme*—and was to receive a cover note for £1,000 on ordinary marine risks on the vessel. He was also to join Lindsay as underwriter to the extent of £1,000 on the ship against risk of confiscation, if this could not be insured elsewhere at or under 30 guineas per cent. The agreement of Oct. 26 does not mention what he was to get for these services; but they were not charitable. By a separate agreement of the same date, the syndicate agreed that out of the first proceeds of the sale of the whisky, £11,000 should be remitted to Foster, to be applied as to £5,500 to meet the bill, £1,000 to pay off the mortgage, and £4,500 as remuneration for his services. The balance of the price £10,312 odd was to be paid by a bill for £4,812 10s. drawn by Lindsay on and accepted by Attfield, Driscoll and Miller. Attfield is the mystery man of the case; he is said to be an ex-schoolmaster, and, though no agreement in writing was produced, he was apparently to negotiate the disposal of the whisky on the other side of the Atlantic, for which purpose he intended, in the first instance, to proceed to New York. Canada, Halifax, St. Pierre, and the open sea, are also suggested as the places where he would operate. There is an agreement providing for his remuneration, dated Sept. 14, 1927, by which the syndicate agree to pay him out of the profits as and when received by them of the "arranged shipment abroad" £2,750 for services—unspecified—rendered and to be rendered. Attfield, on Nov. 2, 1927, undertook to remit to Foster "out of the first proceeds of the sale of the merchandise" £11,000. There is no express agreement with regard to the sources from which Attfield was to be indemnified for his liability on the bill. Presumably, receiving the sale proceeds, he would take care of himself. There is no express agreement with regard to the remuneration of the syndicate, or with regard to the freight to be paid for carriage on the *Wearholme*, or with regard to the disposal of the balance of the proceeds of sale. In fact the whole arrangement so far as disclosed is extremely odd and unsatisfactory, and I am quite satisfied that the court has not been told the whole truth or anything like the whole truth by anybody concerned.

The difficulties arise partly from the dealings with the two bills constituting the price and the provisions with regard to when they were due. I have not looked at the negotiations before the agreement, but only at the original agreement itself. It appears from this "that shipment was to be made at the earliest possible date and in any case goods to be delivered ex warehouse not later than the 26th Nov. next." On the original of the agreement it appears that at first the bills were each to be at ninety days from shipment, to be drawn and accepted on the signing of the agreement, and to be then

A handed to the solicitors to hold as security till Lindsay handed over "mates' receipt or shipping documents, or delivery order from bond." The bills were then to be dated as at date of shipment. But this was altered; "date of shipment" was three times struck out; twice there was substituted Nov. 26, 1927, being the last date for delivery ex warehouse. There was then an express provision that the bills were due ninety days from Nov. 26; no express provision when they were to be dated except that they were to be drawn and accepted on the signing of the agreement—Nov. 26—and a substituted provision that they were to be handed to Lindsay to hold as security till he handed the specified documents "on or before the 26th Nov." The only other agreements which may be material are (i) an agreement of Oct. 26, between Driscoll, Miller and Foster, not Lindsay or Attfield, endorsed on the original agreement, extending the date for delivery of the whisky till Nov. 29, and giving an extra day for delivery for every day's delay in handing over the bills. The bills were handed over on Nov. 26 so the extension of delivery of the whisky was three days; there was no alteration with regard to the date or time for payment of the bills; (ii) an agreement of Nov. 3, 1927, by which the syndicate gave Lindsay's firm seven days extra for bottling, that is, delivery. Foster and Attfield were not parties to this, and the extension of time was not used. Nothing was said about the date or time of payment of the bills. What happened in fact was that on Nov. 26 there was handed to Lindsay's representative, Mr. Berry, two documents, each on unstamped paper and with no dates and with a lithographed heading "London." The first purported to be drawn by Foster and accepted by Attfield for £5,500. The second had no drawer's name, but was accepted by Attfield, Driscoll and Miller.

E If these were to be treated as inland bills, as they were on unstamped paper, they were null and void: see Stamp Act, 1891, s. 2, s. 37 (2), s. 38 (1). The first bill for £5,500 was clearly an inland bill, and was, therefore, null and void, and to give it was a breach of the agreement, which was to give a valid bill. The second bill had no drawer's name, but Lindsay was then in Lausanne, and the bills were sent out to him there. At some date, probably after Nov. 3, the date of the agreement giving seven days' extension for delivery of the whisky, he inserted a date of Dec. 3 in the bill, the form of which was F "ninety days after date," though the agreement provided for "ninety days after the 26th Nov." On Feb. 2, 1928, Lindsay took the two bills to the bank, not having inserted his name as drawer, and was told by the bank clerk, if he did not already know, that a London bill was null and void, being on unstamped paper. He, thereupon, in Lausanne, as part of one and the same transaction, altered London to Lausanne, the place where he was then drawing the bill, and signed his name as drawer. I shall G consider the effect of this later.

The agreement provided for delivery of the whisky f.o.b. in a regular liner on or before Nov. 26, 1927. The reason for this provision was that for spirits to be exported without paying duty, the exporter must give a bond in a large sum, in this case about £55,000, that they should not be smuggled back into Great Britain. The customs would discharge this bond on receipt of a "landing certificate" that the spirits had been landed H in a foreign country. Certain security companies furnished such bonds for a small payment, but required that the shipment should be by a regular liner, whose owners would not, presumably, be mixed up in secret transshipments and smuggling the spirits into England. This explains why the spirits were not to be shipped in the *Wearholme* in the first instance, as it would be difficult to get any security company to give a bond in respect of spirits shipped in the *Wearholme*, and Lindsay would not care to give such a bond himself. I Shipment "on a regular liner" was, therefore, specified, and the syndicate would have to provide the ship and the room. A permission to export could not be obtained from the Customs until the ship was named. But the agreement does not provide for what was to happen if the purchasers did not name a ship on Nov. 26, 1927, when the whisky was ready for shipment. This is what happened. The *Wearholme* was not ready, and, indeed, was not ready in the following February, and the parties had not made up their minds where the regular liner was to take the whisky, in order that it might be put in the *Wearholme*. Dublin was mentioned, and Hamburg, and, later on, Antwerp, but nothing was settled. Lindsay wanted to be sure of payment,

and his advisers thought that the way to secure this was for Lindsay to give a delivery order to the syndicate, which, if accepted by the bonded warehouse, would transfer the property to the syndicate in which event the bills, they thought, would begin to run. This, they thought, would be "the delivery order from bond" mentioned in cl. 4 of the agreement. Accordingly, on Nov. 26, 1927, Lindsay's London office wrote to the syndicate as follows:

"Dear Sirs,—Referring to my conversation with you on the telephone this morning, I beg to confirm having advised you that the 7,500 cases Scotch whisky are ready and that I await your shipping instructions. It is understood now that you will arrange to provide the necessary export bond. Yours faithfully (For F. A. Lindsay) W. B., London Manager."

It is agreed that Berry was told that the purchasers were not ready to ship, and on Dec. 1 the London office sent to the syndicate the document dated Nov. 30, 1927.

"Messrs. The Tanfield Bonding Co., Cannonmills, Edinburgh. Dear Sirs,—Please deliver to the order of Messrs. The Tower Trading Syndicate, 6, Harp Lane, London, E.C. 3, the undernoted 7,500 cases of whisky, rent charges to be for their account as from 1st December 1927. Yours faithfully, (signed) Per pro F. A. Lindsay, W. Scott.

7,500 cases whisky.

2,998 cases each 12/1d. bottles 'Diamond Brand' Scotch whisky.

1,737 cases each 12/1d. bottles 'Lindsay's Liqueurs' Scotch whisky.

1,000 cases each 12/1d. bottles 'King James the Third' Scotch whisky.

1,000 cases each 12/1d. bottles 'Sandy Macnab' Scotch whisky.

400 cases each 12/1d. bottles 'Old Isla' Scotch whisky.

365 cases each 12/1d. bottles 'James McLaren, Ltd.' Scotch whisky.

7,500

Deliver to J. H. Brown for and on behalf of the Tower Trading Syndicate, (Signed) J. D. Driscoll; J. S. Miller."

The syndicate accepted the document, and presented it to the bonded warehouse, who accepted it, and on Dec. 13, acted on an assignment by the syndicate in favour of one Brown. Lindsay's London office informed Foster of the delivery. Foster asked Driscoll if it was in order, and apparently, after a conversation, was satisfied that it was in order. The syndicate in fact pledged the whisky in question to Neagle, by assignment of the delivery order; Foster paid off Neagle, had the delivery order assigned to him, and presented it to the bonded warehouse, who attorned to him. Foster took on Feb. 21 from the syndicate, a first charge on the whisky for any sum which he might have to pay on the bill for £5,500 and for "all the sums mentioned in our undertaking to you of Oct. 26, 1927," which, apparently, included the remuneration of £4,500. Lindsay has, therefore, parted with the property in the whisky, but has not been paid for it. The whisky stands in Foster's name, and he has drawn a bill in payment for it. But when the date when the bill was alleged to be due was approaching, Foster's solicitors, on Feb. 29, 1928, stated that Foster was entitled to treat the agreement as at an end "in view of the inability of the other parties to carry out the agreement." A writ was, accordingly, issued on Dec. 29, 1928, in Foster's name against Driscoll, Miller, Lindsay and Attfield, asking for declarations that he was not liable on the bill or the agreements. Lindsay counter-claimed damages for breach of contract. This is the first action. Lindsay replied with a writ on Mar. 10, 1928, against Foster and Attfield asking for judgment against both of them on the bill and against Foster asking for damages for breach of contract. This is the second action. Lindsay, by writ dated Mar. 7, 1928, claimed on the second bill against Driscoll, Miller and Attfield. This is the third action. WRIGHT, J., holding that the bill for £5,500 was null and void as on unstamped paper, and that Foster was released from liability on the agreement by the events that had happened, gave judgment for him in the first action, for the declarations claimed, and against Lindsay in the second action. In the third action he held that the same considerations which freed Foster in the first action, freed Attfield on the second bill, and therefore,

A gave judgment accordingly, without finally deciding (i) whether the whole transaction was not illegal, a point raised by Attfield, or (ii) the effect on the bill of the alteration in place of drawing and addition of date. Lindsay appeals against all three judgments. But Lindsay's counsel in the first and second actions admit that they cannot contend that the bill for £5,500—a subject-matter of the first and second actions, being on unstamped paper, is not null and void. So far, therefore, as the first and second actions

B are based on the bill, the appeal fails, and as in the second action, Attfield, who is not a party to the agreement, is only sued on the bill, that action and appeal fail entirely against him. But in the first action, Foster claims that he is released from the agreement, and Lindsay, on the other hand, counter-claims against Foster damages for the breach of the agreement; in the second action, Lindsay repeats that claim. There remain, therefore, for decision in the first and second actions the question whether

C Foster has been released from liability from the agreement, or is liable for damages for some, and what, breach of the agreement. Foster undoubtedly, in the first instance, broke the agreement, for, having contracted to give a bill, which must mean a valid bill, he did not give such a bill. The learned judge, as I understand his judgment, has held that Foster is released from liability for that breach, or, indeed, from any liability under the agreement by the fact that Lindsay has delivered the goods to the

D syndicate in a way not contemplated by the agreement, and that nothing in his subsequent action accepts this departure from the agreement.

The first question is then, whether Lindsay's giving the delivery order to the syndicate is a breach of the agreement, releasing Foster from any liability.

[HIS LORDSHIP considered the documents and the evidence and continued:] I am, therefore, of opinion that the tender and acceptance of the delivery order in question

E was justified by the agreement. This ground for alleging that liability on the contract has ceased, therefore, fails; the seller had duly delivered the goods to the order of the syndicate who have accepted delivery. Another suggested ground of excuse is the agreement between Lindsay and the syndicate giving Lindsay seven days further time for bottling. Foster was not a party to this, but the extension of time was never used, as the whisky was ready on Nov. 26, the original contract date, and was only not

F delivered because the purchasers had no ship ready. These defences of Foster, in my opinion, therefore, fail, and as he has contracted to give a valid bill and has not done so, he is liable in damages for breach of contract. The damages appear to be the amount of the bill. It is true that Foster has no control after the delivery order is given, nor would he have any control after the shipment on the regular liner contracted for. If I am wrong in disagreeing with the judge below in what is a difficult question of

G interpretation, there remains the question whether Foster, by his action, has not accepted the delivery order as good tender.

[HIS LORDSHIP reviewed the evidence, answered the question in the affirmative, and said that on that ground also the claim that the agreement was no longer binding failed.] I deal later with the defence of illegality raised by Attfield, which one is strongly tempted to accept.

H The third action is by Lindsay against Attfield and Driscoll and Miller as acceptors of the second bill. Driscoll and Miller did not enter an appearance, and judgment was given against them by default. The learned judge has held that Attfield is discharged by the procedure with regard to the delivery order and the reasons for which he has discharged Foster from liability on the first bill. Attfield pleaded two additional points—(i) that the bill was invalid (a) by reason of an alteration of the date; (b) by

I reason of an alteration of the place named on the bill as the place where it was drawn or issued; (ii) that the whole transaction was illegal as to carry it out was illegal by the law of the United States. On these points the judge gave no decision, freeing Attfield from liability on the first ground named. The bill when handed over on Oct. 26 was accepted, but had no drawer's name and no date. It had "London" lithographed as its place of origin and was intended to have four British subjects as its parties. If Lindsay had inserted his name as drawer without more, the bill would have been invalid as an inland bill on unstamped paper. But the bill was sent to Lindsay at Lausanne, and at Lausanne he inserted his name as drawer. He, therefore, struck out "London"

which was not the place where he was completing the bill, but inserted "Lausanne," **A**
 the true place. This would make the bill a foreign bill and valid. When the document
 was altered, it was not a bill; it was being completed by inserting inter alia, the true
 place where it became a bill. I am of opinion that s. 64 of the Bills of Exchange Act,
 1882, does not apply to such a transaction, and I take the view of the transaction which
 makes the bill valid, rather than the one which destroys it.

The point with regard to the date is more difficult. The contract under which the **B**
 bill was given, to which Attfield was not a party, described the bill as one at "90 days"
 sight from the 26th Nov.," the provision that the ninety days should run from the date
 of shipment having been three times struck out. November 26 was the date by which
 the seller undertook to have the whisky ready for delivery, and by which date it was
 ready. Subsequent agreements for extension of time for delivery were not used, the
 whisky being ready without any extension of time, and these agreements contain no **C**
 alteration of the date of the currency of the bill. In my opinion, the bill should have
 been dated Nov. 26, 1927. In fact, the bill was handed over on Oct. 25 or 26, undated,
 and Lindsay in Lausanne, at some later date, inserted the date of Dec. 3, apparently
 got by disregarding the three-day agreement, and regarding the seven-day agreement
 already referred to, to neither of which was Attfield a party. Lindsay's people in
 London thought that he should have dated it on Dec. 2. It was argued that s. 12 of **D**
 the Act—Bills of Exchange Act, 1882—saved the bill, as the date, if wrong, was inserted
 in good faith by mistake. But, in my opinion, the section between immediate parties
 does not apply to a case where an agreement provides the date from which the bill is to
 run, irrespective of the date of the bill, or the sight of the bill, as "ninety days from the
 26th Nov.," and a date which is not Nov. 26 is inserted in the bill as the date from which
 the ninety days is to run. The date which the section allows to be inserted is the date **E**
 of issue or acceptance, and Lindsay did not insert either of these dates, or intend to
 insert them. He intended to insert what he thought was the date in the agreements
 under which the bill was given, and did not insert the correct date. This, in my opinion,
 makes the bill one by which Attfield was not bound, for though I appreciate that the
 alteration is in his favour, the bill so dated was not the bill which the agreement con-
 templated he should accept. **F**

The question of illegality raised by Attfield in all three actions raises questions of
 some difficulty. The main contract is for the sale of whisky in the British Isles, between
 British subjects for a price to be paid by bills in England. There seems no doubt that
 this by itself is legal, and that the fact that the seller knows that the buyer intends to
 smuggle the goods into the United States of America does not make it illegal: see per **G**
 LORD MANSFIELD in *Holman v. Johnson* (1), where the seller in Dunkirk knew that the
 buyer intended to smuggle the goods into England. In that case LORD MANSFIELD
 was declining to give effect to the laws of his own country. It is different where the
 seller, besides knowing the purpose, assists in the purpose, as in *Clugas v. Penahuma* (2),
 where the seller in Guernsey packed the goods in such a way as to assist smuggling into
 England, and BULLER, J., made this assistance, and GROVE, J., the collusion, the ground **H**
 of their decisions. I have no doubt that if seller and buyer agreed to ship the whisky
 into the United States contrary to the laws of that country, the contract would not be
 enforced here, not because it was illegal here, but as a matter of public policy based on
 international comity: *Ralli Bros. v. Compania Naviera Sota y Aznar* (3). On the other
 hand, if the adventure was to import into Canada, and then to sell to some person
 with the knowledge that he was going to import into the United States, I do not think,
 following LORD MANSFIELD's decision, that the courts would treat this as contrary to **I**
 public policy. There is no evidence that such a sale would be illegal in Canada; on the
 contrary, Mr. Berry states that an export bond would be granted for Canada, though
 not for the United States. Canada is mentioned as a possible destination in the corre-
 spondence, in the policy on the ship, and in the evidence. I take the same view with
 regard to a sale with similar knowledge at St. Pierre, a French island off Newfoundland,
 which is a well-known depot of whisky which the purchaser intends to get into the
 United States, if he can, and which is referred to in the evidence as a possible place
 of sale. The same remark would apply to a sale and delivery on the high seas, either

A off Halifax, or in Rum Row, which is outside the territorial jurisdiction of the United States.

The question, and I regard it as a difficult one, is: What is the position as regards public policy where the adventure may be performed in an illegal way, or in a legal one. I doubt whether the parties had ever made up their mind with regard to the way in which the adventure should be performed. If they sold the goods at the high price

B which would be paid by a person who wanted to get them into the United States, and got the price, it was quite indifferent to them whether the buyer succeeded in his object or not. Attfield, the party alleging illegality, who knew a great deal about what was intended to be done, abstains, on the plea of illness, from giving the court any information in support of his plea. Foster says that he thought there would be a sale at Halifax or St. Pierre, apparently to Attfield. Lindsay had heard rumours that Attfield had a
C permission to import it into the United States, which sounds very improbable. The adventure, it appears to me, could be carried out in a legal way, and the adventurers had not bound themselves to carry it out either way. In my opinion, the law is correctly stated by DICEY in his CONFLICT OF LAWS (4th Edn.) at p. 620, as follows:

D "It must, however, be noted that if a contract is an English contract, it will only be held invalid on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country. The validity of an English contract will not be affected solely because the law of such foreign country dispenses one party or both parties to the contract from the necessity of performing it in full, or makes performance illegal, if that performance need not take place actually in the foreign country."

E This, I think, is supported by the decision in *Waugh v. Morris* (4), where BLACKBURN, J., said (L.R. 8 Q.B. at p. 208):

"We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner,
F it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance."

See also the similar decision in *The Argos (Cargo Ex.)*, *Gaudet v. Brown* (5).

In my opinion, the vital question on this part of the case is whether an adventure to procure in Scotland and deliver whisky by the *Wearholme* to St. Pierre, or Halifax, or a place in the open sea, where it was intended to sell it to persons who are known to be going to endeavour to smuggle it into the United States will not be enforced in this
G country as contrary to public policy. If it will not be enforced, in the sense that the courts will refuse to determine any questions arising out of it, I agree with the view taken by my brothers. But, in my view, such a contract, which is certainly not proved to be illegal by the law of England, Scotland, France, Canada, or the High Seas, where the sale is made, cannot be said to be contrary to public policy, without overruling

H LORD MANSFIELD'S view, which I do not feel able to do. Public policy is a dangerous horse to ride and should be proved strictly against persons who, being accused of illegality, must, like other criminals, be given the benefit of the doubt. In my opinion, when an adventure which can be performed both legally and illegally, has not been performed, and the parties have not agreed how it should be performed, the courts should determine its legal incidents, on the assumption that it is to be performed legally, as it

I can be. The government Departments appear to act on this view by allowing export bonds where the place of destination is Bermuda, Canada, or St. Pierre. I have not gathered how far my brothers will carry their views. There are 7,500 cases of whisky lying in bond at a Scottish warehouse, which were to be the subject-matter of this adventure. Should the court consider the question to whom those cases belong, and whether the property in them has passed from Lindsay to the syndicate or Foster, or should the court treat the whisky as non nullius, an accursed thing whose ownership they will not determine and which they will not protect. If they can bring themselves to determine to whom the whisky belongs, is it contrary to public policy that they should

say that the proprietor must pay for it, if the property has passed to him under an agreement which he has not performed on his part. In the case of highwaymen, the court would hand the property to the true owner. Who is here the true owner? I regret that I am unable to take the view that the difficult questions in this case can be avoided by saying that the whole adventure is illegal. But, as my brothers think that the whole transaction is illegal, and one in which the court can give no relief, the order of the court will be as proposed by LAWRENCE, L.J.

LAWRENCE, L.J.—The evidence led in the three cases under appeal has convinced me that the documents in respect of which relief is sought were documents drawn up for the purpose of dressing up in a legal garb such of the terms of an illegal joint adventure as the parties deemed it prudent to record in writing. In effect, the proceedings now before this court are proceedings brought to ascertain and enforce the rights and liabilities of the parties, inter se, in respect of their dealings and transactions as co-adventurers, and the parties are now seeking the aid of the court to clear up the mess into which they have got themselves owing to the adventure upon which they had embarked having miscarried. No rights of third parties are in question, the bills have not been negotiated, the charge which was created on the whisky in favour of money-lenders has been paid off, and the whisky itself is still in the possession of one or other of the parties. In fact, the proceedings seem to me to bear a strong resemblance to the not unfamiliar action in the Chancery Division between partners to wind-up the affairs of a partnership formed for a particular adventure, which adventure, after having been partially carried out, has come to a premature end. WRIGHT, J., has found that the object of the scheme which brought the parties together was to take advantage of the illicit market for whisky existing in the United States of America and to make a profit in excess of the ordinary market profit obtainable in this country by sending whisky either to the United States or to some convenient entrepot for the United States involving the necessity of their finding a ship, the whisky finance, and someone in a position to dispose of the whisky on the other side of the Atlantic. The learned judge, has, however, shrunk from giving effect to the consequences which, in my opinion, flow from such a finding, namely, that the court ought to decline to entertain the actions and counter-claims.

It is, in my judgment, plainly established by the evidence that by the laws of the United States the importation into that country of alcohol for beverage purposes is prohibited and made a criminal offence, and that the parties, with knowledge of these laws, embarked upon their adventure with the object of making a very large profit by importing, or by instigating or aiding and abetting others to import, a considerable quantity of whisky into the United States in violation of the laws in force in that country. The parties—as might be expected in a case such as this, where they were not previously acquainted with each other and in wholly different walks of life, and where it would be unwise on their part to record in writing the object and scope of the partnership—set themselves the by no means easy task of framing documents which should on their face be legal and bear the semblance of ordinary commercial documents and which, it was hoped, would safeguard the individual interests of those who were risking their goods and money in the adventure. In these circumstances it is not surprising to find that the documents which were in fact drawn up and which have formed the principal topic of discussion in the court below and in this court, do not—even when pieced together—disclose the true nature of the adventure, or the whole of the terms arranged between the parties. It is settled law, however, that the existence of illegality may be proved by parol evidence notwithstanding the apparent legality of the documents before the court: *Collins v. Blantern* (6): and that, if it be proved that a partnership was established for an illegal purpose, the parties will not be allowed to escape the consequences of such illegality merely because they have taken care to conceal it: see, for example, *Stewart v. Gibson* (7) and *Armstrong v. Armstrong* (8). The absence in the present case, therefore, of any written record of the arrangements made by the parties as to the disposal of the whisky after it had been shipped on board a regular line of steamships, or as to the part which Attfield was to take in the adventure,

A ought not to blind the court as to the real nature of the transaction or as to the true nature of the documents produced in these proceedings, or induce it to treat such documents as if they related to a legitimate commercial transaction.

In view of the contention put forward on behalf of Lindsay and of Foster that the adventure, the broad outlines of which I have indicated, was not illegal, and of the further contention put forward on behalf of Lindsay that he was no party to that
B adventure, it is necessary to examine the relevant facts somewhat more closely. The following summary represents the conclusion which I have reached, founded upon a perusal of the evidence given at the trial and upon the inferences which, in my opinion, ought properly to be drawn from such evidence. The parties, after having met and agreed to join in the adventure, decided to acquire, equip and man a special steamer which should convey the whisky across the Atlantic, obviously realising that, in view
C of the object of the adventure, it could not be shipped to its intended destination in a regular line of steamships. Accordingly, the *Wearholme*—a small vessel of 600 tons—was acquired and it was arranged, inter alia, that this vessel should, before starting on her voyage, be insured to the extent of £1,000 against risk of forfeiture and confiscation by any government, which insurance was, no doubt, meant to meet the risk of forfeiture or confiscation by the government of the United States in the event of her capture by
D that government in the course of her mission. In the next place, arrangements were made to clear the whisky from the bonded warehouse in Edinburgh where it was lying, without payment of duty in the United Kingdom. Such clearance involved naming the port of destination, which in view of the object of the adventure, was clearly out of the question; it also involved giving a bond for a large amount to the Customs, a release from which bond could only be obtained on production of a landing certificate issued by
E the authorities at the port of destination. In the face of these difficulties and of the further difficulty that in any event it would be impracticable to procure a bond from an accredited assurance company at a reasonable rate unless the whisky were shipped from the United Kingdom by a regular line of steamships, the parties obviously realised that they could not load the whisky direct on board the *Wearholme* at any port in the United Kingdom. In order to overcome these difficulties, the parties arranged that the
F whisky should, in the first instance, be placed on board a regular line of steamships at Leith or Glasgow and conveyed to some handy port outside of, but as close as possible to, the United Kingdom where a landing certificate could be obtained and that the *Wearholme* should proceed in advance to that port and pick up the whisky on its arrival there and then proceed to convey it to its true destination, where—according to Foster's evidence—it was to be marketed by Attfield who was to receive the proceeds of sale and
G to distribute such proceeds among the co-adventurers according to their respective shares and interests.

The part in this adventure taken by Lindsay—who was a distiller and spirit merchant carrying on business in Perth and London—was as follows.

[HIS LORDSHIP reviewed the evidence and continued:] In the result, I have no hesitation in concluding that Mr. Lindsay's position was that of co-adventurer and not merely
H that of a merchant selling the whisky in the ordinary course of his trade to Messrs. Driscoll and Miller, and that he was an active party to the scheme of sending the whisky to the United States to be sold there by Mr. Attfield for the benefit of the partnership.

The part taken by Sir Harry Foster—who carries on a financial business in the City of Westminster and who admitted in the witness-box that all parties including himself were co-adventurers in the adventure—was as follows. He undertook to contribute
I £1,000 towards the purchase of the *Wearholme*, to join with Mr. Lindsay in underwriting the seizure and confiscation risk, in default of underwriters as before mentioned, and to join Mr. Attfield in securing Mr. Lindsay to the extent of £5,500 for the cost of the whisky. It will be seen that he trusted entirely for the discharge of his liability on the £5,500 bill, for the repayment of his contribution of £1,000 and for his profit of £4,500, to the faithful distribution of the proceeds of sale of the whisky by Mr. Attfield. In view of the admissions made by Foster that Attfield had made a full statement to him as to the part he—Attfield—would take in the adventure and that he knew (i) that the ultimate destination of the whisky was the United States, (ii) that Attfield was going

to New York accompanied by his son Captain Attfield, and (iii) that Attfield was not going to accompany the whisky in the *Wearholme* but was going independently to New York to market it upon its arrival. I find it an altogether too great a strain on my credulity to believe that Foster—as stated by him at the trial—was not interested in sending the whisky to New York and understood that Attfield had purchased the whisky and intended to take it to the United States and to sell it there without risk to the other co-adventurers, which statement is moreover entirely inconsistent with the written undertaking given by Attfield to Foster to remit the £11,000 out of the proceeds to him. Further, it appears from the correspondence that at a later period Foster was anxious to obtain some security for his share of the proceeds of sale from Attfield.

The part taken in the adventure by Attfield—a retired schoolmaster residing at Worthing in Sussex, and the only party to plead the illegality of the adventure—has to be gathered from the documents and from the oral evidence given at the trial by his co-adventurers, as he did not go into the witness-box. It is obvious from what I have stated that he was brought into the adventure on account of the special facilities he professed to have for introducing whisky into the United States. The omission of his name from the agreement of Oct. 26, 1927, is explainable on the ground that he could not well have been made a party to that agreement without defining the part which he was going to take in the adventure and without stating the amount of his share of the profits. Presumably, however, such business men as Lindsay and Foster would satisfy themselves as to his ability to effect the introduction of the whisky into the United States—upon which the success of the adventure wholly depended—before they embarked upon the enterprise and risked their goods and money in it. At all events, it is plain that Lindsay and Foster trusted Attfield to the extent of being willing to place the whisky at his disposal and to allow him to receive the proceeds which, according to their estimate, would amount to a very considerable sum. Attfield's share in the profits was fixed at £2,750, and the only document drawn up to secure his interest was a letter of Sept. 14, 1927, which contained an undertaking by Messrs. Driscoll and Miller to pay him that sum out of the proceeds when received. As, however, Attfield was to handle the whole of the proceeds he presumably did not trouble much about the form of his security. Although Attfield attended various interviews and is admitted by Foster to have told him the part he would take, the parties have professed a surprising ignorance as to the destination of the whisky and of the manner in which Attfield proposed to introduce it into the United States.

The part in the adventure taken by Messrs. Driscoll and Miller—who were shipbrokers carrying on business in the city of London under the style of the Tower Trading Syndicate—was as follows. They undertook to find the necessary ship for carrying the whisky across the Atlantic, the purchase price of which was to be paid out of money provided for that purpose by Lindsay and Foster as already mentioned. They were to effect an insurance on the *Wearholme* at Lloyd's for £3,500, of which £1,000 was to cover the seizure and confiscation risk. They were also to provide the balance of the money—estimated at £1,600—required for the equipment of the *Wearholme*. As their share of the profits—estimated at £10,000 less expenses £2,500, equal to £7,500—they were to get the balance of the proceeds of sale of the whisky and also the *Wearholme* after the claims of their co-adventurers had been satisfied. The documents drawn up to secure their interests in the adventure were the agreement of Oct. 26, 1927, and the bill of sale of the *Wearholme* under which they were made the ostensible purchasers of the whisky and the ship. Messrs. Driscoll and Miller were admittedly wholly impecunious and I gather that their inability to find the £1,600 was the main, if not the only, reason why the adventure miscarried.

In my judgment, the irresistible inference from the facts which I have stated is that the object of the parties in embarking upon this adventure was to obtain the large profit estimated at over £18,000 which would accrue to them by an illicit sale of the whisky in New York, and that Attfield's part in this adventure was to effect such a sale and to make the best arrangements he could for getting the whisky into the United States either by running it into that country in the *Wearholme* or by employing rum-runners to effect the importation into that country, or, if necessary, by delivering the whisky to the

A purchasers outside the United States at such a place, in such a manner, and under such conditions as would ensure that the purchasers would be able to run it into the United States and would, therefore, pay the highest price required by the partners. Unless Attfield were able to accomplish his task in one of these ways it is difficult to see how he could have obtained the requisite price or any price high enough to justify the expenditure in the purchase and equipment of the *Wearholme* and to secure the realisation of anything like the anticipated profits, because it is obvious that the illicit buyer would not hand over the purchase money unless and until he had obtained delivery of the whisky in the United States or at some place outside the United States under the conditions which I have mentioned. On any other hypothesis it appears to me to be impossible to explain why the parties—who practically admitted that the whisky was ultimately destined for the United States—should have gone to the expense of buying and equipping the *Wearholme* to take the whisky across the Atlantic instead of shipping it in the usual way at a comparatively trifling expense, should have insured the *Wearholme* against risk or seizure and forfeiture, should have arranged for having the whisky packed in cases without the usual export marks, and should have been unwilling or unable to name the port or even the country to which they had arranged to ship the whisky.

D If the real nature of the adventure be as I have described it, I do not gather that it was seriously disputed by counsel that it would be an illegal partnership, and that none of the documents purporting to define the rights and obligations of the partners among themselves would be enforceable in any court of this country. Although there are numerous instances of illegal partnerships to be found in the reports, I have been unable to find any case in which the facts are similar to the facts of the present case. On principle, however, I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal even although the parties have not succeeded in carrying out their enterprise and no such criminal offence has in fact been committed, and none the less so because the parties may have contemplated that, if they could not successfully arrange to commit the offence themselves, they would instigate or aid and abet some other person to commit it. The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our courts would furnish a just cause for complaint by the United States government against our government—of which the partners are subjects—and would be contrary to our obligation of international comity as now understood and recognised, and, therefore, would offend against our notions of public morality. The learned judge seems to have no doubt that the adventure would have been illegal, and that it would have been his duty to refuse to entertain any claim arising out of or in respect of the partnership agreement except for the fact that, in his opinion, the transaction was very obscure and that the parties who had given evidence appeared uncertain as to what exactly they were intending to do, from which obscurity and uncertainty the learned judge drew the inference that the adventurers might have carried out their adventure by shipping the whisky to some place in Canada, where it would have been sold to perfectly independent and bona fide merchants who would have been free to run it across the border into the United States or not.

H Supposing that in the celebrated case of *Everet v. Williams* (9), the partners had fallen out after they had made their various contributions to the partnership stock in the shape of horses, saddlery, and money, but before they had carried out their real purpose, and that the action had been brought to determine their respective rights, inter se, in respect of their several contributions instead of their rights in respect of the proceeds of their adventure, would the court have entertained such an action merely because the partners had not definitely settled the precise manner, time and place of carrying out their object? Assuredly not. Although in such a supposed case it could have been said with just as much force as here that there was no evidence that the partners might not have dealt honestly with their customers on Hounslow Heath for the watches, rings and other goods which they intended to acquire instead of carrying out their real intention of acquiring such goods by highway robbery. Similarly, the obscurity and uncertainty in respect to the precise method in which the partners in the present case

intended to carry out their object ought not, in my opinion, to induce the court to entertain the actions. The obscurity and uncertainty to which the learned judge refers do not go to the root of the illegality, but only have reference to the methods by which the object of the partnership should be achieved. Moreover, for the reasons which I have stated, and which I will not repeat, the facts proved at the trial, in my opinion, negative the inference that the co-adventurers might have had an intention of sending the whisky to Canada and of marketing it there in the ordinary course of trade. In my opinion, it is plain that these curiously assorted parties never came together for any such innocent and legitimate commercial transaction. Moreover—quite apart from the obvious fact that the parties never contemplated paying duty on the whisky in Canada or elsewhere—I confess that I find a difficulty in appreciating the suggestion made by the learned judge that any perfectly independent and bona fide Canadian wine and spirit merchant—even if he had an idea of running the whisky into the United States—would, for no reason that I can think of, pay a price which besides paying for the cost of the special steamer would leave the sellers with the very large profit, which they agreed to share among themselves rather than buy the whisky in the open market at the current market price.

In deference to the arguments of counsel I will refer quite shortly to the principal cases cited in this court on the question of illegality, though I have not found them of much assistance in arriving at a conclusion whether a partnership constituted in the circumstances of the present case is illegal or not. In *Re Grazebrook, Ex parte Chavasse* (10), it was held that a joint adventure between subjects of a neutral power for running a blockade established by one of two foreign belligerents against the ports of the other, was legal on the ground that—subject to the risk of capture—neutrals may lawfully trade with a belligerent. In *De Wutz v. Hendricks* (11), it was held to be contrary to the law of nations for a person to enter into engagements in England to raise money to support the subjects of a friendly power in hostilities against their government, and that no right of action could arise out of any such engagements. In *Holman v. Johnson* (1) and *Pellecat v. Angell* (12), it was decided that an action for goods sold and delivered abroad will lie in England notwithstanding that the seller knew that the buyer intended to smuggle the goods into England, provided that the sale was an out and out sale, and that the seller had no further interest in the goods after he had delivered them to the buyer abroad. In *Clugas v. Penahuna* (2), it was held that an inhabitant of Guernsey could not recover in the courts of this country the price of goods sold by him there if he knew it to be the buyer's intention to smuggle the goods into England and gave him assistance for that purpose. In *Lightfoot v. Tenant* (13), it was held that a bond to secure the price of goods sold and delivered in London by the plaintiff to the defendant to be shipped by the latter to Ostend and from thence re-shipped to the East Indies and there trafficked with clandestinely, could not be enforced on the ground either that the plaintiff's contract extended to the future destination of the goods or that the goods had been sold by the plaintiff to the defendant for the purpose of enabling the latter to trade with them clandestinely. In *Waugh v. Morris* (4) it was held that although it was the intention of the parties to a charterparty which stipulated that the ship should load a cargo of hay at a port in France and proceed direct to London, that the hay should be delivered at a particular wharf in the port of London, and, although by an Order in Council it had been forbidden to land hay from a French port in the United Kingdom, of which Order in Council however both the contracting parties were unaware, nevertheless the contract was valid as it had not been made knowingly with the intention to violate the law and could be—and was ultimately—carried out without violating the law. In *Ralli Bros. v. Compañia Naviera Sota y Aznar* (3) it was held that an English contract wholly unobjectionable at the time it was entered into was rendered unenforceable owing to a foreign law having subsequently been enacted which made the performance of an essential term illegal according to the law of the foreign country where it had to be performed.

It will be seen from the foregoing statement of the effect of these cases that they do not really touch the point upon which in my opinion the present case falls to be determined. There only remains to be considered the statement in DICEY'S CONFLICT OF

A LAWS (4th Edn.) 620), that an English contract will only be held invalid on account of illegality if it actually necessitated the performance in a foreign and friendly country of some act which is illegal by the law of such country. I doubt whether the learned author in making this statement had in mind such a contract of partnership as we have here. Be that as it may, however, I am of opinion that, in view of the main object of the contract of partnership between the parties in the present case, it is not saved from
B illegality merely because the partners may have contemplated the event of not being able themselves to import the whisky into the United States and may have considered the possibility of having to deliver the whisky to the illicit buyers on the high seas or at such other convenient place as might be arranged between themselves and their buyer consistently with their being able to obtain the high price ruling on the illicit market in which they intended to sell the whisky. It follows that, if the opinion I have expressed
C as to the illegality of the adventure and as to the consequences of such illegality is right, none of the other questions debated on this appeal arises for decision, and, holding the view I do, I prefer not to express any opinion upon them. For the reasons stated I am of opinion that the orders made by the court below ought to be discharged and the actions and the counter-claims ought to be dismissed without any order as to the costs of any of the parties either in the court below or in this court.

D **SANKEY, L.J.**—It is, in my view, desirable to ascertain the facts of this case before proceeding to any discussion on the many points of law raised. I have come to the conclusion on the evidence, that all the parties concerned were actively engaged in an enterprise to import whisky into the United States of America. It is not a case where one or other of them merely knew that the whisky was going to the States; they were all
E working to get it there, Lindsay as the man who was to provide the whisky, Foster as the man who was to finance it, Miller and Driscoll as the men who were to arrange for the carriage, and Attfield as the man who was to go, if necessary, to New York and arrange for its sale. Moreover, as foreign law is a question of fact, I find that the law prohibiting the importation of whisky into the United States is not a mere revenue law. Many circumstances lead me to this conclusion. As a result of these findings, I have
F arrived at the conclusion that the court ought not to entertain actions of this character; that the whole adventure was illegal; and that all the actions in the court below should have been dismissed.

We were referred, in the course of the argument, to cases arising out of contracts made in one country which ultimately involved a breach of the revenue laws of another country. It appears to me, having regard to the decisions, that such cases stand in a
G class by themselves, and that the principles upon which they proceed are not very germane or applicable to circumstances, where, as here, the foreign law, the infringement of which is ultimately involved, is not a revenue law at all. As, however, the cases were cited, I will deal briefly with them. In *Holman v. Johnson* (1) it was held that an action lies for goods sold abroad—in this case, at Dunkirk—which are prohibited in England, if the delivery of them be completed abroad, though the vendor knows that
H they are to be run into England. LORD MANSFIELD there said (1 Cowp. at p. 343): “No country ever takes notice of the revenue laws of another.” A similar statement of the law by LORD ABINGER will be found in *Pellecat v. Angell* (12), where it was held, that a foreigner who sells and delivers goods abroad, to a British subject, may recover the price, although he knows at the time of the sale and delivery that the buyer intends to smuggle them into this country. But, he added, that there was a distinction where
I the buyer takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise. There he must take the consequences of his own act, but it has never been said that merely selling to a party who means to violate the laws of his own country is a bad contract. It will be observed that both those cases refer to an adventure where ultimately the revenue laws of England were to be broken and not to an adventure initiated in England where the revenue laws of some foreign country were to be broken. Examples of the latter may be found in a number of cases, of which *Simeon v. Bazett* (14) is an instance, which arose out of the continental system inaugurated by Napoleon by his Berlin decree of 1806. Upon these cases, however, I do not

think any argument can be founded, for it is well known that it was not thought to be against public policy to evade the Napoleonic decree by running British goods into the countries affected by it, indeed, as the event turned out, the effect of the Berlin decree was to increase British shipping.

The opinion of LORD MANSFIELD and the cases of *Holman v. Johnson* (1) and *Pellegat v. Angell* (12) have been much criticised, for example, in POLLOCK'S PRINCIPLES OF CONTRACT (9th Edn.) at p. 391, it is said as follows: "This is disapproved by most modern writers as contrary to reason and justice," and in FOOTE'S PRIVATE INTERNATIONAL LAW (5th Edn.) at p. 401, it is stated that

"Modern writers have, however, concurred in condemning these decisions, and, though the theory is firmly established in America also, it can hardly be assumed that they will be followed in the event of the question again arising here."

The opinion of American writers is expressed as follows. In KENT'S COMMENTARIES, BOSTON, 1873, vol. 3, p. 266, the learned author says:

"In this country, we have followed the English rule, as declared by LORD MANSFIELD, to the full extent; and the underwriter is liable for losses in consequence of violation of the trade laws of foreign States, provided he was apprised of the intention, on the part of the insured, to violate such laws, either by the terms of the policy, or the standing regulations of the place to which the vessel is insured, or the known usage of trade. . . . It is certainly matter of surprise and regret, that in such countries as France, England and the United States, distinguished for a correct and enlightened administration of justice, smuggling voyages, made on purpose to elude the laws and seduce the subjects of foreign States, should be countenanced, and even encouraged by the courts of justice. The principle does no credit to the commercial jurisprudence of the age."

STOREY in his CONFLICT OF LAWS (8th Edn.) BOSTON, 1883, at p. 338, says:

"It has long been laid down as a settled principle that no nation is bound to protect or to regard the revenue laws of another country; and therefore the contract made in one country, by subjects or residents there, to evade the revenues of another country, is not deemed illegal in the country of its origin. Against this principle POTHIER argued strongly as being inconsistent with good faith and the moral duties of nations. VALIN, however, supports it; and EMERIGON defends it upon the unsatisfactory ground that smuggling is a vice common to all nations. An enlightened policy, founded upon national justice as well as national interest, would seem to favour the opinion of POTHIER in all cases where positive legislation has not adopted the principle as a retaliation upon the narrow and exclusive revenue system of another nation. The contrary doctrine seems, however, firmly established in the actual practice of modern nations without any such discrimination, too firmly perhaps to be shaken except by some legislative Act abolishing it."

SCRUTTON, L.J., in *Ralli Bros. v. Compañia Naviera Sota y Aznar* (3) says ([1920] 2 K.B. at p. 300):

"In my opinion the law is correctly stated by PROFESSOR DICEY in CONFLICT OF LAWS (2nd Edn.) 553, where he says: 'A contract . . . is, in general, invalid so far as . . . the performance of it is unlawful by the law of the country where the contract is to be performed—and I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood.'"

I respectfully agree with those remarks. I do not think that point was really taken in the recent case of *Sumner, Permain & Co. v. Webb & Co.* (15). In my view, the present position of the law is that the mere fact that a vendor of goods knows that the purchaser proposes to run them into a country where they are prohibited by some revenue law is not sufficient to render the contract of sale illegal, but if, beyond mere knowledge, the

A vendor actively engages in an adventure to get the goods into such country, the court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract. Even if these principles with regard to revenue laws are to stand I can see no ground for extending them, as it seems to me, we must, to decide in favour of the present appellants, or, indeed, that they are applicable to the facts of the present case. Two facts differentiate the present case: (i) The American law which it was proposed to infringe in the present case was no mere revenue law. It was more in the nature of a *malum in se* than a *malum prohibitum*. (ii) The parties concerned have taken an active part in the adventure, a distinction which the court dwelt upon in *Pellegat v. Angell* (12). I can find no case which compels this court to hold that it must or ought to entertain a dispute upon a contract made between parties to further an adventure to break the laws of a foreign State, which, as above pointed out, are not mere revenue laws. It is true that such a contract has not been made illegal by any English statute, nor does it subject persons making such a contract to the penalties provided, for example, in cases which come under the Foreign Enlistment Act, but, none the less, I think that the courts of this country are not bound to entertain such actions in view of the obligations of international comity, as now understood. I think that the courts are not called upon to assist persons who engage in such adventures in settling differences which may have arisen between them and that they ought to apply the principle laid down in *Pearce v. Brooks* (16), where POLLOCK, C.B., said (L.R. 1 Exch. at p. 217):

E “I do not think it is necessary to enter into the subject at large after what has fallen from the bench in the course of the argument, further than to say that since *Cannan v. Bryce* (17), cited by LORD ABINGER in delivering the judgment of this court in the case of *M’Kinnell v. Robinson* (18), and followed by the case in which it was so cited, I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied.”

F He also said (L.R. 1 Exch. at p. 221):

G “If a person lends money, but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied; but if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose, and afterwards, it was turned to that use, neither *Cannan v. Bryce* (17), or any other case decides that his act would be illegal.”

H That may be stating the law too broadly, but in *Waugh v. Morris* (4) where it was held that, although it was the intention of the parties, when the charterparty was entered into, to land the hay at London, yet as the contract was not made knowingly with the intention to violate the law, and as it could be carried out—as ultimately it was—without violating the law, it was not void; and defendant was therefore liable for the demurrage. BLACKBURN, J., said (L.R. 8 Q.B. at p. 207):

I “We agreed that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brooks* (16), it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *M’Kinnell v. Robinson* (18), for the express purpose of a violation of the law.”

I In the present case, on my view of the facts, all the parties concerned were engaged in an adventure which had for its express purpose the violation of the law of the United States. I prefer to adopt the reasoning of WILMOT, C.J., in *Collins v. Blantern* (6) (2 Wils. at p. 350) where he says:

“Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back.”

Again, in *De Wutz v. Hendricks* (11) it is said (2 Bing. at p. 315):

"It occurred to me at the trial that it was contrary to the law of nations . . . for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our own, in hostilities against their government, and that no right of action could arise out of such a transaction."

It appears to me that the law is correctly stated in DICEY'S CONFLICT OF LAWS (4th Edn.) at p. 618, as follows:

"A contract (whether lawful by its proper law or not) is in general invalid in so far as . . . the contract forms part of a transaction which [as here in my opinion] is unlawful by the law of the country where the transaction is to take place."

One point remains to be noted. It is urged that where there are two ways of performing a contract, one of which is illegal and another legal—as, for example, an adventure to sell whisky either in the United States of America or in Canada, as here—it is impossible to say that the contract is an illegal one. In my opinion, that view is excluded by the facts of the case. Here the adventure was for the express purpose of violating the law of the United States of America. I cannot think that where parties intend to deliver in America, if possible, and take all steps to enable them to do so, that the contract is rendered less obnoxious because they have provided that in a certain event which, by the way, has not happened, they will sell the cargo to persons in Canada who may be able to do what they themselves cannot effectuate. As EYRE, C.J., said in *Lightfoot v. Tennant* (13) (1 Bos. & P. at p. 556):

"The sale and delivery of goods, nay the agreement to sell and deliver goods, is *primâ facie* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract, in itself good, is there tainted with turpitude, which destroys the whole merit of it. I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case; but the body of the colour is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them."

To sum up: In my view, an English contract should, and will, be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country, notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing, which permit the contract to be performed legally. For these reasons I am of opinion that the court should not entertain actions of this character and that judgment should be entered for the defendants in the court below in all these cases and in respect of the counter-claim brought by Lindsay in Foster's action, judgment should be entered on the counter-claim for Foster.

Should I be wrong on this point I think I ought, in deference to the arguments which have been addressed to us, to state my conclusions on the other issues in the case. [His Lordship reviewed the evidence.] In these circumstances, I think Lindsay is entitled to damages and the amount would be the amount of the bill in question, namely, £5,500, for which, apart from the point of illegality, I think he should have judgment. This disposes of the first and second actions. With regard to the third action, assuming Attfield's defence of illegality to fail, there remains to be considered the point whether Lindsay has precluded himself from succeeding by reason of his alteration of the date. In my view, he has, and Attfield, therefore, is entitled to judgment on both grounds. Counsel for Lindsay relied on s. 12 of the Bills of Exchange Act, 1882. In my opinion, the onus was upon him to show that that section applies. I do not think it does, because it only refers to a case where no date has been put in a bill and not to a case where the date which had to be inserted in the bill was fixed by some other agreement. It is impossible to gather from the evidence of Lindsay exactly what happened when he

A did fill and/or alter the bill. I think the insertion of Dec. 3, 1927, was wholly unauthorised and it is not a case where there had been merely omission to date the bill which would give the holder a right to fill it in. This I think also was the view taken by the learned judge in the court below. For the reasons, however, which I have already given, the point with regard to illegality prevails, and I have come to the conclusion as above stated that the court ought not to assist these parties to settle disputes arising out of their abortive attempts to import whisky into the United States of America.

Appeals dismissed.

Solicitors: *Stikeman & Co.*; *William A. Crump & Son*; *C. Butcher & Simon Burns.*

[*Reported by T. W. MORGAN, ESQ., Barrister-at-Law.*]

LOCKHART v. HARRISON

[HOUSE OF LORDS (Lord Buckmaster, Viscount Dunedin and Lord Phillimore), June 25, 26, 1928]

[*Reported 139 L.T. 521; 44 T.L.R. 794*]

Libel—Words not necessarily defamatory—Verdict for defendant—Review of jury's verdict.

In a libel action where the words complained of are not of necessity defamatory and the question of libel or no libel has been properly left to the jury, a verdict arrived at by them that the words were not defamatory must stand.

Broome v. Agar (1) (1928), 138 L.T.R. 698, approved and applied.

The verdict of the jury on the question of libel or no libel can be set aside, for instance, where a plain and obvious defamation is found not to be libellous.

Notes. Referred to: *Yousoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581.

As to the functions of judge and jury in a defamation action, and as to when the verdict of a jury in such an action can be set aside as perverse, see respectively 24 HALSBURY'S LAWS (3rd Edn.) 107-112, and *ibid.* 121; and for cases see 32 DIGEST 73-75.

Cases referred to:

- (1) *Broome v. Agar* (1928), 138 L.T. 698; 44 T.L.R. 339, C.A.; Digest Supp.
- (2) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, 121.
- (3) *Levi v. Milne* (1827), 4 Bing. 195; 12 Moore, C.P. 418; 5 L.J.O.S.C.P. 153; 130 E.R. 743; 32 Digest 10, 4.
- (4) *Parmiter v. Coupland* (1840), 6 M. & W. 105; 9 L.J.Ex. 202; 4 Jur. 701; 151 E.R. 340; 32 Digest 73, 1019.
- (5) *Smith v. Gentle*, 6 Dunl. (Ct. of Sess.) 565.
- (6) *Ross v. M'Kittrick* (1886), 14 R. (Ct. of Sess.) 255; 24 Sc.L.R. 190.

Appeal from a decision of the Court of Appeal (LORD HANWORTH, M.R., ATKIN and LAWRENCE, L.JJ.) dated Nov. 24, 1927.

The following statement of facts is largely taken from the opinion of LORD BUCKMASTER.

The appellant was the plaintiff in a libel action brought against the respondent defendant claiming damages for defamation due to the publication in a newspaper known as the "Hexham Courant" of an anonymous letter on Oct. 13, 1924. The action was tried before TALBOT, J., with a special jury at Newcastle-upon-Tyne and resulted in a

verdict for the defendant. The plaintiff appealed to the Court of Appeal seeking to set aside the verdict on the ground that it was against the weight of evidence. The Court of Appeal dismissed the appeal, and from that judgment this appeal was brought. The plaintiff, who is seventy-five years of age, has resided during the whole of his life at Hexham, and from 1878 to 1909 practised there as a solicitor with his brother. Both the appellant and his brother were greatly interested in the development of Hexham Grammar School. This was an old grammar school dating from Queen Elizabeth, rebuilt in 1910 upon a new site. In November, 1923, the education committee of the county council entered into negotiations for the purchase of land adjacent to the school, and during the course of such negotiations the appellant and his brother offered to give a strip of land adjoining the proposed purchase, an offer which was accepted on Oct. 9, 1924.

The respondent was a chartered accountant carrying on business at Newcastle-upon-Tyne who for over twenty years had resided at Hexham in a house adjacent to and overlooking the buildings and grounds of the Grammar School.

In the issue dated Oct. 4, 1924, of the "Hexham Courant" there appeared the following article:

"Gossip and Comment.—By Cardigan.—The Grammar School.—When the Grammar School of Queen Elizabeth at Hexham was opened by Sir Francis Douglas Blake on the 2nd Nov., 1910, it heralded a new era in respect of educational facilities in our town and district. Though success was prophesied for it that success has been much more marked than at one time seemed probable. The old school on the Bank Head, now turned to other uses, despite the best efforts of the governors, gradually fell behind the needs of the age, and it was felt that an effort should be made to provide Hexham with a grammar school worthy of the town and district. It was not without prolonged effort and in face of much opposition that the proposal at length took definite shape. The governors of the old school initiated a bold scheme for adequate buildings to be erected by public subscription but the response was not adequate and they had perforce to appeal to the county education committee. That body at once saw the importance of Hexham as a centre of higher education and they took over the work. The original cost of the building was over £17,000, and while its erection could not have been accomplished without the help of the county council, local efforts had not been wanting. The fine site on which the school stands was secured many years before the actual building of the school by the foresight of L. C. Lockhart [plaintiff's brother], then as now, chairman of the governors and his fellow workers on the old trust. The educational foundations of the district gave freely of their funds and local efforts helped in other ways. The continuity of the old school tradition was preserved by naming the new building the Grammar School of Queen Elizabeth. When the building was first opened accommodation was provided for some 240 scholars, and it was then thought that such provision would meet requirements for a long period. That view was speedily disproved and further provision had to be made. In the boys' department alone there are close on to 200 scholars, a striking proof of the school's development. The county education committee has several times recently had under consideration the acquisition of a further eight acres of land on the west side of the existing school area, on which further school extensions could be made, and a much needed recreation ground laid out. The scholars at present have to use Prior's flat and Dene Park as well as their own small ground. At their last meeting the county education committee, largely at the instigation of Col. Lockhart, decided to recommend the county council to purchase a total area of 9.85 acres at a price of £5,800. Colonel Lockhart and Mr. H. F. Lockhart [the plaintiff] have purchased and offered to give an area of woodland between Eastgate and the land to be acquired, conditionally upon the authority purchasing the whole of the area available and this offer was gratefully accepted. The Grammar School is a decided asset to a town of Hexham's character, and it is to be hoped that at the next meeting of the county council the scheme will go through."

A On Oct. 13, 1924, the defendant wrote a letter to the editor of the "Hexham Courant" referring to the above article and the letter was published in the issue of Oct. 18, 1924.

The letter which was complained of as a libel was in the following terms:

B "The Grammar School.—Sir,—Is the information with regard to the purchase of land contained in your interesting paragraph of the 4th inst. fully accurate? It is stated that Col. and Mr. H. F. Lockhart have offered to give the dene in Eastgate to the county council if the council agree to take the whole of the adjoining land. If the Messrs. Lockhart have really made this offer it is a very handsome gift and they deserve the thanks of the community. But (1) the dene was bought for £900 odd by the late Mr. Riddle who was, I believe, one of the late William Alexander's executors to whom the adjacent property belongs; and (2) I was told while the negotiations with the county council were proceeding that the Messrs. Lockhart acting either as mortgagees of the property, or as the owners by conveyance from Mr. Riddle, insisted that the council must buy the dene as well as the site they had in view; and (3) the action of the Messrs. Lockhart in making the urban council pay a high price for the small piece of the dene required for rounding off the corner at the top of Eastgate would appear to indicate that they were not disposed to make a gift to the public. My question as a ratepayer is whether I am to feel grateful to the Messrs. Lockhart, or whether, I, with others, am paying for the dene by having its price included in the £5,800 stated to be the sum payable for the 9.85 acres adjoining. The site and the dene should go together, but do not let there be any misunderstanding as to the cost.—Yours truly, RATEPAYER.—13th Oct. 1924."

E On May 15, 1925, the writ in the action was issued claiming damages for libel. By his statement of claim the plaintiff, after setting forth the said letter, said that by the words contained in the letter the defendant meant and was understood to mean that the plaintiff and his brother's gift or offer of a gift was a sham, that posing as benefactors to the school and under the pretence of making a free gift the plaintiff and his brother were offering or attempting to sell the said dene at a high price to the council by insisting on selling the 9.85 acres at an excessive price in order to recoup themselves the price they had paid for the dene when they bought it.

F The defendant by his defence denied that the words complained of bore any of the meanings alleged or any defamatory meaning, and he also pleaded that the allegations of fact in his letter were true, and that they were fair comment made in good faith. At the hearing it was proved that all the relevant statements were false, and thereupon G the defendant withdrew his plea of "fair comment" and tendered no evidence, relying merely upon the defence that the statement was not defamatory, and this issue the jury determined in his favour.

The jury accordingly returned a verdict for the defendant, and TALBOT, J., directed that judgment should be entered accordingly.

H The plaintiff appealed. The Court of Appeal dismissed his appeal, and the plaintiff then appealed to the House of Lords.

Norman Birkett, K.C., and *N. L. Macaskie* for the plaintiff.

Jowitt, K.C., *Lowenthal, K.C.*, and *Archibald Wilson* for the defendant.

June 26. The following opinions were read.

I LORD BUCKMASTER (read by VISCOUNT DUNEDIN) stated the facts and continued: The plaintiff alleges that no twelve reasonable men acting reasonably could fairly come to this conclusion [i.e. that the statement was not defamatory], and on that ground seeks to set the verdict aside. In the Court of Appeal the Master of the Rolls thought that there was no ground for saying that the answer given by the verdict was one which twelve reasonable men could not reach. It appears by the judgments of ATKIN, L.J., and LAWRENCE, L.J., that they did not agree with this opinion, ATKIN, L.J., saying that if left to himself he should have decided that no reasonable men could come to the conclusion to which they did, but that the opinion of the Master of the Rolls prevented him from giving effect to that view. In that I think he was wrong; the fact that one

judge thinks a verdict is not unreasonable does not in itself render a verdict unassailable. A It is a mere expression of opinion from which others might differ, for the question of reasonability is not capable of rigid definition. Were it otherwise the opinion of one judge in a Court of Appeal in favour of a verdict so challenged would prevent the other members forming the majority of the court from giving a contrary decision, but though I am not satisfied with the reasoning, I think the conclusion of the Court of Appeal must be accepted. B

A claim for defamation is essentially a matter on which a jury's verdict must be taken; if the words are plainly defamatory without innuendo, and the jury refuse so to decide the verdict is perverse; so also if the innuendo is so clear that there really is nothing for real consideration. If the words are not defamatory, the judge can so hold and withdraw the case from the jury—but if the matter is one on which the question of innuendo can be properly weighed by the jury, it is for them to find whether the words C bear the defamatory interpretation or no. The question, therefore, in this case is whether the innuendo is so obvious that it is impossible to believe that it could be disregarded by twelve reasonable men, and that question is a different one from merely saying what the opinion of any judge would be on the document. To me this letter was a mean and spiteful reflection on men who had acted generously towards the town; the questions in the letter themselves suggest to my mind an answer in that sense, but that D is not the point for our determination. It is true, as pointed out on behalf of the defendant, that the letter was no answer to anything that the plaintiff or his brother had said and that it was a statement of things they might lawfully have done. I do not agree with the further contention that to say a man has done acts which are within the law cannot be defamatory; there are many cruel actions done in exercise of indisputable legal rights, the wrongful assertion of which against any man would be plainly defama- E tory, but none the less these are matters which may be borne in mind by a jury in considering their verdict. No complaint here is made against the summing-up, and the learned judge leaves expressly to the jury the question whether the letter was intended as an inquiry and whether it contained a reflection on the plaintiff—with the matter so left to the jury, it seems to me impossible to complain when the verdict has been given.

This view finds strong confirmation in the authorities. LORD BLACKBURN, in *Capital F and Counties Bank v. Henty* (2) (7 App. Cas. at p. 771), uses these words:

“Independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances.” G

It is, of course, not true to say that a jury's verdict in these circumstances can never H be assailed. If a plain and obvious defamation incapable of any innocent explanation, were found by the jury to be non-libellous, the verdict would certainly be set aside, but such cases occur so rarely that within the last century there are only two to which our attention has been drawn in which this power has been exercised (*Levi v. Milne* (3) and *Parmiter v. Coupland* (4)). It is unnecessary to discuss the earlier of these cases. It is even possible that a different view might be taken of it to-day, but in the latter case, I according to the report, a series of libels had been published of the then late Mayor of Winchester, imputing to him partial and corrupt conduct and ignorance of his duties as mayor and justice of the peace for the borough. The jury having found for the defendant, the verdict was set aside, for the words were obviously libellous and the only justification appeared to be that they were spoken of a man in a public capacity—a defence, of course, that was wholly inadequate. It is unnecessary to examine the further cases in which similar questions have arisen, for the judgment of SCRUTTON, L.J., in *Broome v. Agar* (1) contains a full and, in my opinion, a most accurate statement of

A the true position. In that case a chauffeur brought an action against his late employer, alleging that she had slandered him, by saying that he gave joy rides to women in her car, and that he was a rotter. The judge left to the jury the question as to whether the words were defamatory or no, and the jury answered this question in the negative. The Court of Appeal, with RUSSELL, L.J., dissenting, refused the plaintiff's application for a new trial, based on the ground that the verdict was unreasonable and perverse. I think that that case was properly decided, and that the principle of its decision covers the present dispute. It was possible for the jury to hold, in the present case, that the words were not defamatory, and it is no ground for setting aside their verdict that this opinion is one that I do not share.

C VISCOUNT DUNEDIN.—This is essentially a case of procedure in an English action, and in such a case I should be slow indeed to differ from those of your Lordships who have had the experience of the courts. At the same time I regret the result at which you have arrived. I regret it because I think the letter in question was the mean letter of a coward who, shielding himself under anonymity, wished to wound while he was afraid to strike. That it was a libel has been the opinion of every judge who has had the case before him; but, of course, that is not the question. The question is whether it is a verdict at which twelve reasonable men could possibly have arrived. I am glad to note in the opinion just delivered by the noble and learned Lord on the Woolsack that he does not take the view that the verdict of a jury for the defendant in a libel case is absolutely sacrosanct. He pointed out that the cases are rare indeed. They would necessarily be very rare, but it may not be out of place to mention that in Scotland there have also been two instances—one a good deal more modern than the English ones which have been quoted. They will be found in *Smith v. Gentle* (5) and *Ross v. M'Kittrick* (6).

F I have really too much respect for the common sense of juries to believe that the jury here could have come to the conclusion they did, were it not for one thing. The case began with a defence of fair comment. That was based on the three statements quoted by his Lordship, as (1), (2) and (3). Now, it is statement No. (2) that, taken along with the concluding paragraph, makes the grossness of the libel. At the trial the statements were admitted to be untrue, and the defence of fair comment was withdrawn. I think that it was not properly brought before the jury that this withdrawal of the statements for the purpose of fair comment was not a withdrawal for the question of whether there was defamation. I do not think the jury can have understood that they were still there. But this matter was not raised by way of exception to the judge's charge and, therefore, no use can now be made of it. I should like to add that I specially concur with what was said by my Lord as to the two Lords Justices giving up their own opinion because of the opinion of the Master of the Rolls. As I have already said, I regretfully concur in the judgment proposed.

H LORD PHILLIMORE.—When an action for libel is brought to trial, the written or printed words may be so plainly and necessarily defamatory that the judge should instruct the jury that they are calculated to bring the plaintiff into hatred or contempt, and should forthwith proceed to direct their attention to the question of damages. This is well laid down in *ODGERS ON LIBEL AND SLANDER* (5th Edn.) 119, 121, though the case which he relies on as his principal authority [i.e. *Levi v. Milne* (3)] is not a very satisfactory one. Where a judge does so direct a jury, if the jury should find a verdict contrary to his direction, it may be deemed perverse, and may be set aside, and a new trial may be ordered. But in the case now pending before your Lordships, the judge did not give such a direction. I quote from his summing-up:

I "Therefore, as I say, the only question remaining for your determination, and it is one which is eminently and entirely for you, is what meaning is to be attached to this letter of which the plaintiff complains. In other words, would an ordinary person reading that letter infer that the plaintiff had done something which was not to his credit, and would anybody who read that and believed what was there have felt of the plaintiff less esteem, respect, or regard than he otherwise would?"

In my opinion the judge was right. The letter to the newspaper which was the vehicle of the alleged libel was ungenerous and mean, and none the better for being anonymous. Its purport was to take away from the plaintiff and his brother a meed of praise which a previous article in the same newspaper had bestowed upon them. But if carefully and critically analysed, it did not assert, and might be considered not to convey, the impression that the plaintiff had claimed this praise for himself, or had complacently acquiesced in its bestowal by others. The jury, it is true, might well have said to themselves, that considering the hasty way in which ephemeral productions of this kind are read, and the slight and possibly inaccurate recollection that a reader would have of the previous article, the reader might be led to suppose that the plaintiff and his brother were posing as public benefactors, and might be led, therefore, to think poorly of them; and if the jury had taken this view and had found a verdict for the plaintiff with temperate damages, I should have been well content. But I could not say that the letter necessarily conveys this view. Again, there are three statements in the letter which are not true. I do not say untruthful, but not true. And the result of these is to assert or imply that the plaintiff and his brother, being governors of Hexham Grammar School, were getting full price for some land which they were conveying to the school. This is going very near the wind; and again I should have been content if the jury on account of these words had found a verdict for the plaintiff.

But I cannot say that they of necessity would bring the plaintiff into hatred or contempt. A man is entitled to make the best of his property. There are people who think that business and charity, or business and public spirit should be kept apart; and if this view commended itself to the members of the jury, they were the constitutional tribunal to give expression to it. I agree with ATKIN, L.J., in his judgment in the Court of Appeal, when he sets out certain hypothetical language and proceeds as follows:

“If that language had been expressly used and the jury found that was not defamatory, I apprehend no court would fail to come to the conclusion that such a verdict was perverse and could not stand, with the result that the case would have to be submitted to another jury.”

But I do not follow many of the observations which he and the other members of the court made with regard to the particular language of the letter which is complained of. Concluding, as I do, that the words were not of necessity defamatory, I think that the verdict must stand, and that the judgment of the Court of Appeal was right, and should be affirmed.

Appeal dismissed.

Solicitors: *Bell, Brodrick & Gray*, for *L. C. & H. K. Lockhart*, Hexham; *Crossman, Block, Matthews & Crossman*, for *Dees & Thompson*, Newcastle-upon-Tyne.

[Reported by EDWARD J. M. CHAPLIN, ESQ., Barrister-at-Law.]

A

BROOKE v. BOOL

[KING'S BENCH DIVISION (Salter and Talbot, JJ.), April 20, 24, 1928]

B

[Reported [1928] 2 K.B. 578; 97 L.J.K.B. 511; 139 L.T. 376;
44 T.L.R. 531; 72 Sol. Jo. 354]*Agent—Negligence—Liability of principal—Joint tortfeasors.*

C

The tenant of a lock-up shop requested her landlord, who lived on adjoining premises communicating internally with the shop, to visit the shop occasionally at night to see that everything was secure. A lodger complained one night to the landlord of a smell of escaping gas, which he believed came from the shop, and both went to investigate. A gas pipe, terminating in a burner accessible from the floor, ran down the wall of the shop. The landlord examined the lower part of the pipe with a naked light, and lit the burner, but found no leakage there. The lodger got on the counter of the shop and proceeded to examine the upper part of the pipe, also with a naked light. An explosion followed, and the tenant's goods on the premises were damaged. In an action by the tenant, it was found as a fact that the damage was caused by the negligent act of the lodger, and was not caused directly or indirectly by any negligence on the part of the landlord.

D

Held: the landlord was liable on the grounds (a) that the lodger was his agent; (b) that the landlord was in control of the proceedings; and (c) that the undertaking constituted a joint tortious enterprise.

E

The Koursk (1), [1924] P. 140, applied.

Held: further (per TALBOT, J.), the landlord was liable on the additional ground that, having undertaken the examination of the shop, he was under a duty to take reasonable care to avoid damage resulting from it, and could not escape liability for the consequences of failure to discharge that duty by getting someone to make the examination or part of it for him, whether that person was an agent or contractor, or mere voluntary helper.

F

Per TALBOT, J.: If a man does work on or near another's property, which involves danger to that property unless proper care is taken, he is liable to the owner of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another . . . to do it for him.

G

Notes. Applied: *Honeywill and Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1933] All E.R.Rep. 77.

As to liability of a principal for the negligence of his agent, see 1 HALSBURY'S LAWS (3rd Edn.) 145–147 and 23 *ibid.* (2nd Edn.) 665; as to persons whose negligence renders them joint tortfeasors, see 23 *ibid.*, 665–666 and 32 *ibid.*, 187–188; and as to when the gravity of the risk increases the degree of care required, see 23 *ibid.*, 574–576. For cases see 36 DIGEST (Repl.) 125–126.

H

Cases referred to:

- (1) *The Koursk*, [1924] P. 140; 93 L.J.P. 72; 131 L.T. 700; 40 T.L.R. 399; 68 Sol. Jo. 842; 16 Asp.M.L.C. 374, C.A.; 42 Digest 976, 72.
- (2) *Wheatley v. Patrick* (1837), 2 M. & W. 650; Murp. & H. 183; 6 L.J.Ex. 193; 150 E.R. 917; 36 Digest (Repl.) 104, 519.
- (3) *Samson v. Aitchison*, [1912] A.C. 844; 82 L.J.P.C. 1; 107 L.T. 106; 28 T.L.R. 559, P.C.; 36 Digest (Repl.) 161, 852.
- (4) *Bower v. Peate* (1876), 1 Q.B.D. 321; 45 L.J.Q.B. 446; 35 L.T. 321; 40 J.P. 789; 36 Digest (Repl.) 159, 841.
- (5) *Black v. Christchurch Finance Co.*, [1894] A.C. 48; 63 L.J.P.C. 32; 70 L.T. 77; 58 J.P. 332; 6 R. 394, P.C.; 34 Digest 162, 1266.
- (6) *Hughes v. Percival* (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 31 W.R. 725, H.L.; 42 Digest 982, 124.

I

- (7) *Hardaker v. Idle District Council*, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 44 W.R. 323; 12 T.L.R. 207; 40 Sol. Jo. 273, C.A.; 34 Digest 161, 1255. A
- (8) *Dalton v. Angus* (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 30 W.R. 191, H.L.; 34 Digest 158, 1234.
- (9) *Holliday v. National Telephone Co.*, [1899] 2 Q.B. 392; 68 L.J.Q.B. 1016; 81 L.T. 252; 47 W.R. 658; 15 T.L.R. 483, C.A.; 34 Digest 163, 1271. B

Appeal from Westminster County Court.

The plaintiff, Mrs. Brooke, was the tenant of a shop and basement, and the defendant, Bool, her landlord, lived on adjoining premises communicating internally with the shop. The plaintiff had requested the defendant to visit the shop at night from time to time to see that everything was secure. On May 3, 1927, one Morris, who was a lodger of the defendant, complained of the smell of gas coming from the shop, and he and the defendant together went into the shop to investigate. A gas pipe with a burner at the bottom ran down the wall. The defendant approached the burner, which was accessible from the floor, with a naked light, and lit it, but found there was no escape of gas from that quarter. Morris, who was a much younger man than the defendant, then got on the counter, and proceeded to examine the upper part of the pipe, also with a naked light. An explosion occurred, resulting in personal injuries to Morris and damage to the plaintiff's goods on the premises. The plaintiff brought an action against the defendant, alleging that the damage was due to his negligence. The county court judge gave judgment in the following terms: C

"I find that the explosion was caused by the negligent act of Morris and was not caused directly or indirectly by any negligence on the part of the defendant. I accept as accurate the evidence of the defendant. I think that the plaintiff is a perfectly honest witness, but I reject her evidence wherever it contradicts or qualifies the evidence of the defendant. That being so, I am of opinion that there is no evidence that would entitle me to draw the inference that Morris was the agent of the defendant in doing the negligent act that he did, or to find that the defendant is responsible on the ground of joint enterprise or joint negligence, or on any other ground, for the negligent act of Morris. I have very grave doubts as to whether my opinion is correct. If the Divisional Court should say that there is any evidence entitling me in law to draw that inference, or to find that defendant is responsible on any ground for the negligent act of Morris, I should draw such inference and I should find defendant responsible. Judgment for defendant with costs." E

The plaintiff appealed. F

A. Cairns for the plaintiff.

G. M. Welsford for the defendant. G

Cur. adv. vult.

Feb. 24. The following judgments were read.

SALTER, J.—This is an appeal from the learned judge of the Westminster County Court, who gave judgment with considerable doubt in favour of the defendant. The plaintiff appeals. H

The defendant, accompanied by another man named Morris, went on to premises in the occupation of the plaintiff and there searched for a suspected escape of gas with naked lights. The result was an explosion, and the question is whether the defendant is in law responsible in damages to the plaintiff, whose goods were injured by the explosion. The learned judge found himself unable to find for the plaintiff, but said that, if in the opinion of this court he was entitled in law to find for the plaintiff, he should be taken to have found for her so far as matters of fact were concerned. [His Lordship then stated the facts in detail, and continued:] The evidence of the plaintiff and defendant was in conflict on many points. The learned judge preferred on those points the evidence of the defendant, and I shall, therefore, read the evidence of the defendant and take it that those are the facts which the judge accepted. The evidence is as follows: "I am owner of premises. I have never had occasion to complain of escaping gas. Occasionally plaintiff left gas burning after she left the shop for the I

A night. Once or twice she had done it. I turned it out at least once and on neither occasion said anything to plaintiff. Plaintiff did complain to me that some of her goods had been stolen but I had no proof of it. I went occasionally into the shop at night after she had left. May 3. I did not go into the shop before I went to bed. I was in bed about 10.30 p.m. In consequence of what Morris said I went into the shop. I went into the shop followed by Morris. I had no light in my hand. I smelt no gas, though I stood for a minute. There was a gas burner. I took a box of matches and turned on the gas burner and lit it. Nothing happened, and I turned out the gas burner. The gas burner had certainly been turned off before plaintiff had left. I did not try the gas stove. I tried nothing but the gas burner. Nobody tried the gas stove. Morris stood watching me. He stood still, doing nothing but watch me. Morris got up on the counter and had some matches of his own. Morris struck a light and then explosion occurred. I did not lend him any matches. I did not tell him to get on the counter; he had not struck any matches before.

C "... I welcomed Morris's help to assist in finding out cause of gas escape and to put it right. I think Morris was wrong in doing what he did."

D Cross-examined.—"I said to Morris, 'Perhaps there is an escape higher up.' Morris is about forty; I am seventy-eight. It was desirable (to see if there was an escape higher up) that someone should get on a chair by the counter. Morris got on the counter. I thought he was going to see if there was an escape higher up. I wanted to find out whether there was an escape higher up. I thought to myself, 'Let him find out.' I did not say, 'Do not get on the counter.' Getting on the counter was the only way. After he got on the counter he struck a match. I think he struck it on a match-box. I said nothing to him. It was all over in a second. I suppose that Morris intended to find out whether there was a leak, and, if so, to put it out. We both wished to do the same. I turned on the gas bracket. It lighted, then I put it out. We both intended to stop the leak, if any." [His Lordship then read the judgment of the county court judge and continued:] In my opinion there are three grounds on which it was competent in law for the learned judge to find that the defendant was responsible for what was obviously a grossly reckless act on the part of Morris—namely, holding a naked light F near to a place where he suspected an escape of gas. First, I think that there was evidence of agency. The defendant desired to examine this pipe, and examined it himself so far as he could in a most reckless and dangerous way with a naked light. He then desired to examine the upper part of it. Now the defendant was an old man of nearly eighty years of age, and he had in his company a much younger man. I think that there was ample evidence that the defendant impliedly invited and instructed G Morris to get up on to the counter and complete the examination, when it was not convenient for him to continue it himself, and that Morris did what he did on the instructions of the defendant. The maxim *Qui facit per alium facit per se* applies, and on that first ground I think that there was evidence on which the judge could have found the defendant responsible.

H Secondly, he could have been held responsible on the score of the control which he exercised over the proceedings. It is necessary to bear in mind the difference between the position of the defendant and that of Morris. The defendant was on the premises lawfully, at the request of the plaintiff, whereas Morris was a trespasser, unless the defendant had a right to invite him there to help. There was ample evidence on which the judge could find that the invitation by the plaintiff to the defendant to keep a watch over the premises extended to the right to bring in someone to help him on an occasion I of that kind. In my opinion, Morris was there by the permission and invitation of the defendant, since otherwise he would have been a trespasser, and the defendant was in control of the enterprise. There are two cases sufficiently in point for me to refer to them: *Wheatley v. Patrick* (2) and *Samson v. Aitchison* (3). Both were cases of street accidents arising from negligent driving, and in both cases the defendant was in personal control of the vehicle that caused the damage and was riding in it. In both cases the person driving negligently was driving by permission of the defendant, but was not the defendant's agent, and in both cases the defendant was held responsible in damages to the person injured by the driver. The principle laid down in those cases applied here,

and the defendant, having the right to control Morris and having invited Morris to do what he did, was responsible for the consequences. A

Thirdly, I think that there was here a joint enterprise on the part of the defendant and Morris, and that the act which was the immediate cause of the explosion was their joint act done in pursuance of a concerted enterprise. A case in which the question of joint tortfeasors was much discussed was *The Koursk* (1). There there had been a collision between vessels called the *Clan Chisholm* and the *Koursk* in consequence of separate and independent acts of negligence on the part of those controlling each vessel, and in direct consequence of that collision and without any intervening act of negligence the *Clan Chisholm* ran into and sank the plaintiffs' vessel. The plaintiffs, having recovered judgment against the owners of the *Clan Chisholm* (who limited their liability) then brought an action against the owners of the *Koursk*. It was set up on behalf of the owners of the *Koursk* that the owners of the *Clan Chisholm* and the owners of the *Koursk* were joint tortfeasors, and that the judgment recovered against the former barred any subsequent judgment against the latter. In that case the Court of Appeal considered the law in regard to joint torts and joint tortfeasors, and there are two passages in the judgment of SCRUTTON, L.J., to which I desire to refer. The first occurs where the Lord Justice is discussing the true meaning of joint tortfeasors, and is as follows ([1924] P. at p. 155): B C D

"The substantial question in the present case is: What is meant by 'joint tortfeasors?' and one way of answering it is: 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors': the agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in course of his employment, and his master; two persons who agree on common action, in the course of which, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with, another." E

This case falls within the third class to which the learned Lord Justice refers. Here the defendant and Morris went into the room, obviously proceeding by tacit agreement to examine this pipe and both employing the same negligent means. I think that what Morris did negligently was done by him in concert with the defendant and in pursuance of their common enterprise. In the other passage to which I wish to refer, SCRUTTON, L.J., says ([1924] P. at p. 156): F

"I am of opinion that the definition in CLERK AND LINDSELL ON TORTS (7th Edn.) 59, is much nearer the correct view: 'Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design . . . but mere similarity of design on the part of independent actors, causing independent damage, is not enough: there must be concerted action to a common end.'" G

That appears to me precisely to describe this case, and on that third ground also I think that the county court judge was fully entitled in law to find for the plaintiffs.

Inasmuch, therefore, as the judge says that he is to be taken to have found all the facts in favour of the plaintiff, I think that the appeal must be allowed, and that the judgment entered for the defendant must be set aside, and judgment entered for the plaintiff. H

TALBOT, J.—I am of the same opinion, and I do not differ from the judgment just delivered or from any part of it. There is, I think, another principle on which the liability of the defendant can be satisfactorily based. The evidence in this case shows that the defendant was, by arrangement with the plaintiff, in charge of the shop occupied by her during business hours, in the sense that he had the right, and possibly on occasions the duty, to enter it and see that it was safe and to do anything which needed to be done at once there in order to make it safe. Morris, on the other hand, had no right to enter the shop; and accordingly when he noticed a smell of gas which he thought came from the shop he went to the defendant for leave to go in and investigate. Thereupon the defendant got up, went with Morris into the shop, and there proceeded to ascertain for the protection, both of the plaintiff's premises and of his own, whether gas was escaping I

A by means of lighted matches. It is obvious that to examine a place in which an escape of gas is suspected is highly dangerous, unless proper care is taken, and that one of the necessary precautions against disaster is to avoid the use of a naked light.

B In my opinion, the defendant having undertaken this examination was under a duty to take reasonable care to avoid damage resulting from it to the shop and its contents; and, if so, he could not escape liability for the consequences of failure to discharge this duty by getting (as he did) someone to make the examination, or part of it, for him, whether that person was an agent or a servant or a contractor or a mere voluntary helper. This is the principle of such cases as *Bower v. Peate* (4), *Black v. Christchurch Finance Co., Ltd.* (5), *Hughes v. Percival* (6), *Hardaker v. Idle District Council* (7). See also the judgment in *Dalton v. Angus* (8). The principle is that if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owner of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether agent, servant, or otherwise, to do it for him. A like principle applies to work done in or near a highway involving damage to those who use it; see, for example, *Holliday v. National Telephone Co.* (9).

D It appears to me, therefore, that the defendant is liable to the plaintiff for damage caused to her property by the negligence of Morris, who, by the defendant's authority, continued the examination of the premises which the defendant had undertaken and begun. It is, I think, a reasonable inference from the evidence that the defendant thought that Morris would use lighted matches just as he himself had been doing, but it is quite immaterial. It was the defendant's duty to take care that the dangerous operation which he had undertaken was done safely; and he is as much liable for the carelessness of Morris in doing part of the work as he would have been if he had done it himself in the same way.

Appeal allowed.

Solicitors: *F. H. Adams; MacDonnell & Co.*

[*Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.*]

MORE *v.* WEAVER

[COURT OF APPEAL (Scrutton, Lawrence and Greer, L.J.J.), July 11, 1928]

[Reported [1928] 2 K.B. 520; 140 L.T. 15; 44 T.L.R. 710;
72 Sol. Jo. 556]*Libel—Privilege—Absolute privilege—Solicitor and client—Statements relevant to matter on which solicitor retained.*

Communications between solicitor and client on the matter on which the solicitor has been retained by the client are absolutely privileged provided they are relevant to that matter.

Morgan v. Wallis (1) (1917), 33 T.L.R. 495, overruled.

Notes. Referred to: *Minter v. Priest*, [1930] All E.R. Rep. 431.

As to the defence of absolute privilege in libel cases, see 24 HALSBURY'S LAWS (3rd Edn.) 48–54, paras. 86–96; and for cases see 32 DIGEST 102 et seq.

Cases referred to:

- (1) *Morgan v. Wallis* (1917), 33 T.L.R. 495; 32 Digest 78, 1084.
- (2) *Barnardiston v. Soame* (1676), Freem. K.B. 380, 387, 390; 6 State Tr. 1063; 3 Keb. 442; Poll. 470; 89 E.R. 283, 287, 290; sub nom. *Barnardiston v. Some*, 2 Lev. 114; sub nom. *Soames v. Barnardiston*, Freem. K.B. 430; affirmed sub nom. *Barnardiston v. Soames* (1689), 6 State Tr. 1117, H.L.; 22 Digest (Repl.) 140, 1257.
- (3) *Bottomley v. Brougham*, [1908] 1 K.B. 584; 77 L.J.K.B. 311; 99 L.T. 111; 24 T.L.R. 262; 52 Sol. Jo. 225; 32 Digest 102, 1329.
- (4) *Watson v. M'Ewan*, *Watson v. Jones*, [1905] A.C. 480; 74 L.J.P.C. 151; 93 L.T. 489, H.L.; 32 Digest 109, 1407.
- (5) *Browne v. Dunn* (1893), 6 R. 67, H.L.; 32 Digest 126, 1579.

Appeal from a decision of SWIFT, J., with a jury.

The plaintiff, Miss Kathleen Frances Mervin More, claimed from the defendant, Miss Flora Gertrude Weaver, damages for libel contained in letters written by the defendant to her (the defendant's) solicitors. The defendant denied that the words complained of were defamatory, and pleaded privilege. The defendant had lent the plaintiff £7,500 to enable the plaintiff to purchase and carry on the business of a private hotel in Kensington. Differences arose between the plaintiff and the defendant with regard to the terms of the security to be given for the loan, and also with regard to the time when, and the circumstances in which, the loan should be called in. The defendant consulted her solicitors, and, in order to discuss the advice which they gave her, she wrote certain letters to them. These letters contained the allegations complained of, and when the letters were published in the course of some proceedings taken against the plaintiff, the plaintiff brought this action.

SWIFT, J., held that the letters from the defendant to her solicitors, having been written for the purpose of the solicitors advising and assisting the defendant to get proper security for her money, and finally to obtain repayment of it, were absolutely privileged, and that no action for defamation would lie in respect of them. Even if he were wrong in that view, and the communications were the subject of qualified privilege only, then there was no evidence of malice to destroy that privilege. In either event, there was no case to go to the jury, and the action failed. The plaintiff appealed.

The plaintiff appeared in person.

Rayner Goddard, K.C., and *O'Hagan* for the defendant.

SCRUTTON, L.J.—This appeal is brought by a lady who undoubtedly believes that she has a serious grievance. She has brought several actions, all of which have been dismissed, and has, not unnaturally, got into a state of mind in which she is unable to appreciate the full significance of the position. This action she has brought against another lady for libel and slander. It appears that the defendant lent the plaintiff

A money to enable her to purchase and carry on an hotel in Kensington. Differences arose between them as to the question of what security should be given for the £7,500, which the defendant was lending to the plaintiff, and as to when and in what circumstances the loan should be called in. The defendant consulted her solicitors in order to obtain their advice, and in order to discuss the advice which was given to her by them she wrote certain letters to them which, in the course of some proceedings ultimately taken against the plaintiff, became public, and thereupon the plaintiff brought this action against the defendant for libel, the alleged libels being written communications from the defendant to her solicitors, that is, from the client to her solicitors. The question at once arises, on which there has been some difference of opinion, whether communications from a client to a solicitor and from solicitor to client are or are not absolutely privileged. There are a few, not many, cases where untrue communications or statements which are defamatory are by the law of England treated as absolutely privileged, so that, although they are untrue, defamatory and malicious, the law does not allow any action to be brought in reference to them. The reason for that is that there are certain relations in which it is so important that persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly, and it says that, in order that their duties may be carried on freely and without fear of any action being brought against them, "we will treat as absolutely privileged any statement made in the course of them."

D The leading case which most obviously illustrates that is the absolute privilege given to a judge. I am at liberty by the law of England, in delivering judgment, to be as malicious as I like against the plaintiff and say anything spiteful about her if I like; the law protects me. Why? As Lord NORTH, C.J., said in *Barnardiston v. Soame* (2) (6 State Tr. at p. 1096):

E "They who are intrusted to judge, ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage."

A judge is not privileged to be malicious or careless, but, as was said by CHANNELL, J., in *Bottomley v. Brougham* (3), he is privileged from inquiry whether he is malicious. F The reason is that to expose a judge to the risk of actions from every disappointed suitor, who is the more ready to allege malice the more ignorant he is, is to affect his efficiency and freedom as a judge doing a duty to the community. If the judge were to be exposed to the risk of having his observations made the subject of inquiry by a common jury he would be seriously hampered in doing his duty as a judge. The same G absolute privilege applies to counsel. I suppose there are very few counsel who do not, in the course of their speeches, make defamatory statements about someone. Those statements are absolutely privileged, because it is in the interests of the State that counsel should be able to speak freely without being exposed to the risk of an action at the instance of a person whose conduct he may have denounced. The same absolute privilege applies to a witness. A witness going into the witness-box and giving evidence H may very easily say something defamatory against someone, and it would very much hamper his efficiency as a witness if he said to himself: "Here is someone watching me to see whether I say something malicious, and I must therefore be very careful, because I may be sued by him if I say something which he alleges is malicious." In *Watson v. McEwan* (4) the House of Lords decided that the privilege extends to the statement of a witness to the client and solicitor in preparing the proof for trial.

I The question then is, does the absolute privilege go beyond statements made by judges, counsel and witnesses in court? Does it extend to a client consulting his or her solicitor and making statements to him for the purpose of obtaining advice, and for the purpose of discussing the advice given—statements which are untrue—but which are made for the purpose of obtaining advice? There has been some difference of opinion in the reported cases on the question whether the privilege between solicitor and client is absolute, so that no inquiry is possible whether the statements were malicious, or whether the privilege is qualified only, in which case malice on the part of the person making the defamatory statement will defeat the privilege. It was because of that

difference of opinion on the authorities that when, in this particular case, the master and judge in chambers struck out the plaintiff's statement of claim as frivolous and vexatious we restored the statement of claim in order that this question, which is an important one, might be discussed.

The difficulty arises from the fact that DARLING, J., a judge of great experience, in *Morgan v. Wallis* (1) expressed the view that privilege as between solicitor and client is qualified only, and not absolute. The question in that case arose on an entry in a bill of costs—an extremely unattractive document to him who receives it, but to those who have not to pay, it is full of human interest—to this effect:

“Long attendance on Mr. Edward Morgan and his son-in-law, Mr. Gilmour, conferring on his position in the company which he said was in a solvent condition, but his son, Mr. G. E. Morgan, and his son-in-law, Mr. F. E. Chandler, took advantage of his blindness and illness to withhold information from him, and he could not get his dividend on the preference shares; and he complained that his daughters, Mrs. Gilmour, Mrs. Hall, and Miss Morgan, on whose behalf he also instructed me, had received no dividend since June, 1912, on their preference shares, and he insisted that Mr. G. E. Morgan was applying the company's money for his own ends, and it was believed that at the bottom of the difficulties was Mr. Wilmshurst, who was the auditor of the company, and whom he distrusted.”

I do not know whether there was any necessity for the solicitor to set out as he did the long conversation; it would have been quite sufficient to say “Long interview with you in which you explained your difficulties . . . 13s. 4d.” But the solicitor having set out the details of the interview, an action for libel was brought against him by Mr. Morgan and Mr. Wilmshurst. DARLING, J., expressed the view that the position of solicitor and client only gave rise to a qualified and not an absolute privilege, and that it was open, therefore, to investigate the question of malice. Mr. Morgan and Mr. Wilmshurst did not take very much by their action for they recovered only one farthing damages.

On the other hand, there is the very high authority of LORD HERSCHELL, L.C., in *Browne v. Dunn* (5) (6 R. at p. 72), where he said:

“It seems to me that when communications pass between a solicitor and those who he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of those communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged. There is no authority, so far as I know, to the contrary, and it seems to me that to lay down any other doctrine would be very gravely contrary to the public interest.”

LORD BOWEN, in the same case, desired to keep the point open, but he said this (*ibid.*, at p. 80):

“I myself have no doubt at all, in the absence of authority, that if a solicitor has reason to believe that his services may be required by a possible client who does afterwards retain him, what passes between the solicitor and the client on the subject of the retainer, and relevant to the retainer, is covered by professional privilege . . . There is another and more serious point, a point of law, which I desire to keep open so far as my opinion is concerned. I very much doubt whether, when a professional relation is created between a solicitor and client, and communications pass between the solicitor and the client with reference to the prosecution of a third person, or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, provided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client.”

It was not necessary for LORD BOWEN to decide the point but he was inclined to the view that there was absolute privilege, provided that the communication was relevant. One can see what LORD BOWEN was thinking of. Suppose a client has quarrelled with

A the builder who was building a house for him, goes to his solicitor, discusses the position with him, and makes, in the course of the discussion, statements regarding the builder which are untrue. Those statements would, in LORD BOWEN'S opinion, be absolutely privileged. But suppose that, in the middle of the conversation, the client, being of a gossipy disposition, says: "Have you heard that Jones has run off with Mrs. Brown," that would not be relevant to the discussion. I can quite understand, therefore, that, **B** in certain circumstances, a jury may be asked whether the particular communication was relevant to the discussion between the solicitor and the client, and, in the case that I have just put, I can imagine that the jury would say that they were not relevant. The eminent judge—FRASER, J.—whose loss we all deplore, who spent his life in actions for libel, expressed the opinion in his work, *LAW OF LIBEL AND SLANDER* (6th Edn.) at pp. 189, 190, that the view suggested by LORD BOWEN, and, as I think, entertained **C** also by LORD HERSHELL, that the privilege between solicitor and client is absolute, was right, and that the decision of DARLING, J., in *Morgan v. Wallis* (1) was erroneous and should not be followed.

If, then, relevant communications between solicitor and client are absolutely privileged, was there any evidence in this case to leave to the jury that the communications which passed from the defendant to her solicitors were not relevant to the matter under **D** discussion between the defendant and her solicitors? What was being discussed between them was whether the loan should be called in, when, and on what terms. Obviously, the position of the debtor is most relevant to that discussion when the debtor is distrusted by the client. All the defamatory statements appear to relate to the character of the debtor and to the repayment of the loan.

In these circumstances, it would be idle to ask a jury whether these communications **E** were relevant to the matters being discussed between the defendant and her solicitors, namely, on what terms should the loan be called in. The plaintiff says that the statements were untrue. They may be, but privilege is only designed to shelter untrue statements. This is a case of absolute, not qualified, privilege, and there is no ground for leaving to a jury the question whether the statements complained of were relevant or not and there was no evidence on which the jury could hold that the statements were **F** irrelevant. SWIFT, J., was right in the view which he took, and the appeal must, therefore, be dismissed.

LAWRENCE, L.J.—I agree, and have nothing to add.

GREER, L.J.—I agree.

Appeal dismissed.

G Solicitors: *Mailland, Peckham & Co.*

[*Reported by T. W. MORGAN, ESQ., Barrister-at-Law.*]

SLOGGETT v. SLOGGETT

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), February 28, March 7, 1928]

[Reported [1928] P. 148; 97 L.J.P. 71; 139 L.T. 238; 44 T.L.R. 394; 72 Sol. Jo. 192]

Divorce—Queen's Proctor—Argument at request of court—Matters other than suspected collusion—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 181 (1), (3).

The power conferred on the court by s. 181 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 [now Matrimonial Causes Act, 1950, s. 10 (1)], on a petition for divorce to require the Queen's Proctor to argue any question in relation to the matter which the court deems to be necessary or expedient to have fully argued is not limited by the terms of sub-s. 3 of the section [s. 10 (3) of the Act of 1950] to a case where there is suspected collusion.

Notes. Referred to: *Clarkson v. Clarkson* (1930), 143 L.T. 775; *W—, M.J. v. W—, H.E.W.*, [1936] 2 All E.R. 1112; *Practice Note*, [1945] W.N. 162.

As to interventions by the Queen's Proctor, see 12 HALSBURY'S LAWS (3rd Edn.) 412 et seq.; and for cases see 27 DIGEST (Repl.) 579 et seq. For Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to:

- (1) *Jackson v. Jackson*, [1910] P. 230; 79 L.J.P. 82; 103 L.T. 79; 26 T.L.R. 476; 27 Digest (Repl.) 580, 5393.
- (2) *Sottomayer v. De Barros* (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 27 W.R. 917; 27 Digest (Repl.) 580, 5391.
- (3) *Hudson v. Hudson* (1875), 1 P.D. 65; 45 L.J.P. 39; 33 L.T. 788; 24 W.R. 282; 27 Digest (Repl.) 580, 5390.
- (4) *Latour v. Latour and Weston* (1861), 2 Sw. & Tr. 524; varied sub nom. *Lautour v. Queen's Proctor* (1864), 10 H.L.Cas. 685; 33 L.J.P.M. & A. 89; 10 L.T. 198; 10 Jur. N.S. 325; 12 W.R. 611; 11 E.R. 1193, H.L.; 27 Digest (Repl.) 438, 3633.
- (5) *Lloyd v. Lloyd and Chichester* (1859), Sea. & Sm. 39; 1 Sw. & Tr. 567; 30 L.J.P.M. & A. 97; 1 L.T. 335; 164 E.R. 862; 27 Digest (Repl.) 389, 3221.
- (6) *Forster v. Forster and Berridge* (1863), 3 Sw. & Tr. 151; 32 L.J.P.M. & A. 206; 9 L.T. 148; 164 E.R. 1231; 27 Digest (Repl.) 584, 5436.
- (7) *Masters v. Masters* (1864), 4 New Rep. 200; 34 L.J.P.M. & A. 7; 27 Digest (Repl.) 541, 4892.
- (8) *Richards v. Richards and Cook* (1869), 21 L.T. 598; 18 W.R. 152; 27 Digest (Repl.) 580, 5381.
- (9) *Gaskill v. Gaskill*, [1921] P. 425; 90 L.J.P. 339; 126 L.T. 115; 37 T.L.R. 977; 38 T.L.R. 1; 27 Digest (Repl.) 320, 2666.

Summons for directions by the King's Proctor.

The wife petitioned for dissolution of her marriage on the ground of her husband's adultery with one M.B.T. The petition, which was undefended, came on for hearing on May 25 and 26, 1927, before LORD MERRIVALE, P., who, after hearing the wife and her witnesses, adjourned the case for argument by the King's Proctor. The Attorney-General then directed the King's Proctor to inquire into the facts, and as a result of his investigation he was prepared to adduce evidence of a state of facts different in certain aspects from that proved before the court. This summons for directions was then taken out by the King's Proctor, who, it appeared, proposed to intervene and to call evidence on an issue other than that of suspected collusion.

The Attorney-General (Sir Douglas Hogg, K.C.) and Clifford Mortimer, for the King's Proctor, referred to *Jackson v. Jackson* (1); *Sottomayer v. De Barros* (2); s. 181 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925; *Hudson v. Hudson* (3).

A *W. N. Stable (J. Buckley with him)*, for the wife, referred to *Lautour v. Queen's Proctor* (4); *Lloyd v. Lloyd and Chichester* (5); *Forster v. Forster and Berridge* (6); *Masters v. Masters* (7); *Richards v. Richards and Cook* (8); and *Gaskill v. Gaskill* (9).

By s. 181 of the Supreme Court of Judicature (Consolidation) Act, 1925:

B "In the case of any petition for divorce or for nullity of marriage (1) The court may, if it thinks fit, direct all necessary papers in the matter to be sent to His Majesty's Proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued, and His Majesty's Proctor shall be entitled to charge the costs of the proceedings as part of the expenses of his office. (2) Any person may at any time during the progress of the proceedings, or before the decree nisi is made absolute, give information to His Majesty's Proctor of any matter material to the due decision of the case, and His Majesty's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient. (3) If in consequence of any such information or otherwise His Majesty's Proctor suspects that any parties to the petition are or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the Attorney-General, after obtaining the leave of the court, intervene and retain counsel and subpoena witnesses to prove the alleged collusion."

Cur. adv. vult.

E Mar. 7. **LORD MERRIVALE, P.**, read the following judgment. Directions of the court are asked in this case with a view to the determination of certain questions which arise from time to time with regard to the powers and duties of the King's Proctor in relation to suits for divorce. The matter arises upon a reference to the King's Proctor made by the court, upon the hearing of an undefended suit, wherein, upon inquiries by the court, facts appeared which needed investigation. In view of certain doubts expressed in the course of the proceedings in *Jackson v. Jackson* (1); and of the necessity for, and importance of, the regular conduct of proceedings in divorce suits, the Attorney-General presented the application for the King's Proctor on the summons, in order that, if the proposal should commend itself to the court, facts resulting from inquiries made and to be made by the King's Proctor should be duly considered at the adjourned hearing of the suit and that for that purpose counsel nominated by the Attorney-General should be present. Counsel appeared for the wife petitioner and stated that she did not oppose the application for an order for intervention of the King's Proctor in the present case, if the court should think it admissible under the statute; but her counsel submitted that, upon the true construction of the Matrimonial Causes Act, 1860, and the Supreme Court of Judicature (Consolidation) Act, 1925, intervention of the King's Proctor before decree nisi is limited to cases in which he suspects collusion.

G The words in the section which might *primâ facie* appear to warrant action by the King's Proctor in cases like the present were, it was said, those which appeared fourth in order among the provisions of s. 7 of the Matrimonial Causes Act, 1860, the enactment which introduced in the practice of the Divorce Court the decree nisi and which is now embodied substantially in s. 181 of the Supreme Court of Judicature (Consolidation) Act, 1925. The words were:

I "and at any time during the progress of the cause or before the decree nisi is made absolute, any person may give information to Her Majesty's Proctor of any matter material to the decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary."

The fact that s. 7 went on to enact that if from any such information or otherwise the Queen's Proctor should suspect collusion, he might by direction of the Attorney-General and with the leave of the court intervene in the suit, alleging such case of collusion, was relied on by counsel for the wife. Shortly put, the argument put upon s. 7 and the corresponding s. 181 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, is that expressed in the maxim: *Expressio unius est exclusio alterius*. The

generality of the enactment in s. 181 (1) that the King's Proctor may argue any question which the court deems to be necessary or expedient to have fully argued was said to be limited by the subsequent provision for intervention in the suit, if collusion is suspected. It was also said that there is no express authority for a direction by the court in a case like the present. A

The question for decision does not depend upon the precise effect on the powers and duties of the King's Proctor of the successive enactments of this section. Wider considerations are involved. It is necessary to take into account the subject-matter of the statute, and the various legal provisions which relate to it. Foremost of them is the enactment originally contained in ss. 29 and 30 of the Matrimonial Causes Act, 1857, now embodied in s. 178 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, whereby on a petition for divorce it becomes the duty of the court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not, and also to inquire into any counter-charge which is made against the petitioner, and in case of an adverse finding against the petitioner in respect of either of the matters specified, or a finding of collusion between the parties, to dismiss the petition. Contrary to the ordinary course of trial of civil proceedings, the court is required to deal not only with issues raised by the parties, but with independent matters deemed by the legislature fit to be dealt with in respect of a larger interest, that, namely, of the community; [see now Matrimonial Causes Act, 1950, s. 4]. No doubt has ever been thrown, so far as I am aware, on the peremptory character of the obligation which was cast upon the court by s. 29 of the Matrimonial Causes Act, 1857; see s. 178 (1) of the Act of 1925 [and s. 4 (1) of Act of 1950]. Very soon after the passage of the Act of 1957 a practical demonstration of its effect was given. In *Lloyd v. Lloyd and Chichester* (5) the Judge Ordinary, SIR CRESSWELL CRESSWELL, called for a bill of costs of one of the parties and examined a witness on a question which therein arose, and adjourned the case for further evidence, which was dealt with in like manner. At the time when this case was heard the statute which gave the King's Proctor special duties in relation to suits for divorce had not been passed. The need of some such provision, as it enacted, was however, making itself felt. In *Forster v. Forster and Berridge* (6) which was heard when the Matrimonial Causes Act, 1860, by which this provision was made, was newly in operation, the Judge Ordinary made these observations (3 Sw. & Tr. at p. 156): B C D E F

"So after the court was established it was suspected that attempts had been made to procure a dissolution of marriage by means of collusion, and there had been other instances in which both the party suing and the party sued were equally anxious to obtain a divorce, and without collusion, the party sued abstained from setting up matters which might be set up in answer to the petition. It is in order to check these practices that the statute was passed." G

So far as I know, the powers of the court to require the services of the King's Proctor in aid of the discharge of its duties under s. 29 of the Matrimonial Causes Act, 1857: see s. 178 (1) of the Act of 1925 [and s. 4 (1) of the Act of 1950]; has never been seriously challenged. The matter is, of course, not of "purely judicial character," so far as the administration of justice inter partes is concerned. There are, however, references in reported cases. For example, when SIR JAMES WILDE, afterwards LORD PENZANCE, had succeeded SIR CRESSWELL CRESSWELL, in *Masters v. Masters* (7), the matter was discussed, and in *Richards v. Richards and Cook* (8) action such as is in question here was taken. Comparatively recent instances in reported cases are found in the action taken by SIR JOHN BIGHAM, P., and BARGRAVE DEANE, J., in *Jackson v. Jackson* (1), and by LORD BIRKENHEAD, L.C., when he came to the assistance of the court, in *Gaskill v. Gaskill* (9). Both warrant the view that the several relevant enactments are properly regarded as enabling the court to seek the aid of the King's Proctor in respect of questions of fact as well as that of the law officers of the Crown upon questions of law at any stage of a case. H I

Numerous cases were cited before me in which discussion arose as to the limits of the action of the King's Proctor, where there was no antecedent direction of the court.

- A** Some of these cases determine that he may intervene in respect of matters other than collusion: *Sottomayer v. De Barros* (2), and in his official capacity, or as a member of the public: *Latour v. Latour and Weston* (4), or decided in what cases before the Judicature Act he had a statutory right to costs as against a party to the suit: *Masters v. Masters* (7). Discussions which arose on these topics do not affect the more important of the matters now under consideration. The report of the proceedings in *Jackson v. Jackson* (1) indicates that there was a doubt on the part of the law officers at the time that case was heard as to the extent of the obligation cast then on the King's Proctor by the provisions of the statutes. No such doubt, however, was suggested in the more recent case of *Gaskill v. Gaskill* (9). What was then done was consistent with the course taken by LORD PENZANCE at an earlier time, when, perhaps, the process of reference to the King's Proctor of matters requiring investigation, in aid of the discharge of the duties of this court, was easier of comprehension. The King's Proctor was, before the Divorce Court existed, an officer of the court, as a solicitor is now, with defined duties in the ecclesiastical courts, having jurisdiction in Probate and in the Court of Admiralty. When a new duty and new powers were put upon him, his relation to those courts was matter of common knowledge. Remembrance of that fact helps to a better understanding of the cases before LORD PENZANCE.
- D** The two questions to be dealt with now are (i) whether the services of the King's Proctor are properly required by the court in this case, and (ii) whether a direction that he should be represented at the hearing can properly be given. Regarding the first question, in the light of the statutory duty of the court, to which the King's Proctor's office is ancillary, I can have no doubt that the direction given to the King's Proctor in this case was a valid direction. Giving the effect which, I think, I ought to the submissions made by the Attorney-General, what seems to me proper now to be done is that particulars should be given to the petitioner of facts or matters deemed proper to be brought by the King's Proctor to the attention of the court, and that, at the further hearing of the cause the King's Proctor should be represented, that such facts or matters may be duly presented and considered.

F Solicitors: *King's Proctor; Westbury, Preston & Starvridi.*

[Reported by C. G. MORAN, ESQ., Barrister-at-Law.]

STOKOE v. MICKLEY COAL CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Atkin and Lawrence, L.J.J.), January 17, 1928]

[Reported 138 L.T. 566; 21 B.W.C.C. 70]

Workmen's Compensation—Accident “arising out of and in the course of” employment—Act done “for the purposes of and in connection with the employer's trade or business” —Act prohibited by Explosives in Coal Mines Order, 1913—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 1 (2).

The workman, who was employed by the respondent company as a licensed shot firer to drive a drift through rock, was found dead in his working place near the coal face. Under the Explosives in Coal Mines Order, 1913, cl. 2 (c) and 3 (c), the use of a hole in which a shot had misfired was prohibited, as also the drilling out of it the stemming in order to put in another charge, it being directed that a fresh hole must be bored not less than a foot from the old hole. The county court judge held that the man was killed while doing an act in contravention of the Order of 1913, and, as his motive was to save himself the trouble of drilling a fresh hole, he was not at the time of the accident doing an act for the purposes of and in connection with the employer's trade or business within the meaning of sub-sect. 2 of s. 1 of the Workmen's Compensation Act, 1925, and so his dependant was not entitled to recover compensation.

Held: the motive of the workman in doing the prohibited act was irrelevant when considering whether he was doing it “for the purposes of and in connection with the employer's trade or business,” within s. 2 (1) of the Act of 1925, and if the workman's act was done for the purposes of and in that connection he was entitled to compensation under s. 1 (2); the workman was employed as a shot firer and at the time of the accident he was engaged in doing one of the class of acts which he was employed to do; the fact that he was doing it in a manner prohibited by the Order of 1913 did not prevent his still being engaged in acting for the purposes of and in connection with his employers' trade or business; and, therefore, the decision of the county court judge was wrong and the workman was entitled to compensation.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be “against personal injury caused . . . by accident arising out of and in the course of” employment, thus adopting the wording of s. 1 (1) and the opening words of s. 1 (2) of the Act of 1925. See also s. 7 (1).

Referred to: *Davison v. Holmside and South Moor Collieries*; *Napper v. Lambton*; *Hetton and Joicey Collieries* (1929), 140 L.T. 511; *Noble v. Southern Rail. Co.*, [1940] 2 All E.R. 383.

As to “accidents” within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq.; and for cases see 34 DIGEST 266 et seq. For Workman's Compensation Act, 1925, see 16 HALSBURY'S STATUTES (2nd Edn.) 202, and for National Insurance (Industrial Injuries) Act, 1946, see *ibid.* 797.

Cases referred to:

- (1) *Bourton v. Beauchamp*, [1920] A.C. 1001; 89 L.J.K.B. 1205; 123 L.T. 606; 13 B.W.C.C. 90 sub nom. *Burton v. Beauchamp and Beauchamp*, 64 Sol. Jo. 601, H.L.; 34 Digest 304, 2506.
- (2) *Astley v. R. Evans & Co., Ltd.*, [1911] 1 F.B. 1036; 80 L.J.K.B. 731; 104 L.T. 373; 4 B.W.C.C. 209, C.A.; affirmed sub nom. *Richard Evans & Co., Ltd. v. Astley*, [1911] A.C. 674; 80 L.J.K.B. 1177; 105 L.T. 385; 27 T.L.R. 557; 55 Sol. Jo. 687; 4 B.W.C.C. 319, H.L.; 34 Digest 324, 2649.
- (3) *Garrallan Coal Co. v. Anderson (or Devlin)*, [1927] A.C. 59; 19 B.W.C.C. 356; sub nom. *Garallan Coal Co., Ltd. v. Anderson (or Devlin)*, 136 L.T. 66; 42 T.L.R. 747; 34 Digest 304, 2511.

- A (4) *Davies v. Gwauncaeurgurwen Colliery Co.*, [1924] 2 K.B. 651; 94 L.J.K.B. 229; 132 L.T. 221; 40 T.L.R. 859; 68 Sol. Jo. 882; 17 B.W.C.C. 181, C.A.; 34 Digest 313, 2572.
- (5) *James v. Penderyn Limestone Quarries (Hirwain), Ltd.* (1926), 20 B.W.C.C. 27, C.A.; Digest Supp.
- B (6) *Wilson and Clyde Coal Co. v. M'Ferrin, Kerr (or M'Aulay) v. James Dunlop & Co.*, [1926] A.C. 377; 95 L.J.P.C. 130; 135 L.T. 164; 42 T.L.R. 397; 19 B.W.C.C. 1, H.L.; 34 Digest 301, 2499.
- (7) *A. G. Moore & Co. v. Donnelly, Fife Coal Co. v. Sharp, Fife Coal Co. v. Fyfe*, [1921] 1 A.C. 329; 90 L.J.P.C. 49; 124 L.T. 578; 37 T.L.R. 198; 65 Sol. Jo. 219, 239; 13 B.W.C.C. 458, H.L.; 34 Digest 302, 2501.

C Appeal from a county court judge sitting as arbitrator under the Workmen's Compensation Acts.

The following are the facts as stated in the award. These cases are claims for compensation by the dependants of two brothers named Stokoe, both stonemen in the respondents' employment, who lost their lives by an explosion in the respondents' Mickley Pit on Mar. 2, 1927. The men were both licensed shot-firers, and at the time of the accident they were employed in driving a drift in the mine by drilling through rock at a steep upward gradient, the instrument required for drilling the hole in which the explosive was to be placed consisting of a standard, a ratchet, and a drill. The explosive used was gelignite fired by fuse and detonator. For drilling into rock the standard is a necessity; for drilling into softer material the drill can be worked by means of the ratchet alone. On Mar. 2 the under-manager of the pit, Richard Garrity, whilst going his rounds, found both men dead in their working place, and the place full of fumes. The drill and ratchet were lying about 9 yds. from the coal face, the ratchet being broken, and the drill twisted and showing evident signs of having been exposed to and damaged by fire. The standard was some distance away and uninjured. The inference from the above facts appears to be inevitable, and I find that one or both of the men had been employed in drilling out a shot which had misfired, an operation which could be done by use of the drill and ratchet alone, and had so caused an explosion; but taking into consideration the facts that the body of Thomas Stokoe was found at some distance from the face and was not injured as his brother's was, I do not think I can fairly draw the inference that he was assisting in, or a consenting party, to what his brother was doing, and I find, therefore, that he was an innocent sufferer by the explosion. If I have drawn the correct inference from the facts, it is quite clear that neither William Stokoe nor his dependants could, before the Act of 1923, have successfully made any claim for compensation because such an act was in direct contravention of the Explosives in Coal Mines Order of Sept. 1, 1913, cl. 2 (c) and 3 (c) and (c), and, therefore, one altogether outside the scope of his employment: *Bourton v. Beauchamp and Beauchamp* (1). But now the Workmen's Compensation Act, 1925, s. 1 (2), re-enacting s. 7 of the Act of 1923, provides that an accident in such circumstances as those in the present cases is to be deemed to have arisen out of and in the course of the workman's employment, subject to the condition that the act of the workman was done by him for the purposes of and in connection with the employer's trade or business. It would, in my opinion, be very difficult, if not impossible, to convince oneself that such an act as that of this workman was so done, and I feel very strongly that in all probability the dominant motive in the workman's mind was none other than to save himself the trouble of drilling another hole in the rock, and I am, therefore, of opinion that the condition imposed by sub-s. (2) was not fulfilled. The result, therefore, is that I make my award for the applicant in the case of Thomas Stokoe, and for the respondents in that of William Stokoe. The widow appealed on the grounds that the death must be deemed to have arisen out of and in the course of the employment notwithstanding the prohibition contained in the statutory regulations, and that it was shown in evidence that the act upon which the workman was engaged at the time of his death was being done for the purposes of the respondents' trade or business; that there was no evidence on which the county court judge could find that the workman's dominant motive was to save

himself trouble; and that the existence of a personal motive was not sufficient to prevent an act otherwise arising out of and in the course of the workman's employment being done for the purposes of the respondents' trade or business; that the county court judge failed to direct himself to the question whether the act would have been within the scope of the employment, but for the statutory prohibition; and that the evidence showed that the workman met his death while engaged upon work which he was employed by the respondents to do, namely, dealing with a misfired shot which was necessarily incidental to the principal object which he was employed to attain, namely, cutting a drift through rock with the aid of explosives, and that the default of the workman, if any, was no more than a deviation from the prescribed method.

Sir Henry Slesser, K.C., and C. B. Fenwick for the appellant.

A. Neilson, K.C., and William Shakespeare for the deceased's employers.

LORD HANWORTH, M.R.—This appeal is taken from a decision of the county court judge, who had to deal with some sad facts. There were two men employed by the Mickley Coal Co., Ltd., one called William Stokoe, and the other called Thomas Stokoe. One was a married man without children and the other a married man with three children. They were both employed at the colliery and were both licensed shot firers. It was part of their business, in proper course and at the proper time and in accordance with the regulations that are made for firing shots in a mine, to fire the shots when necessary for the purpose of dislodging the coal. On Mar. 2, 1927, the under-manager of the pit, whilst going his rounds to find out how work was going on, discovered both men dead in their working place and the place full of fumes. The evidence of the under-manager was this: "I was going my round, and when I reached the drift"—that is where he ought to have heard the noise of the men working—"I did not hear anyone working. I went in." Then he says that the actual place where they were working was on a slope which rises 2 in 3. "First found Thomas and that he was dead. Place full of fumes. Then found William further in, also dead—very badly damaged under armpit."

It is true that in a case like that one must draw what inference one can from the fact that men are found at the site of their work, and dead. **FLETCHER MOULTON, L.J.**, in *Astley v. R. Evans & Co., Ltd.* (2) said this ([1911] 1 K.B. at p. 1044):

"Where the workman is shown to have been engaged in his employer's work, and nothing else during the period prior to the accident and the accident occurs by reason of his doing an act which is consistent with his still continuing to be doing that work, the proper presumption is that he did what led to the accident in continuing his employer's work, and not that he had ceased to do his employer's work and had commenced to do something for his own purposes."

As I gather, that passage is cited with approval by **VISCOUNT DUNEDIN** in the House of Lords in *Garrallan Coal Co., Ltd. v. Anderson (or Devlin)* (3). It would appear that these men were found dead at the site of their work. One ought on that discovery to draw the presumption that they were engaged in their work at the time of the accident, But then the judge finds this on the evidence given to him as to where the tools were found, and so on:

"One or both of the men had been employed in drilling out a shot which had misfired, an operation which could be done by use of the drill and ratchet alone and had so caused an explosion."

If that was what they were doing, and, particularly, if they were drilling out the stemming which had been put in to cover up a shot that had misfired, then they were acting contrary to the regulations, and the county court judge finds in the case of one of them, William, that his dependants were disentitled to recover, because he had with a dominant motive in his mind—to save himself the trouble of drilling another hole—contravened the regulations but with regard to Thomas he finds no evidence to connect him with William's act of disobedience, and so he held in favour of Thomas's dependants.

The question is whether the learned county court judge has rightly directed himself in the law which he has applied to the inference which he has drawn regarding William.

A Before the s. 7 of the Act of 1923 was passed it is plain that a man who acted in disregard of a statutory provision was so far acting outside the sphere or limits of his employment that he could not recover. Section 7 of that Act was passed to bring back within the ambit of compensation cases which were excluded from it by reason of the workmen acting contrary to orders or to statutory regulations, and that s. 7 now finds its counterpart in sub-s. (2) of s. 1 of the Workmen's Compensation Act, 1925. I have already

B said all that it is, to my mind, necessary to say about the interpretation of that section in *Davies v. Gwauncaeurgurwen Colliery Co.* (4) and also in *James v. Penderyn Limestone Quarries (Hirwain), Ltd.* (5) but the interpretation of the section does not rest upon what has been said in this court. The case of the *Garrallan Coal Co.* (3) and also *Wilson and Clyde Coal Co. v. M'Ferrin* (6) appear to contain authoritative constructions of the section. Summarising those, it is first of all necessary to see that the accident was one

C which arose out of and in the course of the man's employment. You have to bring in the accident as one which complies with the terms of sub-s. (1) of s. 1, but if you do find that it was an accident arising out of and in the course of the employment, then the workman is not disabled from recovering if the act which he did was one which was in defiance of or in contravention of a statutory or other regulation applicable to his employment. In other words, the sphere of his employment is not finally delimited by the

D statutory regulation applicable to it, if his disobedience to such a regulation was in the course of doing the act for the purposes of and also in connection with his employer's trade or business. I pointed out in *Davies v. Gwauncaeurgurwen Colliery Co.* (4) that it is to be noted that the words are not "in connection with his employment" but "in connection with his employer's trade or business." One has, therefore, to consider what was the employer's trade or business and see whether, in the perspective which

E those larger words give one, it is fair to say that the act was done for the purposes of and in connection with that, and to bear in mind also that sub-s. (2) is one which was intended to enable the workman to overcome the difficulty which had been placed in his way from recovering under the Act in cases where disobedience was found.

I need not go through those cases again. It appears to me that the learned county court judge in the last part of his judgment has misdirected himself in considering what

F was, in all probability, the dominant motive in the workman's mind, and that, as he finds that was to save the workman trouble, the man is not brought back within s. 1 (1) so as to be entitled to compensation, by virtue of sub-s. (2). That is not the test. The purpose for which the disobedient act may have been done may have been to save the workman himself trouble. Probably there is generally some personal reason in the case of a breach of a disciplinary order, but whatever be the reason why it was done,

G if the act was done for the purposes of and in connection with the employer's trade or business, then the man is brought back into compensation. Looking at it from that point of view, it appears to me impossible to say that if this workman, geographically at the site of his work, engaged as a shot firer to put a shot into the coal for the purpose of blasting it, does that in a negligent manner or in a way which contravenes the regulations, he is not doing an act for the purposes of and in connection with his employer's

H trade or business, the employer having employed him to advance that trade or business by the getting of coal. It appears to me, therefore, that the learned county court judge has not correctly directed himself in accordance with what has been said by Viscount DUNEDIN, nor has he observed the precision which is given to the interpretation of the section by noticing the two cases of *M'Ferrin* (6) and *M'Aulay* (6), where in the one case the workman recovered, and in the other he did not. What is said against the present

I workman is that he disregarded the prohibitions which are to be found in the Explosives in Coal Mines Order of Sept. 1, 1913. Those are to be found in cl. (2) (c) and (3) (e); and it is said that this man must have been removing a part of the stemming which ought not to have been removed. It may be so, but, if he did so, he was removing the stemming in order that he might make a space for a new shot to be put in and a new shot for the purpose of blasting coal. The only reason why he was doing wrong was because of these regulations laid down in this order. He did not do it as stepping outside the sphere of his being a coal miner, nor outside the sphere of his master's business, which was coal getting. He did it for the purposes of and in connection with his

master's business, though in a manner which was contrary to the regulations. I do not refer to the other regulations which are important—"a second charge shall not be placed in the same hole"—because each of these regulations seems to apply to the manner in which a shot firer should conduct the business of shot firing. That was this workman's employment. Those regulations he disregarded, and he disregarded them for some personal reason, but in thus disregarding them he was still engaged in acting for the purposes of and in connection with his employer's business. It appears to me that the learned county court judge has formed too narrow a view of the effect of sub-s. (2) of s. 1, and that he ought to have directed himself upon his findings that the man was brought back into compensation by virtue of sub-s. (2). For these reasons it appears to me that the appeal ought to be allowed with costs here and below, and the case must be sent back to the arbitrator for him to find an award in favour of the applicant as the circumstances of the dependency may require.

ATKIN, L.J.—I agree. The fact in this case is that this man—and it is a very material fact—was a shot firer, as was his brother, who was also killed. He had apparently drilled a shot, and, as far as is known, there had been a misfire, and he had returned to the place where the misfire had taken place. The judge inferred from the circumstances that he was drilling out the hole where the shot had been placed. I do not think there is any reason for interfering with that inference.

In doing that, it is probable that the workman was committing a breach of the regulations. It is not very easy to put one's finger on the precise clause in the Order of 1913, because cl. 2 seems to me to refer to cases of shots having been placed in the hole and the placing of shots and the firing of shots which eventually are successful, and cl. 3 seems to apply to cases where there has been a misfire, which has been held to have been the case here. I think it is plain that he had no right under cl. 3, which carefully provides for the means of recovering the wasted shot, to drill out the hole, and I should prefer to put this case on the prohibition in cl. 3, which seem to apply to it. But for sub-s. (2) of s. 1 of the Act of 1925, reproducing s. 7 of the Act of 1923, there is no doubt this man would not be entitled to recover, because what he did would be held to be outside the scope of his employment. That was so decided in *Bourton v. Beauchamp and Beauchamp* (1), in which the man did the very thing that was done here. There one West had drilled a hole in the coal face and placed an explosive cartridge therein, it had misfired, and the cartridge was left standing where it was. Two days later the deceased wanted to get coal and saw the charge which had remained there and the fuse and the stemming. He proceeded to remove the stemming with a view to laying a fresh shot in the same hole, but the charge got ignited in the process, and he was injured and died. It was held before the Act of 1923 that he was not entitled to compensation. The workman in the present case did exactly the same thing, except that he came back to drill out the old hole—whether he did it for the purpose of putting in another charge in the same place or merely for the purpose of recovering the mis-spent shot one does not know. I think the learned county court judge infers the former, and that, I think, is perhaps right; but, at any rate, it was the workman's duty, and within the class of act that he was employed to do, to drill holes and to fire shots. It appears to me if that is what in fact he did, and he was actually doing one of the class of acts which he was employed to do, he was doing it in a manner which was no doubt expressly prohibited, but it appears to me also, within the terms of the section, that he was doing it for the purposes of and in connection with his employer's trade or business. For what other purpose does a man go and drill out holes? Even if he wants to fire another shot he does not do it to amuse himself; he does it because he is a shot-firer, and he does it because it is his duty to fire shots and get out coal by blasting. It seems to me to be a very narrow and a very wrong view to take, to say that because the man violates the prohibition in order to save himself trouble, therefore, he is not acting for the purposes of his employer's business and in connection with it; when he is doing the act he is acting entirely for the purposes of his employer's business and obviously in connection with it. I think, therefore, the matter has been decided by the very experienced and distinguished county court judge on too narrow lines.

A The other argument which has been put before us, and does not seem to have been pressed before the learned county court judge is this: It is said that one must look at cl. 2 which provides that no part of the stemming shall be removed nor shall the detonator leads be pulled out. It is said that inasmuch as this man was in fact at the time trying to remove the stemming, and was working at a place where he was prohibited from working, therefore he is brought within the class of case where a workman is doing an act in an area which he is prohibited from approaching for the purposes of his business. That seems to me too narrow. I doubt the application of that rule at all to this case, because it is obvious, if there is a time at which a person is entitled to find the detonator and remove it, in fact it is his duty to do it, only by cl. 3 he has to do it in another way —by firing another shot to begin with, and then trying to get it out as best he may. But quite apart from that, this case seems to me to fall much more closely within C *Wilsons, Clyde Coal Co. v. M'Ferrin* (6), and that case is since the recent Act of 1923. There were two persons, one being a shot firer and the other not. M'Ferrin, who was the shot firer, was seriously and permanently disabled as the result of returning to a shot hole in which he had fired a shot within the period during which persons were by statutory regulations prohibited from approaching the shot hole. Not only was he not allowed to work in the shot hole, but he was not even allowed to approach the spot D where the shot hole was for a certain period of minutes. I think in that case it was held to be an hour, because there was a special mode by which the shot was fired, and so there was in one sense a prohibition area; but the House of Lords expressly decided that the man was within the Act. VISCOUNT DUNEDIN said:

E "The facts are really precisely the same as they were in the cases of *A. G. Moore & Co. v. Donnelly, Fife Coal Co., Ltd. v. Sharp* (7) but s. 7 obviously applies, and so the arbitrator and the Court of Session held. The only reason for saying that the accident did not arise out of the employment was the reason which was successfully urged in those cases, namely, that the prohibition in the Act of Parliament made it clear that what the workman was doing was not within the scope of his employment, but that is precisely the case for the application of s. 7. The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition."

F I cannot distinguish between the case of a shot firer who is prohibited from returning to the area of the misfired shot at all, and the case of the shot firer who is prohibited from interfering with the hole where the shot was fired. It is a much too narrow distinction, it seems to me, for the purpose of giving any kind of logical meaning to this Act, to say that the man in one case was entitled to compensation and that in the other he was not. G I have, therefore, come to the conclusion that that objection also fails. For these reasons it appears to me that inasmuch as the learned county court judge has really found all the facts that are essential, and has, in my view, been mistaken in coming to the conclusion that merely because the man violated the prohibition in order to save himself trouble, that prevents him from being entitled to compensation in a case where he clearly was acting for the purposes of his employer's trade or business and in connection with it, I think the learned county court judge ought to have awarded compensation. H Therefore, I think the right thing to do is to allow this appeal and to remit the case to the arbitrator for him to award compensation to the dependant.

I **LAWRENCE, L.J.**—I agree. In this case the learned county court judge has, in my opinion, correctly drawn the inference that the deceased workman was employed in drilling out a shot which had misfired and so caused the explosion by which he unfortunately was killed with his brother. The deceased workman was a shot firer, and, therefore, it came within the sphere of his employment to prepare holes for the purpose of inserting the explosive charge and also to insert clay for the purpose of plugging that charge when so inserted. It is true, and I am willing to assume, that there are regulations which prohibit a shot which has misfired, and had been so placed in position, from being touched again. Therefore, in acting as he did it is plain that he was acting in contravention of the Explosives in Coal Mines Order, 1913, but that is not a bar to claiming compensation, provided that he was acting for the purpose of and in connection with his employer's trade or business when the accident happened. It seems to me that

where the learned county court judge has gone wrong is in holding that a personal motive was sufficient to prevent an act otherwise arising out of and in the course of the workman's employment being done for the purposes of and in connection with the respondents' trade or business. To my mind, the motive with which regulations are broken has nothing whatsoever to do with the question whether the act which was done was done for the purposes of and in connection with the trade or business of the employer. This is not a case in which the workman—to use a phrase which has been used in this case—arrogated to himself some job which he was not employed to do, examples of which have been given in many cases. He was not doing anything other than doing the job, although contrary to regulations, of a shot firer. Therefore, it seems to me that the motive with which he broke the regulations has nothing whatsoever to do with the case. The findings of fact of the learned county court judge are, in my judgment, sufficient to bring this case within the section, and therefore I agree that the order should be that the appeal be allowed, and that the case should go back for the purposes mentioned by my brothers.

Appeal allowed.

Solicitors: *King, Wigg & Brightman*, for *Watson, Burton & Corder*, Newcastle-upon-Tyne; *Gregory Rowcliffe & Co.*, for *Cooper & Jackson*, Newcastle-upon-Tyne.

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

SOCIÉTÉ ANONYME PÊCHERIES OSTENDAISES *v.* MERCHANTS MARINE INSURANCE CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Atkin and Lawrence, L.J.J.), January 11, 1928]

[Reported [1928] 1 K.B. 750, 762; 97 L.J.K.B. 445; 138 L.T. 532;
44 T.L.R. 270; 17 Asp.M.L.C. 404]

Costs—Allowance on taxation—Discretion of master—Costs incurred before writ issued, after writ but before issues defined by pleadings closed, and after order for stay—R.S.C., Ord. 65, r. 27 (29).

A trawler, which was insured by the defendants, sank and became a total loss. On a claim under the policy being made in May, 1926, the defendants informed the plaintiffs, the owners of the trawler, that the loss of the ship was not due to a peril insured against, and that they would resist the claim. The owners, therefore, before writ issued, having regard to the fact that the members of the trawler's crew would be going on other voyages and then, possibly, be out of reach took evidence from them. The writ was issued on July 20, 1926, and further costs were incurred. On July 28 an order was made in the usual form that the plaintiffs should file an affidavit of the ship's papers, the order further providing that "in the meantime all further proceedings are stayed." An order was also made that the plaintiffs should give security for costs, "otherwise all further proceedings in this action be stayed." After those orders were made, but before the affidavit required was filed, or security given, costs were incurred by the plaintiffs in taking statements from witnesses, obtaining the opinion of expert witness, and otherwise preparing for trial. On May 20, 1927, the defendants settled the action and were ordered to pay the plaintiffs' taxed costs.

Held: under R.S.C., Ord. 65, r. 27 (29), the taxing master had a wide discretion to allow all such costs as appeared to him necessary or proper for the attainment of justice, and, in the exercise of that discretion, he had power (i) to allow costs

incurred before action brought on matters ultimately proving of use in the action; (ii) to allow costs incurred after writ issued even though the issues in the action were not finally defined by the pleadings being closed; (iii) to allow the costs incurred in the present case after the orders for a stay, for the effect of a stay was to prohibit any step being taken in the action, but not to prohibit anything being done in preparation of the plaintiffs' case, as e.g., procuring evidence.

Notes. Followed: *Scheff v. Columbia Pictures Corpn., Ltd.*, [1938] 4 All E.R. 445. Referred to: *British United Shoe Manufacturing Co., Ltd. v. Holdfast Boats, Ltd.*, [1936] 3 All E.R. 717; *Gibbs v. Gibbs* [1952] 1 All E.R. 942; *Re A Solicitor*, [1955] 2 All E.R. 283; *Francis v. Francis and Dickerson*, [1955] 3 All E.R. 836.

As to allowance of costs, see 26 HALSBURY'S LAWS (2nd Edn.) 100-103 and *ibid.*, vol. 31, 139 et seq.; and for cases see 42 DIGEST 125 et seq., and DIGEST (Pleading & Practice) 848 et seq.

Cases referred to:

- (1) *Bright's Trustee v. Sellar*, [1904] 1 Ch. 369; 73 L.J.Ch. 245; 90 L.T. 155; 20 T.L.R. 210; Digest Supp.
- (2) *Harrison v. Leutner (Leutnor)* (1881), 16 Ch.D. 559; 50 L.J.Ch. 264; 44 L.T. 331; 29 W.R. 393; Digest Practice 885, 4265.

Appeal by plaintiffs from an order of MACKINNON, J., made in chambers on Dec. 19, 1927, ordering that the taxation of costs by the master be reviewed and that the objections taken by the defendants to items in the bill of costs should be allowed.

Le Quesne, K.C., and *K. S. Carpmæl* for the plaintiffs.

R. I. Simey for the defendants.

LORD HANWORTH, M.R.—In my judgment, this appeal succeeds. It raises a somewhat novel point, and no doubt, from the large bearing that it may have, an important one.

On Feb. 25, 1926, there was the loss of a trawler belonging to the plaintiffs which had been insured by the defendants. Soon after the facts as to the loss were ascertained, on May 7, it was notified by a letter written to the plaintiffs that the underwriters had determined to fight the case on the ground that the loss was not due to a peril insured against. The trawler had foundered, and it is not difficult to see that the insurers might be charging the plaintiffs with having scuttled the vessel. Whether that was specifically the intention or not, the plaintiffs were at any rate told that for the purpose of their success in the action it would be necessary for them to be prepared with evidence which should overcome the attitude of the underwriters that the loss was not due to the peril insured against. In June, in consequence of that notification, the plaintiffs and their advisers sent over to the Continent to take the statements of the crew of the trawler. The members of the crew were said to be under contract to serve in other vessels, and it was quite possible that they would be so engaged upon the high seas in different directions and their evidence would be lost if steps were not taken immediately to secure it. On July 20, 1926, the writ was issued, and on the 21st a letter was written by the defendants as to the usual agreement which was to be obtained, that all the underwriters would be bound by the decision in the action. On July 28, there was a summons for directions, and under that summons for directions the usual order was made for ship's papers. That order is in the usual form, and it stated that there should be a stay until the order for the ship's papers had been complied with. There was also an order for security for costs and a stay meanwhile. In October some further statements of witnesses were obtained, and there was the opinion of the engineer, Mr. Camps, also obtained. On Jan. 25, 1927, the affidavit of ship's papers was prepared, but it was not communicated to the defendants. In March the documents which had been catalogued in the affidavit of ship's papers were ready, and then, and not until then, communication was made to the other side that the ship's papers were ready for delivery. On Mar. 5 the ship's papers were filed. On May 20 the action was settled on terms under which the plaintiffs recovered, and were to be paid by the defendants their taxed costs.

Upon the taxation, questions arose as to the three categories of costs. There were the costs which had been incurred before the action was commenced at all; there were, secondly, the costs which had been incurred after the writ had been issued, and which had been incurred before the time when the order for ship's papers was made; and thirdly, there were the costs which had been incurred during the time when there was the stay of proceedings laid down or directed in the order for ship's papers. When the costs were brought before the master objection was taken to them that there was a stay of proceedings for security for costs and ship's papers, and the defendant submitted that the items which had been incurred up to the time when that stay was removed were premature. The master made the order allowing in form both some costs which had been incurred before action, some costs which had been incurred (such as obtaining evidence of witnesses) before the stay was imposed by the order for ship's papers, and also some costs which were incurred during the time when the stay operated. On Dec. 19, MacKINNON, J., disagreed with the decision of the master, and ordered that the costs to which I have referred to should be disallowed; and from that decision the appeal is taken to this court. The result is that the question is raised, first, whether any costs at all could be allowed before action brought; and, secondly, whether any of the costs could be allowed during the time when the stay operated.

With regard to costs generally, it must be borne in mind that Ord. 65, r. 27, sub-r. 29, allows a very wide discretion to the taxing master, and I do not desire to say anything in any way to circumscribe that discretion. It is said that no costs ought to be allowed which have been incurred before action brought. That would be to state the proposition far too widely. It could not be supported in that form. In the case to which our attention has been called, a case which came before SWINFEN EADY, J., of *Bright's Trustee v. Sellar* (1), the observation is made by SWINFEN EADY, J. ([1904] 1 Ch. at p. 371): "Can [the master] allow the costs of a transcript obtained before action?" And it is answered in this way: "It is a matter of discretion. . . . His discretion is not confined to costs incurred after action," and a reference is made to the sub-rule to which I have already referred.

It appears to me, therefore, that there is a power in the masters to allow some costs which may have been incurred before action brought; and if the expense is an outlay made upon materials ultimately proving of use and service in the action the master has a discretion which he probably would exercise in favour of the party incurring that outlay to allow these costs, because they have been made use of during the course of and at the trial.

I come to the next class of costs, namely, the costs which have been incurred before the stay. As to those, it appears clear that just as all other costs which have been incurred in the action and during the action subsequently to writ issued are in the discretion of the master, so such costs to which objection has been taken, namely, the obtaining of the evidence, would fall within the discretion of the master. It is said that it cannot be clear at that moment what would be the issues as defined between the parties at a later stage of the trial, and, therefore, that the outlay then made was obviously unnecessary, and ought not to be allowed. The answer is that if it was a prudent outlay, the master has power to allow it, and it is for him to judge as to whether or not an outlay made subsequent to the issue of the writ was such as might reasonably be included in the costs to be taxed between the parties.

Then comes the more important point upon which the appeal has been presented to us. MacKINNON, J., has held that the stay of proceedings included in the order for ship's papers prevents any costs incurred while that stay was operative from being recovered. I take note that the stay is of "all further proceedings." It is not a stay of activity. The steps which prudence dictates are not forbidden. The question whether or not the steps that are taken are or are not premature, is a matter for the taxing master. I agree with the answer made by Sir George King, in these terms: "I do not understand that this order entirely paralyses the plaintiffs so that they cannot do anything by way of preparation for their real proceedings," &c. If this is so, the question whether any act by the plaintiffs during that period is or is not premature

A must be, like every other question about premature acts, a question of "reasonableness to be decided by me."

In *Harrison v. Leutner* (2) SIR GEORGE JESSEL, M.R., approved of the answers made by the taxing masters, who said:

B "We have always acted upon the principle that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable, and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper, and the time for doing it had arrived."

C Those words seem to contain a working rule which properly exhibits the discretion which is entrusted to the masters. I also would adopt the words used by NORTH, J., in considering a matter akin to the question, namely, whether or not the activities of the parties' advisers have been paralysed or sterilised, which ever one likes to call it. He said:

D "If he had said that he was prevented from preparing [the affidavits] by the order which stayed the plaintiffs proceedings until security for costs had been given, he might have expected that the court would laugh at him."

E When one comes to consider the purpose of this order for staying proceedings, and the good sense of it, it appears to me to be clear that it was not intended to do more than prevent unnecessary steps being taken in the action itself and that it was not intended to prevent such activity as would contribute to the success of the party ultimately. It cannot be said that a step such as the collection of evidence because the witnesses might be dispersed was within the purview of the order made staying proceedings, that no expense regarding such a matter should be undertaken, and no such activity engaged in. For those reasons, it appears to me that the master's answers to the objections were right, and that MACKINNON, J.'s order setting them aside is wrong. The appeal must be allowed, and the answers of the master to the objections upheld with the taxation.

F **ATKIN, L.J.**—I agree. This case has been put before us as one of some importance to underwriters, and I agree that it is. The question arises in respect of costs incurred in an action on a marine policy, partly before the action was brought, and partly during the time during which there was a stay of proceedings under an order for ship's papers. The action was begun in June, 1926, and there was an order made in July for ship's papers. That order was not in fact complied with until March, 1927, so there was a long period during which the stay made under the usual order for ship's papers was operative.

G In the first place it is necessary to consider what are the actual terms of the order. The terms of the order are:

H "That the plaintiffs and all persons interested do produce and show all papers . . . and that in the meantime all further proceedings be stayed."

I I think it is important to compare that with a similar and concurrent stay which was imposed in the same order, an order that the plaintiffs (who were foreign plaintiffs) should give security for costs within a month, "otherwise all further proceedings in this action be stayed." As far as the legal operation of those two forms of words is concerned, I find myself quite unable to discern any difference. I think they have precisely the same effect, and, therefore, in dealing with the question of costs incurred while a stay of proceedings is current, you have, to my mind, to consider the matter as though it made no difference whether the stay was granted by reason of security for costs, or of an order for ship's papers, or of any other. One of the contentions made by the defendants was that the effect of the stay of proceedings was such that the plaintiffs could not recover any costs incurred by them during that period—that they were, as the taxing master has put it in his answers to the objections, paralysed. That seems to me to be quite an incorrect view of the effect of the order. All that the order does is to stay proceedings, and "proceedings" obviously do not include the preparations

which may be made by the parties by seeing witnesses, taking proofs, indulging in correspondence, and so forth. "Proceedings" are such proceedings as are, for instance, taken into account when you have to deal with the provisions of the staying section in the Arbitration Act. [See, now, s. 4 of the Arbitration Act, 1950.] An action cannot be stayed under that Act where the party applying for a stay has taken any step in the proceedings, and by that is meant a delivery of a pleading, which is specially referred to, or some step analogous thereto, such as taking out a summons, or appearing on a summons, and so forth. To my mind it is quite a mistake to suppose that an order to stay is to direct the parties to hold their hands from the time when the order is made and to take no further activities with a view to ascertaining what the facts are and procuring evidence, and so forth. Such a view, it is within everybody's experience, would be quite contrary to the ordinary practice. There is no doubt that while a stay is pending for security for costs or for any other reason, it is the common practice of diligent plaintiffs and diligent defendants to use that time in making some preparation for the trial of the case. They may, of course, go too far—they may make excessive preparation; and if they make excessive preparation, it may well be that the costs will not be allowed; but it is quite plain that nobody understands the order as being an order directing them to do nothing in the action, and I am quite clear that that is not the legal effect of it.

What, then, is the position? The position seems to me to be that the court has ordered, in the case of an action on a marine policy, a stay in order that the defendants may be put in possession of all the written documents that are in the possession of the plaintiffs or parties interested, or which they can reasonably procure under the order; and I have no doubt that one reason for which that order is made is to give the defendants information which otherwise would not be in their possession, to enable them to make up their minds as to what they are going to do in the case—whether they are going to fight it or whether they are going to yield, whether they are going to admit part of it, and so forth. I think that that object ought always to be borne in mind when the master is dealing with the question of costs incurred during that period; but inasmuch as, as I have said, it is not true that the parties are stricken with paralysis, and it is not true that no costs can be recovered merely because they have been incurred in that period, it is always a question of fact for the taxing master whether the costs were or were not reasonably incurred during that period, always bearing in mind the fact that there is a stay, and also (especially in marine insurance actions) bearing in mind the purpose for which the stay is granted. But subject to that, it seems to me that it is a pure question of fact for the taxing master: Was it or was it not reasonable in the circumstances for the plaintiff to have incurred the costs that he did incur, at the time at which he incurred them?

If nothing had been said by the underwriters, and there was no reason to suppose that they would or would not resist the claim, it might very well be that the plaintiffs would find themselves in a difficulty if they incurred elaborate expenditure to prove liability, if in fact the underwriters subsequently admitted liability. But that is not this case, because in this case the defendant's solicitors had written at a very early stage intimating that the defendants intended to resist liability, and expressing their reason in language which certainly might give rise to an apprehension, at any rate, and a reasonable apprehension, on the part of the plaintiffs' advisers, that the plaintiffs were going to be charged with fraud, because the trawler in this case undoubtedly foundered at sea, and the suggestion was that she was lost, not by a peril insured against. That would certainly, or might, convey to anybody concerned in those matters, the suggestion that there was some wilful act alleged as distinct from a peril of the sea. In those circumstances the taxing master might, I think, very well take the view that it was reasonable, at the earliest stage possible, for the plaintiffs to take the evidence of the crew and the master of the trawler, for the purpose of establishing what the true cause of the loss was, and also to take the evidence of an experienced surveyor, who could survey the vessel before she was repaired with a view of indicating that the loss was in fact a loss from a peril insured against and was not the result of wilful damage. The ship, I believe, had foundered, and, therefore, the surveyor would have to report upon the reports of the ship's condition before she had gone to the bottom of the sea.

A All that the taxing master has taken into account here, and it appears to me to be purely a question of fact for him, and, therefore, I think there is no reason for upholding the objections which have been taken. It is for him to decide whether the costs were prematurely incurred or not; he has in the circumstances of the case decided that they were not, and it is entirely a matter for him.

B The other matter that arises is as to the costs incurred before the action was commenced. Upon that one has nothing to do with the question of a stay of the proceedings, but it is a pure question whether or not the costs incurred before the writ was actually issued are costs which the plaintiffs can recover under an order for the costs of the action. It appears to me to be very important to bear in mind that the taxing masters have got to apply the words of Ord. 65, r. 27, sub-r. 29. That rule is the guiding rule in the taxation of costs. It was intended to be. It is intended to sum up generally
C the principles upon which costs are awarded, and I cannot help thinking that if that rule were really rigorously applied by everybody—and by “rigorously applied” I mean applied in all cases, and giving full effect to the width of its language—there would be many fewer complaints brought by successful litigants than are brought at the present moment, because it is a rule which is intended to give to the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action. It says
D so in terms—that the taxing master is to allow “all such costs . . . as shall appear to him to have been necessary or proper for the attainment of justice.” That is the whole principle that the taxing master has got to determine. It is quite obvious that those costs are not limited to costs incurred after the writ has been issued. The taxing master has discretion in every case to decide whether costs incurred before the action were necessary or proper for the attainment of justice, and it may very well be that the costs
E the taxing master approves can be included in that term, as in the case which was put in argument, the case of an accident where a bridge breaks down and it is replaced forthwith, the state of the bridge is the cause of the action, and it is essential that there should be an inspection by skilled witnesses at once. In those circumstances the taxing master might well hold that such costs incurred before the issue of the writ were necessary for the attainment of justice, because the actual facts to be ascertained from such
F an inspection could not be ascertained at a later date. Of course, the taxing master upon that would have to consider the probability or not of the defendant disputing liability or not disputing liability. That again is purely a question of fact for the taxing master. He says in this case that certain costs were properly incurred in taking evidence. I agree that the taxing master seems to have been liberal, but then that is entirely a question for him, and not one with which we can interfere.

G There is one other point which was raised by counsel for the defendants, and it was that no costs can properly be incurred in the action until the issues have been defined, and he says that these costs were incurred before the defendants had delivered their defence or indicated what their defence would be. That goes very much too far. That would mean that the litigant would never be entitled to recover any costs, save the actual
H costs of proceedings, until the defendant had delivered his defence, because until then the issues are not defined. The question is, in every case: What is the reasonable thing to do? and the taxing master is not bound by any such limit of time as is mentioned. For those reasons, it appears to me that the learned taxing master gave expression in his answer to the objections to what I cannot help believing is not only the law, but also has been the general practice in these cases. I think he exercised his discretion whether
I or not the costs incurred were premature or not. It seems to me that that is the only question he had to determine, and in those circumstances I think the objections fail. The result is that this appeal should be allowed.

LAWRENCE, L.J.—I agree. The only objection made by the defendants to the taxation by the taxing master of the plaintiffs' bills of costs in respect of the relevant items, and, therefore, the only objection open to them in this court, was in these terms: “As there was a stay of proceedings for security for costs and ship's papers, the defendants submit that these items were premature.” That objection was, I think, intended to raise a question of principle; at all events it was so treated by the taxing master, and

the only question of principle that I can extract from that objection is that an order for a stay, whether it be pending security for costs or pending delivery of ship's papers, operates not only to stay the proceedings in the section, but also to stay what the master's rule has aptly described as the activities of the parties in getting up their case or looking further after the interests of their clients. The taxing master has evidently had that question argued before him. To my mind it is really the only question of principle that can be raised upon that objection, because the order itself would be a factor to take into account whether certain costs were premature, just as much as any other fact, but that would not make the question decided by the taxing master a question of principle. Counsel for the defendants was reluctant, when I pressed him on the matter, to say that the order stayed the proceedings in the sense that it stayed the hands of the solicitors for either party pending the operation of the stay. All he would say was that when such an order had been made the taxing master was bound to hold that any costs incurred by the parties during the stay were premature and would have to be disallowed as a matter of principle. I think in that he was wrong. There can be no doubt that an order staying proceedings does not apply to staying the ordinary work of a solicitor in getting up the case. Solicitors have to be careful in what they do pending such an order, because the taxing master would, no doubt, consider that in coming to a conclusion whether they were premature or not. That leaves only the question whether in fact these costs were prematurely incurred, and in that I agree with my colleagues that it is a pure question for the taxing master, and is not open to review in this or any other court. It is for him to say whether, in the special circumstances of the particular case, the costs are or are not prematurely incurred; and in considering that question he must, and did, no doubt, have in mind the fact that an order to stay proceedings had been made, and the other factors. He having once come to the conclusion, as he has done, that the costs objected to in the present case were not prematurely incurred, in my judgment that is not open to review. I, therefore, agree that this appeal succeeds, and ought to be allowed, and that the taxing master's answers were perfectly right.

Appeal allowed.

Solicitors: *Thomas Cooper & Co.*; *Waltons & Co.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

A

Re LORD SHERBORNE'S SETTLED ESTATE

[CHANCERY DIVISION (Tomlin, J.), July 6, 9, 1928]

[Reported [1929] 1 Ch. 345; 98 L.J.Ch. 273; 141 L.T. 87]

B

Settled Land—Improvements—Recoupment out of capital—Improvements authorised by Settled Land Act, 1925, but not by previous Acts—Improvements executed before Jan. 1, 1926—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 83, s. 84, Sched. III, Part III.

By virtue of its jurisdiction under the Settled Land Act, 1925, the court can grant to a tenant for life of settled land recoupment out of capital moneys in respect of works, which were "authorised improvements" under that Act, carried out upon the settled land by the tenant for life before Jan. 1, 1926, when the Act came into force, even though such works were not within the meaning of the phrase "authorised improvements" in the Settled Land Acts, 1882–1890. But where the value of the improvements has diminished, a rebate will be directed.

C

Settled Land—Sale of part of settled property—Enhanced value—Right of tenant for life to sum in respect of tenant right.

D

A tenant for life sold a farm which formed part of the settled property and then claimed to be paid £1,000 as that part of the purchase price which was attributable to the tenant right in respect of the farm, on the ground that some years previously he had bought the outgoing tenant's tenant right for £570 and had since greatly improved the land.

E

Held: the tenant for life was really claiming to be repaid out of capital for an improvement which was not within the Settled Land Acts, and, therefore, he was not entitled to any sum in respect of tenant right.

Notes. Considered: *Re Sandbach*, [1951] 1 All E.R. 971; *Re Sutherland Settlement Trusts*, [1953] 2 All E.R. 27. Referred to: *Re Jacques Settled Estates*, [1930] All E.R. Rep. 407; *Re Borough Court Estate*, [1931] All E.R.Rep. 56.

F

As to the application of capital money for improvements authorised by the Settled Land Act, 1925, see 23 HALSBURY'S LAWS (3rd Edn.) 134 et seq.; and for cases see 30 DIGEST (Repl.) 317 et seq. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Cases referred to:

G

(1) *Quilter v. Mapleson* (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342; 31 W.R. 75, C.A.; 31 Digest (Repl.) 546, 6678.

(2) *Re Lord Leconfield's Settled Estates*, [1907] 2 Ch. 340; 76 L.J.Ch. 562; 97 L.T. 163; 23 T.L.R. 573; 30 Digest (Repl.) 320, 90.

(3) *Re Ormerod's Settled Estate*, [1892] 2 Ch. 318; 61 L.J.Ch. 651; 66 L.T. 845; sub nom. *Re Ormerod's Settled Estates*, 40 W.R. 490; 36 Sol. Jo. 427; 30 Digest (Repl.) 312, 14.

H

(4) *Re Foster's Settled Estates*, [1922] 1 Ch. 348; 91 L.J.Ch. 365; 126 L.T. 689; 66 Sol. Jo. 299; 40 Digest (Repl.) 736, 2247.

Adjourned Summons.

The plaintiff, James Huntley, sixth Baron Sherborne, was tenant for life of certain estates in Gloucestershire under a settlement created by the will, dated July 24, 1906, of Edward Lenox, fourth Baron Sherborne. The tenant for life for some years after coming into possession, spent much money upon improvements to the property comprised in the settlement, but no scheme was ever put before the trustees of the settlement. Some of the improvements—most, but not all, of them having been carried out before 1926—would not have come under the Settled Land Acts, 1882–1890, as "authorised improvements." Among items tabulated in an exhibit to an affidavit appeared the following: 74. Electric lighting works at Lodge Park House, January and June, 1922, £77 6s. 8d. 75. Sherborne House, electric light re-wiring, September, 1926, to July, 1927. £1,158 9s. 5d. 76. Sherborne House, electric lighting, erection of No. 1

I

battery, August, 1926, £361 11s. 6d. 77. Wiring billiard room at Sherborne House, June, 1925, £16 7s. 6d. 78. Erection of No. 3 battery, June, 1925, £189 8s. 79. Installation and erection of oil engine, No. 2 battery, August, 1923, to June, 1924, £627 6s. 80. Inspector's fee for inspection and report on electric light installation at Sherborne House, February, 1928, £37 12s. 5d. The tenant for life now applied to the court for an order that these expenses be recouped to him out of moneys in the hands of the trustees of the settlement, and that the sum of £1,000, part of the proceeds of sale of a farm called Old Walls Farm, which formed part of the property settled and which he had himself sold, be paid to him. He claimed that the items of repair were essential, and that the expenditure upon them was payable out of capital; and he further claimed that the said sum of £1,000 was the portion of the proceeds of sale properly attributable to the tenant right valuation of Old Walls Farm.

By the Settled Land Act, 1925:

"Section 83: Improvements authorised by this Act are the making of or execution on or in connection with and for the benefit of settled land of any of the works mentioned in the third schedule to this Act or of any of the works for any of the purposes mentioned in that schedule, and any operation incident to or necessary or proper in the execution of any of those works or necessary or proper for carrying into effect any of those purposes or for securing the full benefit of any of those works or purposes.

Section 84: (1) Capital money arising under this Act may be applied in or towards payment for any improvement authorised by this Act, or by the settlement, without any scheme for the execution of the improvement being first submitted for approval to or approved by the trustees of the settlement or the court. (2) Where the capital money to be expended is in the hands of the trustees of the settlement, they may apply that money in or towards payment for the whole or any part of any work or operation comprised in the improvement on: (i) A certificate to be furnished by a competent engineer or able practical surveyor employed independently of the tenant for life, certifying that the work or operation comprised in the improvement, or some specific part thereof, has been properly executed, and what amount is properly payable in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or (ii) an order of the court directing or authorising the trustees so to apply a specified portion of the capital money: Provided that:—(a) In the case of improvements not authorised by Part I of the third Schedule to this Act or by the settlement the trustees may if they think fit, and shall if so directed by the court before they make any such application of capital money, require that that money or any part thereof shall be repaid to them out of the income of the settled land by not more than fifty half-yearly instalments, the first of such instalments to be paid or to be deemed to have become payable at the expiration of six months from the date when the work or operation in payment for which the money is to be applied, was completed. (b) No capital money shall be applied by the trustees in payment for improvements not authorised by Parts I and II of the third schedule to this Act or by the settlement except subject to provision for the repayment thereof being made in manner mentioned in the preceding paragraph of this proviso. (4) Where the court authorises capital money to be applied in payment for any improvement or intended improvement not authorised by Part I of the third schedule to this Act or by the settlement, the court as a condition of making the order may in any case require that the capital money or any part thereof and shall as respects an improvement mentioned in Part III of that schedule (unless the improvement is authorised) by the settlement require that the whole of the capital money shall be repaid to the trustees of the settlement out of the income of the settled land by a fixed number of periodical instalments to be paid at the times appointed by the court, and may require that any incumbrance of the estate or interest of the tenant for life shall be served with notice of the proceedings.

A Section 88: (1) The tenant for life and each of his successors in title having under the trust instrument a limited estate or interest only in the settled land shall during such period if any as the Minister by certificate in any case prescribes maintain and repair at his own expense every improvement executed under the foregoing provisions of this Act or the enactments replaced thereby, and where a building or work in its nature insurable against damage by fire is comprised in the improvement shall at his own expense insure and keep insured the improvement in such amount if any as the Minister by certificate in any case prescribes."

B *G. B. Hurst, K.C., and J. Neville Gray*, for the tenant for life, referred to *Quilter v. Mapleson* (1); *Re Lord Leconfield's Settled Estates* (2).

Nicholson Combe, for the settlement trustees, referred to *Re Ormrod's Settled Estate* (3).

C *R. Wright Taylor* for a tenant for life in remainder.

D **TOMLIN, J.**—This is an application by the tenant for life to be recouped certain expenditure incurred by him on the mansion house and some other property. This expenditure was incurred from time to time, in part prior to the coming into force of the Settled Land Act, 1925—that is, prior to Jan. 1, 1926—and in part since that Act. The bulk of the items which are in dispute are concerned with electric lighting. Of those items, No. 75 is a sum of £1,158 9s. 5d., for rewiring Sherborne House, the mansion house; No. 76 is the erection of a new No. 1 battery; and a small sum, item No. 80 is a fee for the electrical engineer who reported on the work. Those are matters which were carried out after the Act came into force. They are matters which seem to be within the works authorised by the Act. I think I am satisfied upon the evidence that there was a condition of affairs in Sherborne House, in relation to the electric light installation, which did properly demand some expenditure of capital money. Of the other items on which there has also been dispute, one relates to the electric lighting of a subsidiary house called Lodge Park House, and is an item of £77 16s. 6d. That was executed in 1922, at a time when work of that kind was not within authorised improvements as they were indicated in the former Acts. The other items which are in question are the wiring of a billiard room in Sherborne House, a small item of £16 17s. 6d., executed on June 15, 1925, and the erection of a No. 3 battery, £189 8s., also apparently executed in June, 1925, and then there is the installation of an oil engine, No. 2 battery, and shafting, at £627 6s., between August, 1923, and June, 1924. All those three items were done at a time when, under the law then in force, work of that kind was not an "authorised improvement" under the Settled Land Acts, 1882 to 1890, and, if the law had remained as it then was, the tenant for life would not have been entitled to recover those items out of capital moneys. If he had made an application to the court under the appropriate section of the Act of 1890, asking the court to exercise its discretion in his favour, the court would have been faced with the fact that the improvements were not authorised improvements, and no repayment to him could have been allowed. It is said, however, that, notwithstanding that fact, under the Act which is in force to-day—the Settled Land Act, 1925, which, undoubtedly, has enlarged the frontiers of authorised improvements, so as to include within those frontiers the particular work which is in question—there is power to recoup the tenant for life for the expenditure which was incurred on the settled property before the present Act came into force, and although the work was not authorised by the Acts that were then in force.

H In order to deal with that problem it is necessary to look at the relevant sections of the Settled Land Act, 1925. [His LORDSHIP read ss. 83, 84 (1) (2), 87 and 88 of a Sched. III to the Act, and continued:] Of these sections, s. 88 (1) seems to impose upon the tenant for life an obligation to maintain and repair at his own expense during such period, if any, as the Minister of Agriculture, by certificate in any case, prescribes. That would appear to mean that he is under no such liability by virtue of the section, unless in fact the Minister by certificate prescribes a time. But his liability as established by the Minister by certificate prescribing a time is confined to liability to

I "maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act or the enactments replaced thereby. . . ."

When I turn to the third schedule, I find that it is divided into three parts. Part I is: "Improvements, the costs of which are not liable to be replaced by instalments." Part II is: "Improvements, the costs of which the trustees of the settlement or the court may require to be replaced by instalments." Part III is: "Improvements, the costs of which the trustees of the settlement and the court must require to be replaced by instalments." Under Part II under improvements which the court may require to be replaced by instalments, I find in para. (iii) "electric light or power works, or any other works necessary or proper in connection with the development of the settled land." In Part III, under "Improvements, the costs of which the trustees of the settlement and the court must require to be replaced by instalments," I find, in paras. 1 and 2, further references to "electric power apparatus for buildings" and "works required for the installation of electric . . . light." It seems, therefore, that these improvements, assuming for the moment that the improvements are such as ought to be provided for out of capital moneys, are improvements in respect of which the court must require the costs to be replaced by instalments.

The first point that I have to determine is in regard to that part of the work which was executed before this Act of 1925 came into force. It is said on behalf of the tenant for life, who seeks to secure the recoupment of the money, that the language in ss. 83, 84, and 87, where the phrase "Improvements authorised by this Act" is used, means improvements of the kind set out in the Act as authorised improvements; it does not mean improvements in fact executed under the particular Act and being of a kind which may be executed under the particular Act, but it means "improvements" authorised in the sense of being of the character which the Act prescribes as the necessary character to enable the work to be done out of capital moneys; and, that being so, it is plain under s. 87, the court may make an order authorising capital moneys to be applied towards payment of these particular improvements, because they are improvements authorised by this Act of 1925, and it makes no difference—there is no limit in time—that that they were in fact executed before the Act came into force. On the other hand, it is said: "No. Authorised by the Act" means executed pursuant to the authority of the Act, and when one turns to s. 88, which contains the provision as to the liability of the tenant for life, one finds that phrase implied. There is, in fact, a change of phrase—"every improvement executed under the foregoing provisions of this Act"—and that, if the applicant's case and construction of the Act is well founded, one has the curious result, that, if one executes an improvement within the meaning of the old Acts, under those Acts the tenant for life can get repaid, and he is liable for maintaining the improvement in repair if the Minister prescribes a time. Again, if there is an improvement within the scope of the new Act, and executed under the new Act, he is liable for repair of that improvement, but if there is an improvement not within the scope of the old Acts but executed before the new Act came into force, when repayment of the capital money is authorised under s. 87, one has this curious result—that one has an improvement for which one can pay by capital money under s. 87, but in respect of which one can fix on the tenant for life no liability for repair. That is the argument, and it is said that for that reason I must come to the conclusion that "authorised by the Settled Land Acts, 1882 to 1890, or this Act" must mean executed under those Acts.

There is this observation to be made upon that theory. The draftsman of this Act, which has been drawn with so much care and elaboration, in two sections side by side has seen fit to use two different phrases, and it is a little curious, if, when he used the phrase "authorised by this Act" in s. 87, he meant the same thing as "executed under the foregoing provisions of this Act" in s. 88. If it is to be said that he must have meant the same thing by both sections, it may be that it is proper to read "improvements executed under the foregoing provisions of this Act," as only meaning an improvement which has been paid for under this Act; and that if, on its true construction, s. 87 authorises repayment of capital moneys for an improvement, because it is authorised by this Act, then that may be, for all I know, what he meant by "an improvement executed under the foregoing provisions of this Act." So that the argument which is used against the tenant for life might conceivably be said to fit equally well the other way.

A That leads me to the conclusion that there is only one safe rule, and that is, to adhere to the language and to give to the words their natural meaning, and not to attempt to give one section an artificial meaning because one thinks that by doing so one will make it fit in better with some other section. I prefer to assume that the draftsman of the Act, when he used a different phrase, for some reason or other, meant a different thing, and that "authorised under this Act" does mean literally "an improvement authorised by the Settled Land Act." It means improvement of a particular kind; and, that being so, if the court is satisfied that the improvement in respect of which payment is asked is improvement of the particular kind authorised by the Act, and is also satisfied in all the circumstances of the case that it ought to be paid, then there is jurisdiction to order capital moneys to be so applied, notwithstanding that the improvement has been executed before this Act came into force. That being so, the result is that, in my view, there is jurisdiction, if I think proper to exercise it, to authorise payment of these works out of the fund.

That brings me to the actual details of the whole matter. I am quite satisfied on the evidence that the condition of the wiring of this house was such that sooner or later there would have had to be such a reconstruction of the electric lighting installation as could fairly and properly have been paid for out of capital moneys. In that reconstruction, I have not any doubt that such items as 77, 78 and 79 would have been included, and I have no reason to think that the work was not properly done; indeed, the evidence of the gentleman who made the report makes it plain that it was. The only doubt in my mind is whether, having regard to the fact that some of the work has been done for some years, I ought not in some way to be satisfied that to-day the whole sum ought to be repaid out of capital, or whether there ought not be some rebate upon the footing that, having regard to lapse of time, there is some diminution in the value of the improvement. I think it may very well be said with regard to the batteries and matters of that sort—I do not know what the life of a battery is in an installation of this kind, but, at any rate, they have terminable lives—that four or five years out of the life of a battery is a very substantial diminution of its present-day value. That being so, I am not satisfied, without further evidence, that I ought to allow the total sum. But I feel some difficulty in arriving at a solution of the question what rebate, if any, ought to be allowed. I am disposed to deal with it in this way, and I can only deal with it, of course, in this way, if counsel on behalf of the applicant assents. I myself suspect that the rebate would be small, having regard to the time. What I propose to do is this. I propose to omit items 74, 77, 80 and 81, treating them as omitted, not because they may not be items which can properly be paid, but as being some method of giving a small rebate upon the total sum. By that I mean that I will allow the total sum of the items, omitting a sum corresponding with those four items as a rebate, that is, a sum which will be equal to the total of the items with those four deducted, in satisfaction of all those items, and any balance the tenant for life will have to make up out of his own pocket.

[His Lordship then ordered that with regard to the remaining items, the amount should be repaid in accordance with the Settled Land Act, 1925, s. 84 (4) and the third schedule, in fifteen years by half-yearly instalments, the first instalment to be paid on Jan. 1, 1929.]

Hurst, K.C., and *J. Neville Gray* for the tenant for life as applicant on the claim in respect of tenant right valuation.—The court ought to grant recoupment to the tenant for life in respect of the improvement which he has effected in the value of the farm.

Nicholson Combe, for the trustees, referred to *Re Foster's Settled Estates* (4).

TOMLIN, J.—This is a further application by Lord Sherborne, as tenant for life, for payment of a sum of £1,000 out of the purchase money of a certain farm which has been sold for £3,500. As I understand it, he puts his claim to-day in this way. He says that in 1922 he bought the outgoing tenant's tenant right at some £570 or thereabouts, and that he has so farmed the land since, and has spent such considerable sums in laying down temporary pasture, applying basic slag, and otherwise dealing with the land, no doubt in a very favourable manner, that in those circumstances he ought to be paid £1,000 out of the purchase price; and that the contract was really a contract for the

sale of land for £2,500 and of the tenant right for £1,000. It seems to me to be a claim of a rather novel kind for the tenant for life, who is in possession of some part of the settled land, to make against the trustee. It is a claim in respect of money paid by a purchaser of land, a claim to some part of the purchase money by way of tenant right. I do not think there is any such right in the tenant for life. But it is plain to me that the claim as framed at the time is shown by the agent's letters. He says:

"Lord Sherborne will claim part of the purchase money in respect of 'Old Walls Farm,' as it included a considerable amount which was due to him for improvements, and which is really due to the tenant. Lord Sherborne went to considerable expense in putting this land all down to temporary pasture, and applied basic slag to same, which was the reason this land was so much improved, and enabled me to sell it at a considerable profit. I estimate at least £1,000 of the purchase-money should be credited to Lord Sherborne."

It will be observed, first of all, that there is no reference there to what was paid to the outgoing tenant for tenant right, I dare say for the good reason that by the time this sale was effected, that ought to have been long since exhausted. What he is really claiming is to be repaid, out of capital, moneys for an improvement which is not within the Settled Land Acts—that, and nothing else. It seems to me that if I were to assent to any such proposition as that the tenant for life who happens to be in occupation of the land and cultivating it himself, is entitled to sell the land and make it a bargain with the purchaser that some part of the purchase money should be treated as tenant right belonging to the tenant for life, I should be opening up a very wide door for transactions which might be seriously impeached. I do not propose to do anything of the kind. I propose to take the view that the tenant for life here is applying to be recouped for an improvement which is not within the Acts and which I have no jurisdiction to allow. I, therefore, disallow the application.

Solicitors: *Peacock & Goddard*, for *Mullings, Ellet & Co.*, Cirencester; *Nicholl, Manisty & Co.*; *Mills, Curry & Gaskell*.

[Reported by K. R. A. HART, ESQ., Barrister-at-Law.]

R. v. WHITEHEAD

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Swift and Branson, JJ.), July 31, 1928]

[Reported [1929] 1 K.B. 99; 98 L.J.K.B. 67; 139 L.T. 640; 92 J.P.197; 27 L.G.R. 1; 28 Cox, C.C. 547; 21 Cr. App. Rep. 23]

Criminal Law—Evidence—Corroboration—Arrest of accused—Charge, accompanied by usual caution, read to accused by police officer—Absence of denial by accused—Essential nature of corroboration—Something extraneous to witness who is to be corroborated.

It is a misdirection for a judge to tell a jury that absence of denial on the part of a person charged with a crime, after the charge, accompanied by the usual caution, has been read to him by a police officer, may amount to corroboration of the prosecutor's story.

Corroboration must proceed from something extraneous to the witness who is to be corroborated. A statement by that witness implicating the accused cannot be corroboration of that witness's evidence.

Notes. Followed: *R. v. Charavanmattu* (1930), 22 Cr. App. Rep. 1. Extended and Applied: *R. v. Naylor*, [1932] All E.R.Rep. 152. Considered: *R. v. Parker*, [1933]

A 1 K.B. 850. Applied: *R. v. Keeling*, [1942] 1 All E.R. 507. Referred: *R. v. Leckey*, [1943] 2 All E.R. 665.

As to corroboration, see 10 HALSBURY'S LAWS (3rd Edn.) 458-462; and for cases see 14 DIGEST (Repl.) 533-548 and 15 DIGEST (Repl.) 829, 1014, 1018. As to the offence of intercourse with a girl under the age of sixteen, see now Sexual Offences Act, 1956, s. 6 (36 HALSBURY'S STATUTES (2nd Edn.) 219).

B Cases referred to:

(1) *R. v. Lillyman*, [1896] 2 Q.B. 167; 65 L.J.M.C. 195; 74 L.T. 730; 60 J.P. 536; 44 W.R. 654; 12 T.L.R. 473; 40 Sol. Jo. 584; 18 Cox, C.C. 346, C.C.R.; 14 Digest (Repl.) 453, 4390.

(2) *R. v. Osborne*, [1905] 1 K.B. 551; 74 L.J.K.B. 311; 92 L.T. 393; 69 J.P. 189; 53 W.R. 494; 21 T.L.R. 288, C.C.R.; 14 Digest (Repl.) 453, 4395.

C (3) *R. v. Tate*, [1908] 2 K.B. 680; 77 L.J.K.B. 1043; 99 L.T. 620; 72 J.P. 391; 52 Sol. Jo. 699; 21 Cox, C.C. 693; 1 Cr. App. Rep. 39, C.C.A.; 14 Digest (Repl.) 539, 5240.

Appeal against conviction and sentence.

D The appellant was convicted before HUMPHREYS, J., at the Glamorganshire Assizes of having had unlawful carnal knowledge of a girl of the age of fifteen years in the months of October and November, 1927. He was sentenced to fifteen months' imprisonment with hard labour, and appealed against conviction on the ground of misdirection, and also against sentence.

The material facts of the case are contained in the following passage from the summing-up, in which it was contended that the alleged misdirection occurred:

E "The evidence in this case is almost entirely the evidence of the girl herself. . . . In law you are perfectly entitled to convict the prisoner upon her evidence, if you believe it, but it has always been the practice of judges in cases of this character to warn juries of the danger of convicting anyone upon the entirely uncorroborated evidence of the girl."

F After discussing the story told by the girl, his Lordship continued:

G "Then there comes something more important in the way of corroboration. . . . The girl's condition was noticed by her mother . . . in January, 1928, . . . and she spoke to the girl. In my judgment, what the girl said to her is not admissible in evidence, but you know what the girl said—it is obvious—because you know what the mother did. As soon as the girl spoke to her she took her to the doctor, and the doctor said she was pregnant, and it is perfectly clear that the girl must have at once said that it was the prisoner who was responsible for her condition because the prisoner is at once accused. The accusation takes the form of the mother going to a magistrate and laying an information, as a result of which a summons is granted. First of all the girl leaves the prisoner's house; the mother takes the girl away, and she leaves on Feb. 11. Upon Feb. 13 a police constable goes and serves the summons upon the prisoner. The silence of a man who is accused of a crime, his failure to make any answer or to show any indignation may be corroboration, but whether it is corroboration in a particular case is a matter for a jury to decide. It is for you to decide whether it is corroboration or not, according to whether you think a respectable man, if he was innocent, would make an answer to such a charge. The police officer said he told him [the prisoner] exactly what he was accused of and read the summons to him, which accused him of carnally knowing M. M. J., a girl of the age of fifteen years. According to the police officer the only answer was: 'I don't wish to say anything now.' There was no sort or kind of denial. . . . If you think the failure on his part to make a denial when the charge was sprung upon him by the police officer corroborates her evidence, then you will probably more readily accept her evidence as being corroborated to that extent."

H The jury found the appellant Guilty, and he was sentenced as above stated.

Bertram Reece for the appellant.

T. W. Langman for the Crown.

The judgment of the court was delivered by

LORD HEWART, C.J.—The appellant was convicted at the Glamorganshire Assizes of unlawful carnal knowledge of a girl under the age of sixteen years. He was sentenced to fifteen months' imprisonment with hard labour. Against that conviction and sentence he appeals. The appellant gave evidence at the trial denying the charge. A complaint had been made by the girl to her mother, but the present case is not like *R. v. Lillyman* (1) or *R. v. Osborne* (2), because in those cases the complaint was made at the first reasonable opportunity that presented itself after the offence was committed, whereas in the present case the complaint was not made until after the lapse of several months. The learned judge, when he came to sum up the case to the jury, used the following words: [His Lordship read the passage set out hereinbefore, and continued:] It is said that the opening part of that passage was likely to convey to the minds of the jury that, although the girl's statement to her mother was in the circumstances not admissible in evidence, nevertheless they could infer from what the mother did that the girl had accused the appellant, and that that amounted to corroboration of the girl's story. If the jury were so told, that direction was unfortunate. The jury ought not so to regard the conduct of the mother, and if they were to infer that the girl must have accused the appellant, that would not amount to corroboration of what the girl said, as it proceeded from the girl herself. Corroboration must proceed from something extraneous to the witness who is to be corroborated. A girl cannot corroborate herself, otherwise she need only repeat her story some twenty-five times in order to secure twenty-five corroborations of it. I am not sure, however, that that is what the judge really meant. What he said may have been intended to be merely introductory to what he subsequently told the jury. The jury were told that the girl's story was corroborated by the fact that the appellant made no denial when a police officer read over the charge to him and at the same time gave him the warning that he need not say anything in answer to the charge unless he wished to do so, but that, if he did say anything, whatever he said would be taken down in writing and given in evidence. That is, we think, a misdirection. It goes far beyond anything that was said in *R. v. Tate* (3). **LORD ALVERSTONE, C.J.**, there said ([1908] 2 K.B. at p. 683):

"The non-denial of the offence by the prisoner, when formally charged by the police, is not corroboration. We are far from saying that evidence of non-denial cannot be corroboration, for in some cases the absence of indignant denial would amount to that, but non-denial of a formal charge made by the police is not, or may not be, on the same footing."

For these reasons we are of opinion that this appeal must be allowed, and that this conviction must be quashed.

: *Appeal allowed.*

Solicitors: *Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.*

[*Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.*]

INCHE NORIAH v. SHAIK ALLIE BIN OMAR

[PRIVY COUNCIL (Lord Hailsham, L.C., Viscount Sumner and Lord Atkin), June 15, 18, October 15, 1928]

[Reported [1929] A.C. 127; 98 L.J.P.C. 1; 140 L.T. 121; 45 T.L.R. 1]

Undue Influence—Voluntary gift—Presumption of undue influence—Rebuttal—Need to prove gift result of free exercise of independent will—Independent legal advice given to donor—Need to prove advice taken—Essential characteristics of advice—Rebuttal of presumption by evidence of other facts.

Where, in the case of a voluntary gift, the facts are such as to raise a presumption of undue influence against the donee, proof that the donor had independent legal advice is not the only way in which the presumption can be rebutted. Nor can it be said that independent legal advice, when given, does not rebut the presumption unless it can be shown to have been taken. To rebut the presumption it is necessary for the donee to prove that the gift was the result of the free exercise of independent will on the part of the donor. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing. In cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption, but if evidence is given of circumstances sufficient to establish that the gift was the spontaneous act of the donor acting in circumstances which enabled him to exercise an independent will there is no reason to disregard them merely because they do not include independent advice from a lawyer. Where advice is relied on it must have been given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor. It is most important from the point of view of public policy to maintain the rule of law which has been laid down and to insist that a gift made in circumstances which give rise to the presumption of undue influence must be set aside unless the donee is able to satisfy the court of facts sufficient to rebut the presumption.

Notes. Considered: *Lancashire Loans Ltd. v. Black*, [1933] All E.R.Rep. 201. Applied: *Williams v. Johnson*, [1937] 4 All E.R. 34. Referred to: *Antony v. Weerasekera* (1953), 97 Sol. Jo. 522; *Tufton v. Sporni* [1952] 2 T.L.R. 516; *Bullock v. Lloyds Bank, Ltd.*, [1954] 3 All E.R. 726.

As to undue influence, see 14 HALSBURY'S LAWS (3rd Edn.) 478, and *ibid.*, vol. 17, 672 et seq.; and for cases see 12 DIGEST (Repl.) 110 et seq., and 25 DIGEST 257 et seq.

Cases referred to:

- (1) *Allicard v. Skinner* (1887), 36 Ch.D. 145; 56 L.J.Ch. 1052; 57 L.T. 61; 36 W.R. 251; 3 T.L.R. 751, C.A.; 12 Digest (Repl.) 111, 659.
- (2) *Rhodes v. Bate* (1866), 1 Ch. App. 252; 35 L.J.Ch. 267; 13 L.T. 778; 12 Jur. N.S. 178; 14 W.R. 292, L.J.J.; 12 Digest (Repl.) 125, 765.
- (3) *Powell v. Powell*, [1900] 1 Ch. 243; 69 L.J.Ch. 164; 82 L.T. 84; 44 Sol. Jo. 134; 12 Digest (Repl.) 115, 676.
- (4) *Morley v. Loughnan*, [1893] 1 Ch. 736; 62 L.J.Ch. 515; 68 L.T. 619; 9 T.L.R. 214; 3 R. 592; 12 Digest (Repl.) 118, 697.
- (5) *Re Coomber, Coomber v. Coomber*, [1911] 1 Ch. 723; 80 L.J.Ch. 399; 104 L.T. 517, C.A.; 12 Digest (Repl.) 116, 683.

Appeal by leave from a judgment of the Court of Appeal of the Supreme Court of the Straits Settlements (MORISON, C.J., and BROWN and REAY, JJ.) allowing an appeal from the judgment of DEANE, J., given on Mar. 24, 1926.

The question raised was whether a deed of gift made April 18, 1922, whereby the appellant gave to the respondent certain lands and hereditaments the property of the

appellant situate in the town of Singapore, ought to be set aside on the ground of undue influence on the part of the respondent. The appellant was a Malay woman, a widow and the aunt of the respondent. She was illiterate, did not speak English, and at the time the deed of gift was made was infirm and unable easily to move about. For some years the respondent had collected the rents from and managed the properties of the appellant. Before the appellant executed the deed she had the independent advice of a Singapore lawyer. On July 17, 1925, the appellant issued a writ against the respondent claiming, inter alia, a declaration that the deed of gift was void. DEANE, J., gave judgment in favour of the appellant, setting aside the deed of gift, but that judgment was reversed by the Court of Appeal (REAY, J., dissenting). The appellant now appealed by leave to His Majesty in Council.

Jenkins, K.C., and *N. L. Macaskie* for the appellant.

W. H. Greene, K.C., and *Hubert F. F. Greenland* for the respondent.

Oct. 15. **LORD HAILSHAM, L.C.**—In this case the appellant brings an action against the respondent claiming that a deed of gift, dated April 18, 1922, and made between the appellant and respondent, should be set aside on the ground that the relationship between the parties at the time when the deed was executed was such as to raise a presumption of undue influence against the respondent, and that that presumption had not been rebutted. The respondent denies that the relationship between the parties was such as to raise any presumption, and alleges that, if there were such a relationship, the presumption was rebutted. The trial judge decided in favour of the appellant; but his judgment was reversed by the Court of Appeal, which held, by a majority, that there was no such relationship as raised any presumption of undue influence, and that if there were such presumption, it had been rebutted by the facts proved by the respondent.

The facts leading up to the present action are as follows. The appellant is a Malay woman, wholly illiterate and of great age. The respondent is of Arab birth, and is the nephew by marriage of the appellant. The appellant's husband died before the year 1902, leaving her a considerable amount of landed property. This property consisted of (a) Two pieces of leasehold land of an area of some 4,097 sq. ft., situate at Minto Road, in Singapore, and held by him at a rental of \$2 per annum for a term of ninety-nine years from October, 1858. (b) A house known as 104, Southbridge Road, Singapore, held for a term of 999 years at a rent of \$1 per annum. (c) Certain leasehold premises known as 1, 2, and 3, Minto Road, together with a small piece of land in McPherson Road, Singapore. Shortly after her husband died, the appellant conveyed the whole of this estate to her daughter, Seetee Mariam, who was herself a widow and the sole surviving child of the appellant; and the appellant and her daughter then lived together at No. 2, Minto Road. The respondent came to Singapore about the year 1905, being then some twenty-three years of age. He went to live with his aunt, the appellant, and his cousin, Seetee Mariam, at No. 2, Minto Road. The respondent married in 1908, and brought his wife to live with him at this house. The respondent was entirely without means when he reached Singapore, and the appellant started him in business. At a subsequent date the respondent divorced his wife and re-married, and then went to live at No. 3, Minto Road, which he rented from Seetee Mariam at \$10 a month. The two houses, Nos. 2 and 3, Minto Road, adjoined one another and there was a through communication between the two, and the respondent saw the appellant daily. From 1918 onwards the respondent collected the rents of her properties for Seetee Mariam. On Aug. 25, 1921, Seetee Mariam died, and the appellant became entitled to the properties as her next-of-kin. On Sept. 12, 1921, the appellant executed a deed appointing the respondent her attorney for the purpose of obtaining letters of administration of the estate of Seetee Mariam, to be granted to him for her benefit. On Sept. 23, 1921, letters of administration were granted to the respondent accordingly. On Mar. 1, 1922, the respondent conveyed to the appellant the whole of the properties as the legal personal representative of Seetee Mariam, but he continued to collect the rents. The respondent had employed Messrs. Drew and Napier, a well-known firm of solicitors in Singapore, to act for him in regard to the grant of letters of administration. On April

A 18, 1922, the appellant executed a deed of gift whereby she gave to the respondent absolutely the whole of the properties referred to under (a) and (b) above, and left herself with a total gross income of about \$30 a year. The properties comprised in the deed of gift had been sworn by the respondent for probate at \$23,600, and No. 104, Southbridge Road was then let at a rental of \$100 a month, and was assessed for rates at \$250 a month. At the time when the deed was executed, and ever since the death of her daughter, the appellant had lived alone at No. 2, Minto Road, with the respondent in the communicating house next door. The appellant was so old and infirm that she was unable ever to leave the house, and she seldom saw any of her relatives or friends; the respondent managed the whole of her affairs, including all her domestic affairs, and bought her food and clothing.

C The respondent called evidence to show that before executing the deed, the appellant had independent advice from Mr. James Aitken, a lawyer, of Singapore. Mr. Aitken gave evidence, and deposed that early in April, 1922, the respondent sent for him and told him that the appellant desired him to prepare a deed of gift in his, the respondent's, favour; that he accordingly attended at No. 2, Minto Road, and received instructions from the appellant to prepare such a deed of gift; he thinks that the details as to the leases of the land were given by the respondent. After receiving these instructions he saw the respondent at his office on a number of occasions, and he stated that on one occasion he told the respondent that he had better get another solicitor to represent him in order to protect his interests. After preparing the deed of gift, he took it to the appellant's house and explained it to her; the respondent was there when he arrived, but was not present during the explanation. He read the deed to the appellant and told her that it was irrevocable, and that it gave the property absolutely to the respondent, and he asked her if she signed voluntarily. He did not know that she was parting with practically the whole of her property, and he asked no questions as to the value of her total estate; he thought when he saw her that she was about eighty years of age and that she would not live long; he did not advise her that if she desired to ensure the respondent having her property after her death it would be possible to do so by will. His fees for drawing the deed of gift were paid by the respondent out of rents collected by him on behalf of the appellant. In addition to this evidence, a Mr. Campbell, another lawyer of Singapore, was called by the respondent, and stated that on the instructions of one of the appellant's relatives who had heard of the deed of gift, he went to see the appellant at her house on May 20, 1922; that the appellant was very angry at his coming, and said that she had made the deed voluntarily and that the respondent maintained her and took care of her, and that she did not wish the transaction set aside. The interview lasted about ten minutes; the respondent was not present when he arrived, but as Mr. Campbell was explaining to the appellant why he had come, the respondent came in and asked what was happening, and the witness thereupon explained how he came to be there, and left the house.

I The appellant's evidence at the trial was disregarded because it was recognised by both sides that her mind was then in such a state as to render her evidence quite valueless. The respondent gave evidence, but the learned trial judge did not believe his testimony. The learned trial judge found that from the death of her daughter onwards the appellant was a feeble old woman, unable to leave the house, relying entirely upon the respondent for everything—even for her food and clothes—leaving the management of her affairs to him, so that she had no knowledge of her own affairs or as to the value of her properties, and so that she was totally and completely in the respondent's hands. He held that when the deed was executed by the appellant her relationship with the respondent was such that he had gained complete ascendancy over her, and that the presumption arose that the deed was procured by his undue influence. He held further that the appellant had had no independent legal advice, and that the circumstances were not such as to rebut the presumption. At the hearing before this Board the respondent contended that there was no confidential relationship between the parties giving rise to any presumption; that if there was any such relationship, the gift was not referable to the relationship; and that in any event the evidence called by the respondent was sufficient to rebut the presumption, if it ever arose.

The principles upon which this case falls to be decided have been the subject of a series of decisions in the English Court of Chancery; and it was not disputed between the parties that the principles of English law must be applied. The question to be decided is stated in the judgment of COTTON, L.J., in the well-known case of *Allcard v. Skinner* (1), 36 Ch.D. at p. 171, as follows:

"The question is: Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes: First, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

In their Lordships' view the relations between the appellant and respondent are correctly summarised in the judgment of the trial judge, and they are amply sufficient to raise the presumption of the influence of the respondent over the appellant and to render it incumbent upon him to prove that the gift was the spontaneous act of the appellant, acting under circumstances which enabled her to exercise an independent will, and which justified the court in holding that the gift was the result of the free exercise of her will.

At the hearing before this Board there was much discussion upon the question whether the presumption can be rebutted in any other way than by proof of independent legal advice, and also as to what constituted sufficient legal independent advice for this purpose. A number of cases were cited containing expressions of opinion by various learned judges, some of which are not easy to reconcile unless they are treated as governed by the particular facts of the case then under discussion. Their Lordships are satisfied that in the present case there were no circumstances except the giving of independent legal advice, if that was given, to rebut the presumption; but since the cases have never been reviewed in any ultimate Court of Appeal, their Lordships think it right to state the conclusion which they have reached.

For the appellant reliance was placed on *Rhodes v. Bate* (2) and the passage in the judgment of TURNER, L.J. (1 Ch. App. at p. 257):

"I take it to be a well-established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."

Also upon the language used by FARWELL, J., in *Powell v. Powell* (3) ([1900] 1 Ch. at p. 245):

"It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other if the latter impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must show (and

A the onus is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation."

And on the further statement of the learned judge:

B "Further, it is not sufficient that the donor should have an independent adviser unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it and so defeat the rule; but the stronger the influence the greater the need of protection. The real meaning of the rule is that the youth, being in the eye of the court unfit to deal irrevocably with his parent or guardian in the matter of a gift of this kind, must appoint some independent adviser to act for him. It is the action resulting from the advice, not action against the advice, that binds the donor."

C On the other hand, the respondent relied on a number of statements of the law which indicate that independent advice is only one of the methods by which the presumption can be rebutted. As an instance, the judgment of WRIGHT, J., in *Morley v. Loughnan* (4) where the learned judge says ([1893] 1 Ch. at p. 752):

D "The burthen lies on the recipient to show that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances";

and also on the judgment of the Court of Appeal in *Re Coomber, Coomber v. Coomber* (5).

E The decision in each of these cases seems to their Lordships to be entirely consistent with the principle of law as laid down in *Allcard v. Skinner* (1). But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by F establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can G rebut the presumption. But the fact to be established is that stated in the judgment already cited of COTTON, L.J., and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given H with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.

I In the present case their Lordships do not doubt that Mr. Aitken acted in good faith; but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties; and they regard it as most important from the point of view of public policy to maintain the rule of law which has been laid down and to insist that a gift made in circumstances which give rise to the presumption must be set aside unless the donee is able to satisfy

the court of facts sufficient to rebut the presumption. It follows that in their Lordships' opinion the appeal must be allowed; the judgment of the trial judge be restored, and the respondent must pay the costs of the action in the courts below, and of the appeal to his Majesty in Council. Their Lordships will humbly advise his Majesty accordingly.

Appeal allowed.

Solicitors: *Tamplin, Tayler & Joseph; Nisbet, Drew & Loughborough.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

ROYAL LONDON MUTUAL INSURANCE SOCIETY, LTD. v. BARRETT

[CHANCERY DIVISION (Tomlin, J.), March 7, 1928]

[Reported [1928] Ch. 411; 97 L.J.Ch. 177; 139 L.T. 208;
44 T.L.R. 363; 72 Sol. Jo. 240]

Insurance—Life assurance—Exception—Suicide—Policy to remain in force to extent of pecuniary interest of third parties—"Third parties"—Exclusion of assurers—Assignment of policy to assurers as security for loan.

By a policy of insurance, dated Dec. 21, 1926, an insurance company insured the life of the assured for £900. Condition 5 in the policy provided: "The policy shall be void if the life assured dies by suicide. . . . In any such case . . . the policy shall remain in force to the extent of the pecuniary interest of third parties bona fide acquired for valuable consideration. . . ." By a mortgage dated Feb. 1, 1927, the assured demised to the insurers a leasehold house and assigned to them the life policy as a security for a loan to him of £850. A term of the mortgage deed was that the insurers should satisfy themselves primarily out of the policy moneys and that the leasehold house should, to that extent, be discharged from the charge. On July 7, 1927, the assured committed suicide. In an action by the insurers to enforce their security the executrix of the assured contended that, in view of the terms of the mortgage, the insurers must satisfy themselves out of the policy moneys, thereby discharging the house.

Held: "third parties" in condition 5 referred to a person or persons other than the insurers, the assured, or the policy holder, and did not mean "any body other than the assured or the policy holder," and, therefore, the condition did not apply to the insurers, with the result that the policy was void and the insurers were entitled to enforce their security against the leasehold house.

White v. British Empire Mutual Life Assurance Co. (1) (1868), L.R. 7 Eq. 394, distinguished.

Notes. Considered: *Digby v. General Accident, Fire and Life Assurance Corp., Ltd.*, [1940] 1 All E.R. 514. Referred to: *Digby v. General Accident Fire and Life Assurance Corp., Ltd.*, [1942] 2 All E.R. 319.

As to assignment of life policies, see 22 HALSBURY'S LAWS (3rd Edn.) 281, 282; and for cases see 29 DIGEST 372 et seq.

Cases referred to:

- (1) *White v. British Empire Mutual Life Assurance Co.* (1868), L.R. 7 Eq. 394; 38 L.J.Ch. 53; 19 L.T. 306; 17 W.R. 26; 29 Digest 367, 2954.
- (2) *Rowett, Leakey & Co., Ltd. v. Scottish Provident Institution*, [1927] 1 Ch. 55; 95 L.J.Ch. 434; 135 L.T. 558; 42 T.L.R. 504, C.A.; 29 Digest 366, 2950.

- (3) *Cook v. Black* (1842), 1 Hare, 390; 11 L.J.Ch. 268; 6 Jur. 164; 66 E.R. 1084; 29 Digest 367, 2958.
- (4) *Solicitors and General Life Assurance Society v. Lamb* (1864), 2 De G.J. & Sm. 251; 4 New Rep. 313; 33 L.J.Ch. 426; 10 L.T. 702; 10 Jur. N.S. 739; 12 W.R. 941; 46 E.R. 372, L.J.J.; 29 Digest 369, 2966.
- (5) *City Bank v. Sovereign Life Assurance Co.* (1884), 50 L.T. 565; 32 W.R. 658; 29 Digest 369, 2967.

Action to enforce a mortgage security.

By a mortgage dated Feb. 1, 1927, one Albert Stanley Davies demised to the plaintiffs a leasehold house and assigned to them a policy of assurance on his life, which had been effected by him with the plaintiffs, as a security for a loan to him by the plaintiffs of £850, repayable with interest at 6 per cent. per annum. The plaintiffs agreed by the policy to pay the sum of £900 to A. S. Davies, or his personal representatives, or permitted assigns. Condition 5 of the policy provided as follows:

“Suicides.—The policy shall be void if the life assured dies by suicide or by the hands of justice. In any such case the directors may allow to the policy holder such part of the sum assured as they shall think fit, and the policy shall remain in force to the extent of the pecuniary interest of third parties bona fide acquired for valuable consideration (satisfactory proof of which will be required), provided notice thereof in writing shall have been received and admitted by the directors at least one month prior to the date of death.”

On July 9, 1927, A. S. Davies committed suicide. The defendants, the executrix of the deceased, by her counter-claim, claimed payment of the difference between the said sum of £900 and the amount due to the plaintiffs under this mortgage, and contended that the plaintiffs, having by virtue of the above-mentioned transactions acquired a different status from that which they had under the contract between themselves and A. S. Davies contained in the policy, were “third parties” within the meaning of those words as used in condition 5. The plaintiffs contended that the policy was void and that they were not third parties. One of the clauses in the mortgage provided that the plaintiffs were to satisfy themselves primarily out of the policy moneys, and that the leasehold house, to that extent, should be discharged from the charge.

Gavin Simonds, K.C., and *E. E. H. Brydges*, for the plaintiffs, referred to *White v. British Empire Life Assurance Co.* (1); *Rowett, Leakey & Co. v. Scottish Provident Institution* (2).

G. B. Hurst, K.C., and *A. T. James*, for the defendant, referred also to PORTER’S LAWS OF INSURANCE (6th Edn.), p. 139; *Cook v. Black* (3); *Solicitors and General Life Assurance Society v. Lamb* (4) and *City Bank v. Sovereign Life Assurance Co.* (5) is a confirmation of *White’s Case* (1). “Third parties” are parties acquiring a different status from that which they had under the contract.

TOMLIN, J.—This is an action in which the Royal London Mutual Insurance Society, Ltd., are seeking to enforce a security to them by one Albert Stanley Davies against the legal personal representative and residuary legatee of Albert Stanley Davies. The mortgage security consists of a mortgage created on Feb. 1, 1927, to secure £850 with interest at 6 per cent. upon a sub-demise of a certain leasehold house, No. 57, Balmoral Road, Newport, and a policy which, on Dec. 21, 1926, had been issued by the plaintiff company to Davies upon his own life to secure payment of £900 without profits, at an annual premium of £36 18s.

The only point which arises in the action is upon the construction of one of the conditions of the policy, and it arises in this way. On July 9, 1927, Davies committed suicide, and one of the conditions of the policy (condition 5) provided that in such an event the policy should be void. The suicide of Davies is not in question. That is admitted, and the policy, therefore, is void under cl. 5, except so far as it may fall within an exception which it contains. It is alleged, on the one hand, by the company that it does not fall within the exception, because it is not a case where there is any

pecuniary interest of third parties bona fide acquired for valuable consideration, the company alleging that an assurer is not within those words. On the other hand, the defendant says that the expression "pecuniary interest of third parties bona fide acquired for valuable consideration" is wide enough to cover a case where the assurer himself advances money on the policy and the policy is assigned to him. If the company is right, they can enforce their charge against the leasehold house and need not take account of the policy at all, that being wholly void, whereas, if they are wrong, the policy is in force to the extent of the mortgage money, which is somewhat less than the policy—£850 as against £900—and by virtue of a clause in the mortgage the company would have to satisfy themselves primarily out of the policy moneys, with the result that the leasehold house would go free.

That is the problem. It is confined to the construction of the instrument, and I think it is proper to approach it in this way—first to consider what is the natural and primary meaning of the words, and then to consider whether there is any part of the clause or of the policy which justifies or compels any departure from that primary and natural meaning or whether there is any rule of construction or authority which demands that such a departure should be made.

Taking the question of the natural and primary meaning of the words, it seems to me that the third party there is a third party by reference to those who are concerned in the contract of assurance. In other words, I think the phrase means a third party with reference to the assurer and the policy holder, and possibly the assured, because the policy holder and the assured may conceivably be different persons. But it seems to me that it is impossible to say there that "third party" means "anybody other than the assured" or "anybody other than the policy holder," and that it, therefore, includes the assurer. Therefore, the *prima facie* meaning of these words must, I think, be that the policy shall remain in force to the extent of the pecuniary interest of anybody other than the assurer or the assured bona fide acquired for valuable consideration. There is nothing in the language of the clause which invites or justifies a departure from that. The proviso that notice in writing shall be received and admitted by the directors at least one month before the date of death certainly does not invite any departure from that; so far as it has any bearing at all, it is more consistent with the primary and natural meaning than with any artificial meaning. It is said by counsel for the defendant that I ought to attach some special sense to "third parties," as distinct from "third persons," and that, where the assurer takes upon himself a new character (that is the character of an assignee of the policy in addition to his original character as assurer), he, within the meaning of this language, becomes a third party, although in some of his aspects he still remains a first party. I do not think there is anything in the language to justify any such distinction.

The question is, whether my having arrived at the natural meaning of the words and having found nothing in the clause itself which justifies any departure from it, there is any rule of construction, or any authority, which ought to lead me to take a different view? The only rule of construction, so far as I know, is the old rule of construing a document *contra proferentem*. That that rule applies to policies of assurance of course, is undoubted, and it is so stated by WARRINGTON, L.J., in *Rowett, Leakey & Co. v. Scottish Provident Institution* (2), but it has to be borne in mind that that only becomes material when a real ambiguity exists, and, in my view, there is no real ambiguity here. The language, in my opinion, is plain language, having an undoubted natural meaning, with nothing attached to it to suggest any departure from the natural meaning. But even if it were otherwise and even if this was treated as a case of ambiguity, it must be remembered that what we are construing here is something in the nature of an exception out of an exception, and that, that being so, he who asserts a particular view of the exception is for this purpose in the position of "proferens" and it may be that, if any such doctrine as I have mentioned is to be applied, it is to be applied against him. However, my own view is that there is no rule of construction affecting this particular case which requires me to depart from the natural meaning.

It remains to consider authority. There are, I think, only two cases in the books, so far as my attention has been called to them, which have any real bearing on it. The

A first is *Solicitors and General Life Assurance Society v. Lamb* (4), which came in the first instance before WOOD, V.-C., and afterwards before the lords justices. That was a case where the policy of assurance contained a provision that, if the assured should die by his own hand, the policy should be void except to the extent of any interest acquired therein by actual assignment by deed for valuable consideration. He, in fact, assigned the policy as security with other property to a third person and then committed suicide; and the point in the case was that the assurance company said that the assignee, having a number of properties in his hands as security for his debt, was bound either to throw the debt upon the properties other than the policy, so that the policy might be left in the position of not being a security for anything at all, or else that the amount owing by the security ought to be rateably apportioned between the several properties, including the policy, so that the amount secured on the policy was thereby diminished, the result being, either that the insurance company would get off payment altogether, or would have to pay very much less. It was held both by the Vice-Chancellor and by the lords justices that that view was sound, and there was no equity which entitled the insurance company to have any such marshalling as they claimed. There seems to have been no question of the construction of the clause; the question was whether, having regard to the clause, the assurer was entitled to have a marshalling of the kind that I have indicated. In the course of their judgments the lords justices made some observations about the condition in the policy, and TURNER, L.J., said:

E “To construe this condition as importing that the assured was not as between him and the office to have any benefit of the policy would indeed, as it seems to me, be directly to contradict the very terms of the condition, for the condition in terms imports that the policy is to be valid to the extent of any interest acquired therein by assignment for value.”

In other words, he is saying: “In terms the condition says that it is to be valid to the extent of any interest acquired therein by assignment for value, and this proposition of the assurer is an attempt to defeat the plain meaning of the clause.” That being so, it does not seem to me that that case throws any light upon the present case at all. Its interest, perhaps, may be that it shows the first form, historically an earlier form, of this clause which provided for the validity of the policy to the extent of any interest acquired by actual assignment.

Whether it is accidental or whether it is deliberate, it is to be observed that this clause in the cases as we advance, changes its form, and, in the next case to which I am going to refer, the form is changed to one which, it is possible, may have been devised for the very purpose of excluding the assurer from the exception. That is *White v. British Empire Mutual Life Assurance Co.* (1) and there the clause was this:

H “Should any person assured, separately or jointly, die by his or her own hands, by the hands of justice, or by duelling, before the policy shall have been in existence three years, the policy in every case such shall be void, except to the extent of any bona fide interest therein which at the time of such death shall be vested in any other person or persons for his, or her, or their own benefit, for a sufficient pecuniary or other consideration, upon satisfactory proof of the creation, existence or extent of such interest; Provided that notice of such assignment shall have been received by the company at least one month previous to the death of the assured.”

I Whether that was intended by the draftsman to exclude the assurer or not I do not know. If it was so intended, it did not succeed, and it seems to me quite plain that MALINS, V.-C., who determined that case, determined as a matter of language that the phrase “other person or persons” meant “other” with reference to the assured, and, therefore, it was wide enough to include the assurer, where the assurer was an assignee of the policy, with the result that where, as here, the assurer advances money to the assured on a mortgage of the policy and other property, the policy was held to be good notwithstanding the suicide of the assured, and was held to be valid to the extent of the mortgage debt to the assurer at the death of the assured. I have been invited by counsel for the defendant to come to the conclusion that the reasoning of the

Vice-Chancellor was of a very elaborate kind, and that, in order to arrive at the conclusion that the assurer was not excluded from the words, he first of all held that the words did exclude him, and then proceeded on some general principle, which he found in *Solicitors and General Life Assurance Society v. Lamb* (4) and elsewhere, to say that, although *prima facie* it did exclude him, he was bound to hold that it did not exclude him. I do not think that there is any justification for that suggestion. The judgment, as it seems to me, propounds the simple question whether the company must be considered as being "other persons who have acquired an interest in the policy," and it gives an affirmative answer to the question. In other words, it arrives at the goal by the shortest and easiest path. That being so, that case stands as no authority for it is one of a clause containing different language.

When we come to the case under consideration to-day we have got a third form. Whether it is accident or whether it is historical development, this may be another attempt of the insurance company to exclude themselves from the operation of this class of exception, and the question is whether at last they have succeeded. My own view, having regard to what I have said as to the natural and primary meaning of the words, is that they have succeeded, and, having found nothing in principle or on authority which compels me to take a contrary view, I must conclude that upon the true construction of this clause the expression "third party" does not include the assurer, and that, that being so, the assurer is entitled to proceed to enforce his security against the other property comprised in the mortgage. There will, therefore, be a declaration that, on the true construction of the policy, in the events which have happened, the policy is void.

Solicitors: *Smith & Hudson; Mills & Morley*, for *H. M. Williams*, Newport, Mon.

[Reported by L. M. MAY, Esq., Barrister-at-Law.]

BARTON AND OTHERS v. KEEBLE AND OTHERS

[CHANCERY DIVISION (Eve, J.), March 16, 20, 1928]

[Reported [1928] Ch. 517; 97 L.J.Ch. 215; 139 L.T. 136]

Landlord and Tenant—Covenant—Under-letting without consent—Covenant to use premises as "private dwelling-house wherein no business of any kind is carried on."

By a lease, dated Oct. 11, 1905, the plaintiffs demised a dwelling-house to the defendant, K., who covenanted that he would not without the licence of the lessors "use the premises or any part thereof, or permit the same to be used for any purpose whatsoever other than for the purpose of a private dwelling-house wherein no business of any kind is carried on." In 1914 K. sub-let part of the premises. In an action by the plaintiffs for possession on the ground that K. by sub-letting was in breach of the covenant,

Held: the words "wherein no business of any kind is carried on" were intended to add to the stringency of the covenant and not to qualify it; they must be treated as an addition to something which already operated to prevent a sub-letting of any part of the premises and as emphasising that no business of any kind must be carried on on the premises; and, therefore K. was in breach of the covenant and the plaintiffs were entitled to possession.

Note. Considered: *Downie v. Turner*, [1951] 1 All E.R. 416. Approved: *Dobbs v. Linford*, [1952] 2 All E.R. 827.

As to covenants relating to user and against underletting, see 23 HALSBURY'S LAWS (3rd Edn.) 620-625, 629-637; and for cases 31 DIGEST (Repl.) 122, 123, 167 et seq., 417-419.

A Cases referred to:

- (1) *Berton v. Alliance Economic Investment Co.*, [1922] 1 K.B. 742; 91 L.J.K.B. 748; 127 L.T. 422; 38 T.L.R. 435; 66 Sol. Jo. 487, C.A.; 31 Digest (Repl.) 160, 2980.
- (2) *Cohen v. Gold*, [1927] 1 K.B. 865; 96 L.J.K.B. 419; 136 L.T. 723; 43 T.L.R. 376; 25 L.G.R. 198, D.C.; 31 Digest (Repl.) 724, 8073.
- (3) *Russoff v. Lopovitch*, [1925] 1 K.B. 628; 94 L.J.K.B. 355; 132 L.T. 789; 41 T.L.R. 278; 23 L.G.R. 230, C.A.; 31 Digest (Repl.) 722, 8054.
- (4) *Hall v. Rogers* (1925), 133 L.T. 44; 41 T.L.R. 341; 69 Sol. Jo. 397; 23 L.G.R. 550, D.C.; 31 Digest (Repl.) 641, 7484.

Action for possession and damages for breach of covenant.

C The plaintiffs were the estates governors of Dulwich College, and owners of the reversion in fee of hereditaments known as "Newlands," No. 128, Woodwarde Road, Dulwich. By a lease of Oct. 11, 1906, the estates governors demised to the defendant Keeble all that parcel of land with the dwelling-house, offices and outbuildings thereon known as "Newlands," Woodwarde Road, Dulwich, for a term of ninety-nine years from Mar. 25, 1906, at the yearly rent of £8, payable quarterly on the usual quarter days. The lessee covenanted for himself and his assigns that he would duly observe and perform (inter alia) covenants by which he agreed that he

D "14. Will not, without the lessors' previous licence in writing, use the premises or any part thereof or permit the same to be used for any purpose whatsoever other than for the purpose of a private dwelling-house wherein no business of any kind is carried on. 15. Will not, without the lessors' previous licence in writing, do or suffer to be done in or on the demised premises anything which may in the judgment of the lessors be or grow to be injury or annoyance of the lessors or of any of their tenants, or of any of the occupiers of any contiguous or adjoining premises or of the public or neighbourhood."

E The lease contained a proviso for re-entry. The house was one of a number of similar houses intended to be occupied as private dwelling-houses. It had an elevation of two floors, the ground floor of four rooms with hall and staircase, and the upper floor also of four rooms, with a bathroom and lavatory. It was occupied down to 1914 solely by the lessee and his family. In that year, without the knowledge of the plaintiffs, he let three of the upper rooms, unfurnished, to a tenant, whose tenancy expired in June, 1926. On July 2, 1926, there appeared in a local paper an advertisement wherein he advertised to be let from July 19 "three rooms unfurnished, first floor, no children, suit middle-class couple, rent £1 a week, 128, Woodwarde Road, Dulwich." In response to the advertisement, H. F. Parkins, the second defendant, called upon Mr. Keeble, and, having inspected the rooms, he agreed to take them for himself and his wife. In the meantime the attention of the secretary and manager had been called to the advertisement, and on July 3 he wrote a letter to Mr. Keeble, pointing out that the proposed letting was contrary to the terms of the lease, and asking for an undertaking that it would not be proceeded with. Before the letter reached Mr. Keeble's hands the transaction between him and Mr. Parkins had been completed, and on July 19 Mr. Parkins and his wife entered into occupation of the upper floor and remained there to this day.

H The plaintiffs alleged that this sub-letting and the occupation and user thereof by Parkins was a breach of covenants 14 and 15. On Dec. 21, the plaintiffs served notice on Keeble, specifying the breaches of covenant and requiring him to remedy the same, and to make compensation therefor. He failed to comply therewith and this action was then begun, in which they claimed as against all the defendants possession and damages for breach of the covenants. By his defence Keeble denied that there had been a breach of the covenants, and counter-claimed for relief if it should be found that he was liable to forfeiture. The sub-tenant also denied that the sub-letting was a breach, and pleaded that the plaintiffs were estopped from relying thereon as they had permitted similar sub-letting and user and occupation elsewhere on the estate. He pleaded also the Rent and Mortgage Interest Restrictions Acts, 1920 to 1923, and

asked relief from forfeiture, if there had been a breach, according to the Law of Property Act, 1925, s. 146 (4). A

Bennett, K.C., and *F. E. Farrer* for the plaintiffs.

Hockman, for the sub-tenant, referred to *Berton v. Alliance Economic Investment Co.* (1); *Cohen v. Gold* (2), and *Russoff v. Lopovitch* (3).

Cartwright Sharp, for the tenant, referred to *Hall v. Rogers* (4). B

EVE, J.—By a lease dated Oct. 11, 1906, the plaintiffs, the estates governors of Dulwich College, demised to the defendant, Harry James Keeble, a messuage and premises known as 128, Woodwarde Road, Dulwich, for a term of ninety-nine years from Mar. 25, 1906. In this action they claim to recover possession of the demised premises on the ground that the lessee in breach of covenants contained in the lease has used them otherwise than as a private dwelling-house, and has thereby done or permitted to be done something which may be, or grow to be, injury or annoyance of the plaintiffs, or their tenants, occupants of the neighbouring houses. Mr. Keeble denies that he has committed any breach of covenant. C

The first question, therefore, is whether what has been done involves a breach of any of the lessee's covenants contained in the lease. The plaintiffs allege that it is a breach of the covenants numbered 14 and 15. It must be conceded, for it has been so determined by authorities binding on this court, that if covenant No. 14 had stopped at the words "of a private dwelling-house" that which has been done would constitute a breach of that covenant. But the covenant does not stop there: it concludes with the words "wherein no business of any kind is carried on." At first sight those concluding words seem either superfluous, or inconsistent with the earlier part of the clause prohibiting user for any purpose other than for the purpose "of a private dwelling-house," and there is some difficulty in appreciating what the draftsman had in mind when he penned that addition. On the one hand, it is suggested that he probably was contemplating that class of case wherein questions have arisen whether or not a particular user involved the carrying on of a business—cases wherein it has been argued that the practice of a profession, the reception of paying guests, or the carrying on of some charitable work has not involved a breach of a covenant to use the premises as a private dwelling-house and not to carry on a business there, and that his intention was to include every kind of business in the prohibition. On the other hand, it is said that the expression "a private dwelling-house" is capable of more meanings than one, according to the context in which it is found, and that, according to the true construction of this covenant, so long as the house is not used for business purposes of any kind there is no user of it for any purpose other than for the purpose of a private dwelling-house. In support of this contention reliance was placed on the next following covenant (No. 15), under which the lessors could restrain a user which, although not a breach of covenant No. 14, might still be of such a nature as to be in their judgment a cause of injury or annoyance to them or their tenants. D

The question is: What effect am I to give to these words, "wherein no business of any kind is carried on"? Ought I to read that as something intended to add to the stringency of the covenant, or is it in the nature of a qualifying addendum? The difficulty in treating it as a qualification is that the covenant so qualified would, so long only as no business was carried on, admit of user inconsistent with what was contemplated by the first part of the clause. The premises are to be used as a private dwelling-house only, and any subdivision is inconsistent with that; and yet, if the concluding words are to be read as defining the private dwelling-house as being one wherein no business is being carried on, it would seem that each room in the house might be sub-let separately without any breach of the covenant. I cannot think that this is the true construction of the clause. I think the words must be treated as an addition to something which already operates to prevent a sub-letting of any part of the premises, and that its only effect is to emphasise the fact that no business of any kind must be carried on upon the premises. I think, therefore, as far as Mr. Keeble is concerned the defence raised upon the construction of the contract fails, and that there has been on his part a user of the premises for purposes other than those of a private dwelling-house. It is E

A not necessary for me to recapitulate the grounds on which the Court of Appeal and my brethren have held that a divided occupation is a breach of a covenant to use as a private dwelling-house. There are obvious reasons why a house occupied by two separate families cannot be accurately described as a single private dwelling-house. It may well be, as was suggested in the course of the argument, that the agreement to sub-let did not involve a breach of the covenant not to use, and that as long as the agreement was executory the only remedy of the lessors would be by a quia timet action, but when actual user followed, the breach related back to the agreement, and in its nature it is, in my opinion, a continuing breach. So far, therefore, as Mr. Keeble is concerned I think there is no defence to the action.

C The position of Parkins is somewhat different. He, of course, had notice of, and is bound by, the covenant contained in the lease under which his immediate lessor holds, but it is said that by virtue of the Rent Restrictions Acts, 1920 to 1923, he cannot be evicted, since no order can be made for recovery of possession against him under s. 5 of the Act of 1920 as substituted by s. 4 of the Act of 1923. Whether this is so or not depends upon the further question whether his dwelling-house is still controlled. [His LORDSHIP dealt with this matter, and held that Keeble was in actual possession of the dwelling-house for the period between the conclusion of one tenancy and the beginning of Parkins' tenancy, and that, therefore, s. 2 (1) of the Rent Restrictions Act, 1923, operated to decontrol the part let to Parkins * so that his defence based on the Rent Restrictions Acts failed.] The result is that as to the first two defendants an order must be made against them for recovery of possession.

Solicitors: *Druces & Atlee; H. H. Wells & Sons; Tucker & Co.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

F
LLOYD v. COOK
GOUDGE v. BROUGHTON
SIMSON v. MIATT
BARTRAM v. BROWN
BARKER v. HUTSON

G [COURT OF APPEAL (Scrutton, Greer and Sankey, L.J.J.), June 19, 20, 21, 22, July 17, 1928]

[Reported [1929] 1 K.B. 103; 97 L.J.K.B. 657; 139 L.T. 452; 92 J.P. 199; 44 T.L.R. 761; 72 Sol. Jo. 533; 26 L.G.R. 609]

H Rent Restriction—Decontrol—Actual possession by landlord—"Landlord"—Owner or freeholder—Possession on July 31, 1923—Decontrol whether or not premises previously let—Extent of decontrol—Long lease unexpired—Tenant as "landlord"—Lease granted to "tenant" after July 31, 1923, for not less than two years—Sitting tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (7)—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5, c. 32), s. 2 (1), (2).

I By s. 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923: "Where the landlord of a dwelling-house to which the principal Act [i.e., the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act [i.e., July 31, 1923], or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when

* As to decontrol of premises within the Rent Restrictions Acts by the landlord coming into possession, see *Lloyd v. Cook*, &c., *infra*.

the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house." The word "landlord" in this subsection is not used in the strict sense of a person between whom and a tenant a contractual relationship of landlord and tenant exists, or of a person who has a tenant, but means an owner or a freeholder who can let the premises, or a person who is the plaintiff in an action for the recovery of possession of a dwelling-house under the Rent Restrictions Acts. Where such a person is—on or at any time after July 31, 1923—in actual possession of an entire dwelling-house, the entire dwelling-house is decontrolled, whether or not it has been previously let. The decontrol extends to the whole of the dwelling-house and to every part of it, so that a subsequent letting of the whole or of any part of the dwelling-house cannot revive control. "Landlord" in s. 2 (1) does not "however" include a tenant from an owner or freeholder who can sub-let. When, by reason of s. 2 (1) the standard rent no longer applies to the whole house, an apportioned part of it ceases to apply to each and every part, whether or not such part has ever been let.

By s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy exists, or had existed." On the true construction of s. 12 (7) and s. 2 (1) of the Act of 1923, where a long lease coming within the terms of s. 12 (7) expires after July 31, 1923, and the landlord goes into actual possession before he grants a new tenancy the dwelling-house becomes decontrolled under s. 2 (1); where after such a long lease expires the landlord has arranged for a tenancy to follow immediately, the landlord not coming into actual possession, s. 2 (1) does not apply, and the house is not decontrolled; where such a long lease has not expired, the combined effect of s. 12 (7) and s. 2 (1) is to turn the tenant into a landlord-owner, and, if such "landlord" has been, on or since the passing of the Act of 1923, in actual possession of the premises, the court may treat the premises as decontrolled, and it is immaterial if, after that, the "landlord" lets part and later resumes actual possession of that part, for the first proviso to s. 2 (1) of the Act of 1923 does not apply since the premises are already decontrolled. If at the time of the passing of the Act the "landlord" has sub-let part of the premises and comes into actual possession of that part, the part is decontrolled, for as landlord he has resumed possession of the part and decontrol follows from the last words of the proviso.

By the Rent and Mortgage Interest Restrictions Act, 1923, s. 2 (2): "Where at any time after the passing of this Act, the landlord of a dwelling-house to which the principal Act [the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after the 24th day of June, 1926, being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the principal Act shall, as from the commencement of the term, cease to apply to the dwelling-house. . . ." The phrase "the tenant" in the above subsection means "the sitting tenant" and decontrol under the subsection can be effected only by a lease or agreement for a lease to a tenant who is in occupation at the time of the grant of the lease or the date of the agreement.

Notes. Section 2 of the Rent, &c., Restrictions Act, 1923, was repealed by the Increase of Rent, &c., Restrictions Act, 1938, but the case is published here as a house which was decontrolled under the Act of 1923 was not subject to control immediately before Sept. 2, 1939, and so would not now be an "old control" house, though it might subsequently have become subject to "1939" control and be controlled unless decontrolled by the Rent Act, 1957, s. 11, or "new control," as to which, see 23 HALSBURY'S LAWS (3rd Edn.) 733, 735, 736.

Considered: *Domendietti v. Ryan* (1929), 141 L.T. 239. Followed: *Kingsley v.*

A *Adler*, [1929] 1 K.B. 525. Considered: *Abbey v. Barnstyn*, [1930] 1 K.B. 660; *Thomas v. Jacobs* (1935), 78 Sol. Jo. 231; *Schaffer v. Ross*, [1939] 4 All E.R. 363. Explained: *Mouser v. Major*, [1941] 1 All E.R. 180. Referred to: *Clark v. Downes*, [1931] All E.R.Rep. 157; *Jefevre v. Hirst* (1931), 100 L.J.K.B. 733; *Holden v. Howard*, [1937] 4 All E.R. 483; *Fowle v. Bell*, [1946] 2 All E.R. 668; *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Gormly*, [1951] 2 All E.R. 1030.

B As to decontrol as affecting "old control," see 23 HALSBURY'S LAWS (3rd Edn.) 717, 731-735; and for cases see 31 DIGEST (Repl.) 724 et seq. For Rent Restrictions Acts, see 13 HALSBURY'S STATUTES (2nd Edn.) 1028 et seq.

Cases referred to:

- (1) *Cohen v. Gold*, [1927] 1 K.B. 865; 96 L.J.K.B. 419; 136 L.T. 723; 43 T.L.R. 376; 25 L.G.R. 198, D.C.; 31 Digest (Repl.) 724, 8073.
- C** (2) *Ratkinsky v. Jacobs*, [1929] 1 K.B. 24; 97 L.J.K.B. 566; 138 L.T. 739; 92 J.P. 142; 44 T.L.R. 548; 72 Sol. Jo. 354; 26 L.G.R. 380, D.C.; 31 Digest (Repl.) 726, 8093.
- (3) *Brooks v. Liffen*, [1928] 1 K.B. 441; 44 T.L.R. 94; 164 L.T.Jo. 410, D.C.; affirmed sub nom. *Brookes v. Liffen*, [1928] 2 K.B. 347; 138 L.T. 676; 92 J.P. 102; 44 T.L.R. 350; 26 L.G.R. 199, C.A.; 31 Digest (Repl.) 724, 8078.
- D** (4) *Finey v. Gougoltz*, [1926] 2 K.B. 322; 95 L.J.K.B. 770; 42 T.L.R. 501; 70 Sol. Jo. 758; 24 L.G.R. 321, D.C.; 31 Digest (Repl.) 638, 7460.
- (5) *Jenkinson v. Wright*, [1924] 2 K.B. 645; 94 L.J.K.B. 17; 132 L.T. 157; 40 T.L.R. 858; 69 Sol. Jo. 74, D.C.; 31 Digest (Repl.) 638, 7459.
- (6) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 40 T.L.R. 868; 69 Sol. Jo. 49; 22 L.G.R. 746, C.A.; 31 Digest (Repl.) 639, 7467.
- E** (7) *Dunbar v. Smith*, [1926] 1 K.B. 360; 95 L.J.K.B. 242; 134 L.T. 380; 42 T.L.R. 196; 70 Sol. Jo. 367; 24 L.G.R. 147, D.C.; 31 Digest (Repl.) 641, 7482.
- (8) *Catto v. Curry*, [1926] 1 K.B. 460; 95 L.J.K.B. 414; 134 L.T. 540; 42 T.L.R. 243; 70 Sol. Jo. 368; 24 L.G.R. 250, D.C.; 31 Digest 656, 7587.
- (9) *Joy v. Eppner*, [1925] 1 K.B. 362; 94 L.J.K.B. 157; 132 L.T. 343; 41 T.L.R. 136; 69 Sol. Jo. 841; 23 L.G.R. 52, D.C.; 31 Digest (Repl.) 667, 7654.
- F** (10) *Doulin v. Parcell* (1926), 136 L.T. 633; 43 T.L.R. 140; 25 L.G.R. 71, D.C.; 31 Digest (Repl.) 724, 8076.
- (11) *Oakley v. Wilson*, [1927] 2 K.B. 279; 96 L.J.K.B. 783; 137 L.T. 479; 43 T.L.R. 521; 71 Sol. Jo. 409; 25 L.G.R. 316, D.C.; 31 Digest 724, 8075.
- (12) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 13 Digest (Repl.) 467, 918.
- G** (13) *Remon v. City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 36 T.L.R. 869; 18 L.G.R. 691; 84 J.P.Jo. 349, C.A.; 31 Digest (Repl.) 638, 7455.
- (14) *Sutton v. Begley*, [1923] 2 K.B. 694; 92 L.J.K.B. 1086; 129 L.T. 773; 68 Sol. Jo. 82; 21 L.G.R. 679, C.A.; 31 Digest 686, 7786.
- H** (15) *Barrett v. Hardy Bros. (Alnwick), Ltd.*, [1925] 2 K.B. 220; 94 L.J.K.B. 665; 133 L.T. 249; 41 T.L.R. 426; 69 Sol. Jo. 492; 23 L.G.R. 427, D.C.; 31 Digest (Repl.) 656, 7586.
- (16) *Glossop v. Ashley*, [1922] 1 K.B. 1; 90 L.J.K.B. 1237; 125 L.T. 842; 85 J.P. 234; 37 T.L.R. 827; 65 Sol. Jo. 695; 19 L.G.R. 593, C.A.; 31 Digest (Repl.) 673, 7687.

I **Appeals from decisions of Divisional Courts.**

The facts appear from the judgments.

Montgomery, K.C., *J. C. Lockwood* and *Gordon Clark* for the landlord, and *John Duncan* for the tenant in *LLOYD v. COOK*.

Croom-Johnson, K.C., and *Horace Douglas* for the landlord, and *Stable* for the tenant in *GOUDGE v. BROUGHTON*.

Hanbury Aggs and T. M. O'Callaghan for the tenant under a long lease, and *John Duncan* for the sub-tenant in *SIMSON v. MIATT*.

Croom-Johnson, K.C., and *J. H. Critchley* for the defendants, and *Quass* for the plaintiff in *BARTRAM v. BROWN*. A

Humphrey Edmunds for the tenant, and *John Duncan* for the sub-tenant in *BARKER v. HUTSON*.

Cur. adv. vult.

July 17. The following judgments were read.

SCRUTTON, L.J.—This group of appeals was heard together on account of difficulties which had arisen from contradictory decisions of the Divisional Courts with regard to the true meaning of the decontrolling section, s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923. The material words of that section are as follows:

“(1) Where the landlord of a dwelling-house to which the [Increase of Rent, &c. (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house. . . .” B
C

The chief conflict with regard to the meaning of these words, giving rise to these appeals, is between the decisions of *Cohen v. Gold* (1), and *Lloyd v. Cook* ([1928] 2 K.B. 364), on the one hand, and *Ratkinsky v. Jacobs* (2) on the other. D

In *Cohen v. Gold* (1) the plaintiff, when the 1923 Act was passed, was in possession of the whole of a house, which he had never let. In 1925 he let three rooms on the ground floor to Gold. He alleged in the action that his actual possession from the passing of the Act of 1923 to the letting in 1925 had caused the Rent Restrictions Acts to cease to apply to the three rooms or the whole house, and, therefore, that he could eject Gold. The Divisional Court (ACTON and TALBOT, JJ.) decided against the plaintiff, affirming the county court judge. I understand that the decision proceeded on two grounds—(i) that “the landlord” could not be in possession or come into possession of premises which had never been let; when there was no tenancy, there was no “landlord.” (ii) That being in possession of the whole house did not involve being in possession of a part of the house, subsequently let as a dwelling-house. The point that the occupier, being in fact the assignee of a lease with twenty-six years to run, was a tenant, and not the owner, and could not be within the meaning of the section “the landlord,” does not appear to have been taken in the county court, or to form the ground of the decision. E
F

In *Lloyd v. Cook*, which is one of the present group of appeals, the claim was by the sub-tenant Lloyd to apportion the standard rent of the whole house to determine the proper rent to be paid by him to his landlord, Cook, for two rooms which he occupied. Cook replied that the two rooms and the whole house had been decontrolled. Cook was the holder of a ninety-nine years’ lease and occupier of the whole house. She had let three rooms to one Churchman. On Aug. 12, 1926, Churchman vacated possession. Cook went in, prepared one room for the reception of her son, who at once occupied it, and on Aug. 28, 1926, let the two remaining rooms to Lloyd. Cook contended that she had come into actual possession of the two rooms, which were, therefore, decontrolled. The Divisional Court (SALTER and CHARLES, JJ.) decided against the contention, reversing the county court judge, who had held that the rooms were decontrolled. The points that the rooms were not decontrolled by reason of the proviso to s. 2 (1) of the Act of 1923, and the effect of s. 12 (7) of the Act of 1920 in enabling the court to disregard long leases at a ground rent, were not taken in the county court, and could not be taken against the county court decision in the High Court. The Divisional Court took the view that, though the dwelling-house composed of three rooms had been decontrolled, Cook having come into possession of it after it had been let, the dwelling-house of two rooms, which as such had never been previously let, had never been or come into Cook’s possession as landlord, following *Cohen v. Gold* (1). The points that Cook being tenant was not landlord within the meaning of the section, and with regard to the effect of s. 12 (7) of the Act of 1920, were never taken or decided. G
H
I

A On the other hand, in *Ratkinsky v. Jacobs* (2), Barnet Ratkinsky, the father, had bought a house in 1917, and had let four rooms to a Mr. Cohen, who vacated possession in February, 1926. Barnet, being then in possession of the whole house, let four rooms, three of Cohen's letting and one other, to Jacobs. In February, 1927, Barnet sold the whole house to his son Morris, who, in November, 1927, gave notice to Jacobs to quit, and claimed possession. Jacobs replied he was protected by the Rent Restrictions Acts, and his counsel relied on *Cohen v. Gold* (1) and *Lloyd v. Cook*. The court, composed of BRANSON and MACKINNON, JJ., declined to follow the cases cited. They held that "landlord" meant "owner"; that an owner might be in actual possession though he had never previously let; and that, as the owner had been in possession of the four rooms let to Jacobs after the passing of the Act of 1923, they were decontrolled. In this case it will be noted that the Ratkinskys were owners, not themselves

C tenants.

These two lines of decisions cannot stand together; one side or the other must be wrong. I look at the object and words of s. 2 of the Act of 1923 to ascertain its true construction. I take its object to be at a time when rent restriction was supposed to be drawing to an end, owing to increased provision of houses, gradually to decontrol in cases where existing vested interests had come to an end by the owner's or landlord's

D having or obtaining vacant possession on or after July 31, 1923, but not to allow a tenant to obtain freedom to profiteer, by sub-letting, while his landlord was bound to him by the Acts. By reason of the proviso to s. 2 (1) it could not be argued that the tenant by coming into possession of the part which he had sub-let obtained freedom from control, while his landlord was controlled; the landlord could get freedom from control of the part of which he came into actual possession, though he was controlled

E as to the part in possession of the sub-tenant. This was carrying out the policy of s. 5 (5), and s. 15 (3), of the Act of 1920.

Turning to the actual words, the substantive part of s. 2 (1), of the Act of 1923, uses the word "landlord"; it does not speak of tenant, or sub-tenant. It speaks of a "whole dwelling-house" and frees the whole dwelling-house under certain conditions from the application of the principal Act. The first of these conditions is if the "landlord" is at the passing of the Act in actual possession of the whole dwelling-house. He cannot be, if at that date he has a tenant. If he has then no tenant, he is not *stricto sensu*, a "landlord." This seems to me conclusive to show that the term "landlord" cannot be used as requiring a contract of tenancy. To hold otherwise would be to prevent any person being in actual possession at the passing of the Act so as to decontrol the house, for if he were then a "landlord" in the strict sense, his tenant would be in possession. The word "landlord" must be used

G either in the looser meaning of "owner," or in the still looser meaning of a person who at a later stage is going to appear as a landlord contesting with a tenant the terms of his tenancy. Indeed, that "landlord" means "owner" is the view of SALTER, J., in *Brooks v. Liffen* (3), adopted by SANKEY, L.J., in the same case in this court. But if

H "landlord" means "owner," it seems to me impossible to support the view that the section cannot apply unless the house is or has been previously let, which is the fundamental ground for the decisions in *Cohen v. Gold* (1) and *Lloyd v. Cook*. If the owner on or after July, 1923, is or comes into actual possession of the whole house, there are no vested interests to prevent decontrol; similarly, if he comes into actual possession of a dwelling-house which is part of another dwelling-house, the first and smaller dwelling-house may be decontrolled. It is further to be noted that the effect of the

I "landlord's" coming into possession of the whole dwelling-house is that "the principal Act shall cease to apply to the dwelling-house." Now, apart from the effect of sub-s. (7) of s. 12 of the Act of 1920, which must be considered separately, this renders it very difficult to contend that a tenant can be a landlord or owner. Suppose the tenant sub-lets his whole tenement and then comes into actual possession of it again, if as between himself and any sub-tenant the house is decontrolled, is the house decontrolled as between the tenant and his landlord, so that the landlord can distrain without leave of the court, or get possession at the end of the tenant's contractual tenancy? It is difficult to see why it should follow from the tenant's getting actual possession against

his sub-tenant that he should lose the protection of the Acts against his landlord. **A**
 But if he does not, then the Acts have not "ceased to apply to the dwelling-house."
 In the case of the tenant's sub-letting part, the proviso to s. 2 (1) makes it clear that
 Parliament did not intend that the tenant recovering actual possession should free
 himself and that part of the house from the Acts. It may be said that the insertion
 of the proviso involves that but for the proviso the tenant would be a landlord within
 the first part of the section. But it is not uncommon to insert a proviso to prevent the **B**
 main enactment being construed as having a meaning which it does not bear. It will
 be noted that in the proviso "landlord" certainly means "owner" or "freeholder" as
 distinguished from "tenant"; it will be curious if in the first part of the section it has
 a different meaning and includes "tenant."

I have come to the conclusion, after careful consideration of the object and language
 of the section, that "landlord" means owner or freeholder, and subject to consideration **C**
 of the Act of 1920, s. 12 (7), does not include a tenant from a freeholder. I test the
 question in this way. Suppose that, the day after the passing of the Act of 1923, two
 persons came before a judge to ascertain their respective positions in regard to houses
 which were by rateable value within the Rent Restrictions Acts. The first was a free-
 holder, who said: "I have always been in actual possession of this house, which has
 never been let. It is now decontrolled?" The answer would, I think, be: "Yes; it is **D**
 true you are not strictly a landlord, as there is no tenant, but if this is the meaning of
 'landlord' no 'landlord' would ever be in actual possession at the passing of the Act;
 possession would always be in the tenant. Landlord must mean owner who can let."
 The second applicant said: "I have a three years' lease from the freeholder, and am in
 actual possession. I can sub-let the whole of the premises. Am I a 'landlord' in actual
 possession so that the premises are decontrolled?" The answer should, in my opinion, **E**
 be: "No; you are in actual possession, but as a tenant, not as a landlord; so long as
 you are a tenant you cannot get decontrol." I do not find the definitions of "land-
 lord" in the 1920 Act, s. 12, present any difficulty. Subsection (9) expressly excludes
 the tenant from those persons who may be "landlords" because they are entitled to
 possession, and would include an owner who has not let, but is in possession. When **F**
 s. 12 (1) (f) makes "landlord" include a person deriving title under the original landlord,
 I do not think it can contemplate there being at the same time two landlords—one the
 landlord, the other the tenant. The person who derives title under the original landlord
 takes his place; the "original landlord" ceases to be the landlord. I am the more
 persuaded that the term "landlord" must be restricted to "owner" because I do not
 see how else the Acts can "cease to apply to the dwelling-house." If they still apply **G**
 as between owner and tenant, they do not "cease to apply." When Parliament wanted
 the Acts to cease to apply to a particular rent or tenancy, they knew how to say so—
 s. 12 (7) of the 1920 Act—in which subsection the Acts continue to apply to the whole
 dwelling-house. It is also to be noted that to construe "landlord" as "a tenant who
 has or may let" would in some cases have no effect, and in other cases an effect contrary
 to the policy of the Act. If the tenant, whether statutory or contractual, sub-lets part **H**
 of his tenement, by the operation of the proviso the part is not decontrolled by the
 landlord-tenant coming into actual possession of the part so let. If the statutory
 tenant assigns or sub-lets the whole of his tenement, the landlord, under s. 5 (1) (h) of
 the Act of 1920 [added by s. 4 of the Act of 1923], can turn him out, and there will be
 no question of actual possession reverting to the tenant. If a contractual tenant or a
 statutory tenant, with consent, lawfully sub-lets the whole, and if he is a "landlord" **I**
 within s. 2 of the 1923 Act, this consequence follows. Before he sub-lets he is in actual
 possession, and if he is a "landlord" the premises are decontrolled, and he loses his
 protection against his landlord, which I cannot believe to be the intention of Parlia-
 ment.

There remains the question of the meaning of the subsection just cited [s. 12 (7) of
 the Act of 1920]. As I have stated in *Brooks v. Liffen* (3), I have no doubt of the
 original object of this subsection. It was (i) to prevent a long lease at a small ground
 rent from hampering the landlord in charging a proper rent, or perhaps from evicting
 the tenant at the end of the lease. (ii) To prevent compassionate tenancies granted

A at a low rent during the war from having a lasting effect against the charitable landlord. But the suggestion was made that the effect of the courts having to treat such tenancies as non-existing was to prevent them from seeing that there was an owner other than the tenant, and to compel them always to treat the tenant as owner. In *Brooks v. Liffen* (3) this argument was carried to an ingenious extreme. Brooks was the freeholder; Liffen, his tenant, had, in 1904, twenty years to run of a long lease at a low ground rent. This lease terminated in June, 1924, and Liffen was immediately granted a quarterly tenancy at a rack rent. In November, 1926, Brooks gave the tenant notice to quit, alleging that, as the courts could not treat the long lease as existing, Liffen had been in actual possession after 1923, and, therefore, the Acts ceased to apply to his dwelling-house. The county court judge, the Divisional Court, and the Court of Appeal declined to accept this argument. The court was not bound to shut its eyes to the fact that at the time when there was a quarterly tenancy by a freeholder to a tenant there was then an owner of the house, and Liffen, though a "person entitled to possession" under s. 12 (1) (g), was not "a person other than the tenant." Further, the subsection expressly said that the Acts were to continue to apply to the house; the owner could not, therefore, say that they did not apply. Another way of stating the point decided was that, if the court was unable to look at the facts while the long lease was in existence, when at the end of that lease they could look at the facts they found Liffen a quarterly tenant and Brooks a landlord who had never been in actual possession. The Act of 1923, therefore, gave Brooks nothing, while the Act of 1920 said that the Acts were to continue to apply to the house.

Some trouble is caused by *Finey v. Gougoltz* (4) and *Jenkinson v. Wright* (5). In the latter case Jenkinson, in 1920, acquired an unexpired term of thirty-one years in a ninety-nine years' lease. In 1921 she mortgaged her leasehold interest by sub-demise to the mortgagee at a nominal rent of a peppercorn. She lived in the house, and let part of it after 1923. She gave her sub-tenant notice to quit, alleging that she had had actual possession after 1923, and he replied that the tenancy under the mortgage could not be looked at under sub-s. (7), and that the proviso to s. 2 protected him. The county court judge held that the plaintiff was tenant, and, therefore, that the proviso applied, and the house was still subject to the Acts. The judges in the Divisional Court allowed the appeal, but on different grounds. DARLING, J., held that a tenant with a substantial part of a lease unexpired was a "landlord" for the purposes of s. 2 (1) of the Act of 1923, apparently quite independently of the question of the relation of rent to rateable value under sub-s. (7) of s. 12 of the Act of 1920. This seems to me, with respect, to be legislation, not construction. Long leases at a rack rent do not take a house out of the Act. He further held that, though the mortgage made the "landlord" a tenant, it might be disregarded under sub-s. (7), and the "landlord-tenant" was, therefore, in actual possession, and the Acts did not apply. This, although sub-s. (7) said that the Acts should apply, and only the tenancy be disregarded. ROWLATT, J., did not express any opinion on the first point; he agreed that sub-s. (7) struck out the mortgage tenancy, but pointed out that the point with regard to the proviso to s. 2 was not taken in the county court, and, therefore, could not be considered. So far as it rested on the view of DARLING, J., that any tenant under a long lease, whether within sub-s. (7) or not, was a landlord, in my view, this case was wrongly decided. If the other points had been taken in the county court, it appears to me, for the reasons stated hereafter, that Jenkinson was, by the operation of sub-s. (7), a landlord in an actual possession of a tenement decontrolled by s. 2, and, therefore, the subsequent letting did not make the proviso applicable.

In *Finey v. Gougoltz* (4) Gougoltz was the lessee of a ninety-nine years' lease at a rent of £10; and in January, 1925, was in possession of the whole of the house. In February, 1925, she let a room to Finey. As he did not pay his rent she distrained on him, without leave, and he brought an action for wrongful distress, and claimed apportionment. The county court judge held that Gougoltz was not landlord, but tenant, and that the premises were not decontrolled. The Divisional Court reversed this decision, holding that sub-s. (7) required them to treat the tenant as landlord, and s. 2 decontrolled the house, there not being three persons, landlord, tenant, and

sub-tenant, under the proviso. They thus not only ignored the rent and tenancy, but ignored the real owner, and ignored the concluding words of sub-s. (7) that the Act should apply to the dwelling-house. For the reasons given below I think this case was rightly decided. A

I do not pretend that it is easy to construe sub-s. (7) of s. 12 of the Act of 1920, and s. 2 of the Act of 1923; and I doubt whether the draftsmen or legislature bestowed any thought on their meaning. I have come to the conclusion that the true construction of sub-s. (7) of s. 12 of the Act of 1920 and s. 2 of the Act of 1923 is as follows: B

(i) Where a long lease coming within the terms of sub-s. (7) expires after July, 1923, and the landlord goes into actual possession, before he grants a new tenancy, there seems to be no difficulty: the house becomes decontrolled under s. 2. (ii) Where, when such a long lease expires, the landlord has arranged for a tenancy to follow immediately, *Brooks v. Liffen* (3), by which we are bound, decides that, the landlord not being in actual possession, s. 2 does not apply, and the house is not decontrolled. C

(iii) Where such a long lease has not expired, sub-s. (7) of s. 12 of the Act of 1920, with s. 2 of the Act of 1923, requires the court to ignore the fact that there is an owner, not the tenant and an owner who is not in actual possession. The subsection says that the Act is to apply in respect of the house, but s. 2 of the Act of 1923 enables the court to overlook the owner and turn the tenant into a landlord-owner, thus depriving the tenant of any protection or restriction he would get from the Acts. I doubt whether Parliament ever gave the relation between the two sections a thought, but, in my opinion, the above is the result of their labours. D

I have had great doubt what is the position when the long lease under sub-s. (7) of s. 12 of the Act of 1920 has not expired at the time, either at the passing of the Act of 1923 or after it, when the tenant is in actual possession of the demised tenement. But I appreciate that to hold that the freeholder at such a time is to be considered by the court as owner and landlord will be to prevent a very large number of dwelling-houses in London, where there are many long leases at ground rents, from being decontrolled. Though with considerable hesitation, I have come to the conclusion that the court which is to disregard the rent and tenancy may, under s. 2 of the Act of 1923, treat the tenant under such a lease as the landlord, and if he is, or has been, on or since the passing of the Act of 1923, in actual possession, may treat the premises as decontrolled. In other words, that in such a case the part of sub-s. (7) of s. 12 of the Act of 1920 which provides that the Acts are to continue to apply to the dwelling-house is to be treated as repealed by s. 2 of the Act of 1923. If the tenant under a lease within sub-s. (7) of s. 12 of the Act of 1920 is in actual possession of the whole house at the passing of the Act of 1923, or comes into possession of the whole house, he can be treated as landlord, and the premises be decontrolled under s. 2 (1) of the Act of 1923. It is immaterial if, after that, he lets part, and resumes actual possession of this part. The proviso does not apply, for the premises are already decontrolled. If at the time of the passing of the Act he has sub-let part of the premises and comes into actual possession of that part, the part is decontrolled, for as landlord he has resumed possession of part, and decontrol follows from the last words of the proviso. E

I have come to the conclusions (i) That in so far as they rest on the view that there cannot be a landlord under s. 2 of the Act of 1923, unless the exact dwelling-house, the subject of the dispute, has been previously let, and that it is immaterial that a large dwelling-house containing the dwelling-house in question has been previously let or has returned to the actual possession of the owner, *Cohen v. Gold* (1) and *Lloyd v. Cook* are wrongly decided, and *Ratkinsky v. Jacobs* (2) is rightly decided. (ii) That "landlord" in s. 2 of the Act of 1923 means owner or freeholder, and that, apart from sub-s. (7) of s. 12 of the Act of 1920, actual possession by a tenant either of the whole or part of a dwelling-house cannot decontrol the house, either under the principal clause or the proviso. It is possession by a tenant, not by a landlord. (iii) That the general operation of sub-s. (7) of s. 12 of the Act of 1920 and s. 2 of the Act of 1923 may during the currency of a lease within sub-s. (7) of s. 12 of the Act of 1920 under s. 2 of the Act of 1923 turn a tenant into an owner, so as to decontrol a house under F

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A s. 2 of the Act of 1923 to which sub-s. (7) of s. 12 of the Act of 1920 had said the Acts were to apply. I have above stated the detailed application of subsection and section. (iv) As to other cases, this court is of course bound by *Prout v. Hunter* (6) and *Brooks v. Liffen* (3). The following cases were correctly decided: *Dunbar v. Smith* (7), *Catto v. Curry* (8), *Joy v. Eppner* (9), and *Doulin v. Purcell* (10). The following cases were wrongly decided: *Jenkinson v. Wright* (5), so far as it rests on the view of DARLING, J., B that the tenant under any long lease is an owner, and in so far as it ignores the effect of the proviso to s. 2; *Oakley v. Wilson* (11).

LLOYD v. COOK

This is one of the two cases the conflict of which with *Ratkinsky v. Jacobs* (2) resulted in the hearing of this group of cases.

C Mrs. Cook in 1913 purchased as tenant the remaining period of a long lease of ninety-nine years. She let three rooms, part of the demised premises, to Churchman, who gave up possession on Aug. 14, 1926. She then came into actual possession of these three rooms, and at once prepared one for her son, who came in and occupied, paying rent. On Aug. 28, she let the other two rooms to Lloyd, who presently applied for apportionment, to which Mrs. Cook replied that the rooms were decontrolled. The D county court judge held in Mrs. Cook's favour that the two rooms were decontrolled, Mrs. Cook having been in actual possession between Aug. 14 and Aug. 28. This is his contemporary note. In signing a note on Mar. 8, 1928, he added that Mrs. Cook was the landlord of the three rooms let to Churchman. The Divisional Court reversed this decision on the ground that the two rooms had never been let before as a separate dwelling, and, therefore, when first let were controlled by the Acts, supporting this E decision by that in *Cohen v. Gold* (1). Oddly enough, SALTEE, J., agrees that the three rooms were decontrolled as a separate dwelling, but holds that the two rooms, part of the three, were not. It must be noted that there is no trace in the notes or judgment that any point was taken as to the effect of the long lease under s. 12 (7) of the 1920 Act, or as to the effect of the proviso to the 1923 Act, s. 2, or, I think, as to the contention that though Cook might be the landlord of Churchman or Lloyd, she was not F the landlord of the whole dwelling-house within the meaning of s. 2 of the Act of 1923. The decision of *Smith v. Baker & Sons* (12) prevents our giving effect to our view on these points. Apart from these points I think the decision of the county court judge was right and the decision of the Divisional Court erroneous. I do not think it was necessary that there should be a previous letting of these two rooms as a dwelling-house G before a "landlord" could obtain actual control of them, and that it is immaterial whether they had never been let at all, or only as part of a larger dwelling-house. If they had never been let at all, the actual possession was the more complete. On the points which alone we can consider, the appeal must be allowed and the judgment of the county court judge restored, with costs here and below. But I think it right to add that, in our view, of the construction of the statutes, if the points had been taken: (i) Apart from the question of the long lease, the freeholder would be owner; the H proviso to s. 2 of the Act of 1923 would, therefore, apply, and neither the three nor the two rooms would be decontrolled. (ii) If the long lease is considered, as I have already stated, in my opinion it prevents the court from taking notice that there is an owner who was not in actual possession, and allows the court to treat the tenant as landlord and ignore the owner. If subsequent cases raise similar facts to *Lloyd v. Cook* and the I first point above is taken, and there is no long lease, the rooms would not be decontrolled, though not for the reasons given by the Divisional Court, which were, in my opinion, erroneous.

GOUDGE v. BROUGHTON

In this case Goudge, the plaintiff, bought a cottage called "Under Beeches Stables," in October, 1925. It had never previously been let. When he bought it he found in it the gardener of the previous owner. This gardener is stated to have paid no rent. The gardener stayed in the cottage, paying no rent, till December, 1926, when the plaintiff let the cottage to the defendant Broughton and "got rid of the gardener."

Goudge gave Broughton notice to quit and brought an action for possession, and Broughton pleaded the Rent Acts. The county court judge made an order for possession. To do so he must have found that Goudge before he let to Broughton was in actual possession, through or in spite of the gardener, who was a licensee, tenant at will, or trespasser, and who anyhow was not there on terms that he paid rent, and that the cottage was, therefore, decontrolled. The Divisional Court reversed this, on the ground taken in *Cohen v. Gold* (1) that the plaintiff could not be a "landlord" who had obtained actual possession, for if he did so obtain possession it was when the cottage had never been let, and, therefore, he could not be a "landlord." Holding this, the court did not decide the point about the gardener, though I think *SALTER, J.*'s judgment shows that he would either have held Goudge to have possession through the gardener or the finding of the county court judge to be one of fact with which he could not interfere. I take the same view of this point. I think there was evidence on which the judge could find that the owner was in actual possession through the tenant at will or licensee. In *Remon v. City of London Real Property Co.* (13), I said, and I think it has been accepted, that the decision with regard to statutory tenants only applies to cases where there was a previous legal letting and legal tenancy, and does not extend to caretakers, occupiers by service, and mere trespassers. I should have made the same finding as the judge. That being so, Goudge was in actual possession after the passing of the Act of 1923, and the premises became decontrolled, for, in my view, it was not necessary that they should have been previously let to make the plaintiff a "landlord" within the meaning of the Act, which is the decision in *Cohen v. Gold* (1) on which the Divisional Court proceeded. I think that decision and the decision in the present case cannot stand. The appeal must be allowed and the judgment of the county court restored, with costs here and below.

SIMSON v. MIATT

In this case one Miller was a tenant of a dwelling-house under a long lease at £10 a year, and he let the house to Simson at £60 a year. During this time Simson let four rooms on the top floor and a room on the ground floor to Mitchell. In 1922 Mitchell went out and Simson, as tenant to Miller, was in possession of the whole house. In December, 1925, Simson purchased from Miller the unexpired portion of the lease, being then in possession of the whole house as tenant under the long lease. In April, 1926, Simson let to Miatt three out of the four rooms on the top floor. Miatt did not pay his rent. Simson, therefore, took out a summons for possession. Miatt replied with a summons for apportionment. The county court judge, in a careful judgment, held that Simson was always a tenant and never a "landlord," and that the premises were not, therefore, decontrolled. It is, I think, clear that the point under the Act of 1920, s. 12 (7), was taken before him, for he talks of Miller as a lessee at a ground rent having no landlord, and Simson having no landlord after the assignment in 1925. But it follows, in my view, that Simson was then a landlord in actual possession by virtue of sub-s. (7), and that the house was, therefore, decontrolled. The Divisional Court, without expressing any opinion on this point, held, following *Lloyd v. Cook* ([1928] 2 K.B. 364), that as the three rooms let to Miatt had never been let before, Simson did not come into possession of them as landlord. I have already held that *Lloyd v. Cook* was wrongly decided. It follows that the reason of the Divisional Court for supporting the judgment was erroneous. But, in my opinion, the county court judge did not give the proper effect to the fact that Simson was tenant under a long lease at a ground rent. He should have treated Simson after 1925 as a landlord in actual possession. Section 2 of the Act of 1923 then decontrolled the premises, and Miatt had no right to a summons for apportionment. The premises were decontrolled before he omitted to pay his rent, for the actual possession obtained by Simson was not for non-payment of rent. The judgment of the county court was, therefore, erroneous, and the judgment of the Divisional Court supporting it was also based on erroneous reasons. The appeal must, therefore, be allowed, and judgment given for possession, and the summons for apportionment dismissed.

BARTRAM v. BROWN

The facts in this case are very complicated. Brown, the landlord, was sued for levying a distress without the leave of the court, and replied that the premises had become decontrolled (i) by his being in actual possession after 1923; (ii) by his having granted two long leases (a) to one Griss, and (b) to one Redman, thus decontrolling the premises under sub-s. (2) of s. 2 of the Act of 1923. The county court judge held: (i) That the landlord had never obtained actual possession; (ii) that under sub-s. (2) the lease must be granted to the "sitting tenant," a tenant then in actual possession, and not to a fresh tenant. The Divisional Court affirmed him in both points. I have come to the same conclusion. With regard to the point of actual possession, without going into the complicated facts, I cannot find a time after July, 1923, when Brown was in actual possession. A certain Mrs. Simpson remained in possession of some rooms during the whole period, paying rent to various people, including Brown. Brown had carried on a butcher's business there and withdrawn from it, and never seems to have come near the place, except for a casual inspection. He granted long leases to Griss and Redman, both of whom disappeared. Mrs. Simpson remained a tenant through all the changes in the history of the house. On the second point, I think the object of the subsection was to allow the change from a tenant under the Acts to a tenant under contract, who had as much contractual protection as he would get under the Acts to decontrol the house. If a long lease was being granted to a new tenant, decontrol could be effected under s. 2 (1) of the Act of 1923, by the landlord's entering into actual possession before he granted the new lease, without any need for sub-s. (2). If there were a sitting tenant "the tenant," he could not be dealt with in this way, and sub-s. (2) was necessary. The whole aim of s. 2 of the Act of 1923, in my opinion, was to accelerate decontrol, if vested interests were extinguished as provided for. The appeal must be dismissed with costs.

BARKER v. HUTSON

The facts of this case are simple. In 1926 the owners were in actual possession of a dwelling-house, 3, Oxford Road, Ealing, and on Dec. 25, 1926, they let it to Barker, the present plaintiff and appellant. In May, 1927, Barker sub-let two rooms to Hutson, the present defendant and respondent. Barker gave Hutson notice to quit. Hutson replied that the rooms were under the Rent Restrictions Acts, and asked for apportionment. The county court judge, following *Cohen v. Gold* (1), and finding that the two rooms had never been let as a separate dwelling-house before, decided in favour of the tenant. The Divisional Court, hearing the case after *Lloyd v. Cook* had been decided, followed the two previous cases and dismissed the appeal. In my view, when the freeholders were in actual possession after July, 1923, the whole house became decontrolled. Control did not revive in the letting of the whole house to Barker, or the two rooms to Hutson. The appeal must be allowed, the judgment of the county court judge set aside, and an order made for possession and mesne profits at 17s. 6d. a week from Nov. 21, 1927. The plaintiff must have the costs here and below. The order of the judge for apportionment cannot stand.

GREER, L.J.—It will be seen when I read my judgment, that, although I agree in the result in all these five cases, I do not agree with my Lord with regard to the grounds on which the decision is put, and, unfortunately, the grounds for the decision seem to me to be more important than the decision in each of these cases. Therefore, I think it necessary to read a separate judgment.

In order to deal with the questions arising in these cases, it is necessary to consider two questions arising on the construction of s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923. The first question is whether, when the Act has ceased to apply to the whole of a dwelling-house, it becomes re-applied to parts of the dwelling-house subsequently let, which have never been the subject-matter of a separate letting before. The second question is whether a house can become decontrolled if the landlord of the tenant, who is the occupying tenant at the time when the question arises, is able to

prove that he was in possession of the whole of the dwelling-house at the time of the passing of the Act of 1923—July 31, 1923. A

The first question involves a decision whether *Cohen v. Gold* (1), followed by *Lloyd v. Cook* ([1928] 2 K.B. 364), on the one hand, or *Ratkinsky v. Jacobs* (2) on the other hand, was rightly decided. On this question I have come to the conclusion that once the whole of a dwelling-house, to which the Act applies, has become decontrolled, the decontrol affects every part of the dwelling-house, whether such part has or has not been previously let. It has been decided by this court that where the whole of a dwelling-house is let on Aug. 3, 1914, that is a letting of every part of the dwelling-house, and a subsequent letting of part of the dwelling-house is not, within the Act, the first letting of such part: *Sutton v. Begley* (14). For the purpose of deciding when the separate part was first let, the rule that the whole includes the part has thus been applied by the court. I think that the same rule should equally apply when the question is whether the decontrol of the whole is a decontrol of all the parts. Since the decision in *Barrett v. Hardy Bros. (Alnwick), Ltd.* (15), it has always been considered that the Rent Restrictions Acts operate in rem, by attaching to a dwelling-house a standard rent which applies to the whole house, and, where necessary, also applies by apportionment to every part. In my judgment, when, by reason of s. 2 of the Act of 1923, the standard rent no longer applies to the whole house, an apportioned part of it also ceases to apply to each and every part whether such part has ever been separately let or not. I think the decisions in *Cohen v. Gold* (1) and *Lloyd v. Cook* were not right, and that *Ratkinsky v. Jacobs* (2) was correctly decided. B C D

The other question with regard to the meaning of "landlord," in s. 2 of the Act of 1923, is one of great difficulty. It seems quite clear that neither in the Act of 1920 nor in that of 1923 is the word used in the technical sense of a person between whom and the tenant a contractual relationship of landlord and tenant exists. An occupying tenant only requires the protection of s. 5 of the Act of 1920 when his position as tenant under his contract is determined, and it is impossible to read that section without seeing that the landlord referred to in many of the subsections is the immediate landlord of the occupying tenant. For example, the landlord referred to in sub-s. (1) (c) [as substituted by s. 4 of the Act of 1923] is the landlord who has received a notice to quit from his tenant. This clearly means the immediate landlord of the occupying tenant, he being the only person to whom such notice could be given. It also seems clear that if such an immediate landlord required the dwelling-house for occupation as a residence for himself within sub-s. (1) (d), he would be the landlord for the purposes of that subsection. It has been held, and I think rightly held, in Scotland, that "landlord" in sub-s. (1) (f) includes a tenant who has sub-let. It seems clear also that under sub-s. (1) (i) "landlord" must include a landlord who is himself a tenant, if he is the employer in whose employment the tenant therein referred to was. In my judgment, the effect of s. 2 of the Act of 1923 is to add to the various circumstances which, under s. 5 of the Act of 1920, permit an order for possession to be made, and that "landlord" in that section includes any person who, but for the provisions of the Act of 1920, would be entitled to say to the occupying tenant: "Your tenancy has come to an end. Hand over the premises to me." E F G H

In my opinion, s. 2 of the Act of 1923 provides that where a person claiming that the contract of tenancy between him and the occupying tenant has come to an end can prove to the court that he was in possession of the whole of the dwelling-house on July 31, 1923, or, subsequently to that date came into possession thereof, he establishes the decontrol of the house, and he is entitled to succeed in his claim for possession against the occupying tenant. Once this state of things is proved, the Act is repealed so far as that house is concerned. I read the proviso as creating an exception in a case where the dwelling-house which is the subject-matter of the dispute is part of a larger dwelling-house, enacting that in such a case the smaller dwelling-house shall not be decontrolled. I take the same view of the second subsection of s. 2, and, indeed, with reference to this subsection, the case seems even clearer than with reference to sub-s. (1), because, as has been decided, and I think rightly, the tenant therein referred to is the sitting tenant, and the only person who could, in ordinary circumstances, I

A grant to the sitting tenant a further lease for two years is his immediate landlord. In most cases the freeholder with a tenant whose lease is still in operation would have no say in the question whether or not a two years' lease should be granted to the sitting tenant; the latter's tenancy is a tenancy between him and his immediate landlord. I think the construction of the Act of 1923 that has commended itself to me is one which carries out the probable intention of the Acts of Parliament gradually to bring about the decontrol of property which was controlled for reasons which no longer apply.

B It seems quite clear that the word "landlord" in s. 5 of the Act of 1920 cannot mean landlord in the ordinary accepted meaning of the word. The section is dealing with cases in which the tenancy at common law has come to an end. There is no longer a contractual landlord and a contractual tenant. The person claiming possession from the occupying tenant is his ex-landlord. The word "landlord" is used in the sense of C the person, be he himself a freeholder or a leaseholder, who is the ex-landlord of the occupying tenant. Section 5 gives to the tenant the absolute right to remain in possession notwithstanding the expiry of his tenancy, unless his ex-landlord can bring the case within one or other of the sub-clauses of the section. If he cannot do so, the ex-landlord is turned into a statutory landlord; if he does so, the court may make an order for possession. The matter will be made clearer by considering a concrete case. A. is D the freeholder. He has let the whole of a dwelling-house at a rack rent for twenty-one years to B. B., after occupying for seven years, has lawfully sub-let on an annual tenancy to C., and has duly given him notice to quit, and after the notice has expired brings an action for possession in the county court. He proves that he let the house to C. as part of the terms of his employment of C., and claims the benefit of sub-s. (1) (i). The court has a discretion to make an order for possession under that subsection. E leaseholder has himself duly performed all the terms of his subsisting lease from the freeholder. The freeholder is therefore out of the picture so far as the facts are concerned which the county court judge has to consider. It seems impossible to hold that the long leaseholder is not the landlord of the occupying tenant within the purview of s. 5 (1) (i). So, if B., instead of being the original lessee of A., had bought the lease, and in other respects complied with sub-s. (1) (f), it would be difficult to hold that he F was not the landlord within the meaning of sub-s. (1) (f). Similar considerations lead to a similar conclusion in any case where the immediate landlord of the occupying tenant can bring his case for possession within sub-s. (1) (g).

In considering the construction of s. 2 of the Act of 1923, it seems necessary to consider the effect of sub-s. (7) of s. 12 of the Act of 1920. It has been suggested that, but for this subsection, the term "landlord" would in all cases mean the freeholder. G In my judgment, the subsection has no such effect. I think it was inserted to prevent an occupying tenant, under a lease from the ground landlord or any other landlord who had let the premises to him for any reason at a rent less than two-thirds of the rateable value, from saying after the expiration of the lease that he was entitled to retain possession so long as he paid that rent, and not for the purpose of preventing him from being considered the landlord in a case where his lessee had let the house at H a rack rent to the occupying tenant. I think the landlord, under s. 5, is in every case the ex-landlord of the occupying tenant who is seeking an order for possession. The considerations I have been dealing with affecting the meaning of the word "landlord" in s. 5 of the Act of 1920 seem to me equally to apply to the question arising in one of these cases with regard to the meaning of "landlord" in s. 2 of the Act of 1923, which by s. 4 has to be read as one with the Act of 1920—that is, as if it were contained in a I section of that Act.

In my judgment, the word "landlord" in s. 2 of the Act of 1923 means the same person as it means in s. 5 of the Act of 1920—that is to say, the person who, being an ex-landlord of the occupying tenant, is asking for possession of the tenement on the determination of the contractual tenancy. Where such an ex-landlord can prove that he was in possession of the whole of the dwelling-house either at the date of the passing of the Act of 1923—July 31, 1923—or since that date, the 1920 Act ceases to apply to that dwelling-house, and to every part of it, and the court is bound to consider such a person's claim for possession or increased rent, independently of the Act of 1920.

Once these facts are proved, the whole of the dwelling-house passes for ever out of the purview of the Act. It is "decontrolled"—to use a convenient word—not merely as between that landlord and that tenant, but for all purposes. If there be an outstanding tenancy between the freeholder and the occupying tenant's landlord, the rights of the parties to that tenancy agreement are put outside the Act, and they are for the future to be regulated by the subsisting agreement. The mesne landlord who has himself been freed from the restrictions of the Act is himself disentitled to claim its protection when his own landlord becomes by contract or at common law entitled to possession. I myself cannot see that this result is unreasonable or unfair. A mesne landlord who has himself obtained release from the shackles of the Act has no grievance if the facts which entitled him to such release operate in favour of his superior landlord or landlords. I read the proviso not as an explanation of the meaning of the substantive parts of s. 2, but as an exception to it. I think if it had not been there a mesne landlord who had let part of a house as a separate dwelling-house, and could prove that he was in possession of that part on July 31, 1923, would have been entitled to say that the part dwelling-house was decontrolled. The proviso was put in to prevent the tenant of a whole dwelling-house which had not been decontrolled from profiteering with regard to part of the dwelling-house, while his immediate landlord remained subject to control, while the latter part of the proviso was inserted to enable his immediate landlord, if he got into possession of the rest of the house, to say that at any rate that part was decontrolled. I am confirmed in my view of the meaning of "landlord" in the first subsection of s. 2 by considering the provisions of the second subsection. It seems to me impossible to apply this section if "landlord" means the freeholder, where such freeholder is not the immediate landlord of the occupying or "sitting" tenant as he has been conveniently called. So long as the mesne landlord has committed no breach of the head lease entitling the freeholder to possession as against him, the only person who could grant a two years' lease to the sitting tenant is his immediate landlord, and if the term "landlord" in this subsection means the ex-landlord of the sitting tenant, I think that in the first subsection it must also mean the ex-landlord of the sitting tenant, even where he is himself a lessee of a superior landlord. In my opinion, there are no decisions of this court that bind me to come to a different conclusion from that which I have expressed above.

In *Glossop v. Ashley* (16) it was held by SCRUTTON, L.J., that there can only be one standard rent of a house to which the Act applies, and by the whole court that the rent to be considered as the standard rent of the material dwelling-house was the rent at which it was let by a lessee to an occupying tenant on Aug. 3, 1914, and not the rent at which it was let by the freeholder to the leaseholder. This decision, though not directly in point, seems to me to support my view with regard to the meaning of the Acts of 1920 and 1923. As I have already pointed out, it has always been considered, and I think rightly considered, that the Rent Restrictions Acts operate in rem, and not in personam, and it follows that the res in question, the whole house is let, is not the tenancy agreement but the whole material thing—the house and every part of it.

The only case that has occasioned me some difficulty is *Brooks v. Liffen* (3), affirmed in the Court of Appeal, but I do not think that it really touches the point under consideration in these cases. The person in possession in that case at the material date was not a landlord and had never become a landlord at the time the question arose. He was never a person who had obtained freedom from the restrictions of the Act, and, therefore, his landlord could not say that he, the landlord, had also obtained such freedom. The position would have been different, in my judgment, if after obtaining possession the tenant sub-let and was claiming possession from the sub-lessee. Then the house would have been decontrolled for all purposes. If this is regarded as an odd or anomalous result of the Rent Restrictions Acts, it would certainly not be the only one, and I cannot see in it any good reason why I should reject a construction of the Act which, for the reasons I have stated, appeals to me as the right construction.

The only other part of the Act of 1923 to be considered is s. 3, which defines "possession" as meaning actual possession. The distinction between actual possession and

A the right to possess will be found to determine one of these appeals. My view of the meaning of sub-s. (1) of s. 2 of the Act of 1923 is in accord with the opinion of TALBOT, J., in *Brooks v. Liffen* (3), when before the Divisional Court, and the opinion of MACKINNON, J., in *Ratkinsky's Case* (2) in one part of his judgment. In the former case TALBOT, J., said ([1928] 1 K.B. at p. 444):

B "The object of the section is to confer certain rights on a man who is a landlord at the time when the question of his position as against a tenant arises, if he can show that he was in possession of, or took possession of, the dwelling-house at either of the times specified in the subsection."

In *Ratkinsky v. Jacobs* (2) MACKINNON, J., says (138 L.T. at p. 742):

C "It appears to me quite clear that the words 'landlord' and 'tenant' are not used in the section in any technical sense . . . for the purpose of s. 2 (1) of the Act of 1923, the words meant the owner of the premises or one of the parties to the litigation contemplated by s. 5 of the principal Act of 1920."

It follows that the judgment in *Jenkinson v. Wright* (5) was right, and that *Finney v. Gougoltz* (4) was rightly decided.

D I now proceed to apply the above construction of s. 2 of the Act of 1923 to the five cases which we have to decide.

In *Lloyd v. Cook*, a lessee for ninety-nine years came into possession of the whole of a house, No. 14, Eversholt Street, Camden Town, on Aug. 12, 1926. She subsequently let two of the rooms, which were part of three rooms that had, before she took possession, been separately let. There was no evidence that Mrs. Cook's rent under her lease was less than two-thirds of the rateable value. It was held by the Divisional Court that, though the whole house had been decontrolled, the dwelling-house comprised by the three rooms had not. In my judgment, this decision is wrong. The decontrol applies, in my view, to the whole house, and to every part of it. Once there has been decontrol of the whole house, the Act is repealed with regard to it. This appeal should be allowed with costs.

F In *Goudge v. Broughton* a freeholder by assignment obtained possession of a cottage and then let it to a tenant. It had never been previously let. The county court judge held that the cottage had come into the actual possession of the freeholder after the Act of 1923 was passed. The cottage had never been previously let, but had been occupied by the licensee of the previous owner. The freeholder gave notice to quit in accordance with the terms of the defendant's oral tenancy agreement. The county court judge held that the cottage had been decontrolled, and made an order for possession. The Divisional Court reversed this finding. In my judgment, the county court judge was right, and ought not to have been reversed. The plaintiff was the landlord for the purposes of the Act. If the Act of 1923 had never been passed, he would have been a landlord seeking possession of his property, and liable to be defeated by s. 5 of the Act of 1920. As I have indicated, I think he is the person referred to as "landlord" in s. 2 (1) of the Act of 1923, and, having been in actual possession of the cottage since the passing of the Act, he was entitled to say that the cottage had been decontrolled. This appeal should be allowed with costs here and below.

I In *Simson v. Miatt* the facts have been conveniently summarised by SCRUTTON, L.J. Until Dec. 6, 1925, the plaintiff occupied, as tenant to Miller, at £60 a year. On that date he bought Miller's long lease, and was then in possession under the long lease, a lease which came within sub-s. (7) of s. 12 of the Act of 1920, and could, therefore, be ignored. On April 17, 1926, he became the landlord of three rooms, which he let to Miatt. If I am right with regard to the meaning of "landlord" in s. 2 of the Act of 1923, he was a landlord who, having been in possession of the whole house since July, 1923, would be entitled to say that the house was outside the Act, and he was, therefore, entitled to recover possession. I think this appeal should also be allowed.

Bartram v. Brown was an action for damages for illegal distress. The distress was made without the leave of the court required by s. 6 of the Act of 1920. The question was whether, on the proved facts, the Act of 1920 had ceased to apply. The county

court judge found that the defendant had never been in actual possession of the house, or any part of it that was let to the plaintiff, therefore it could not be said that the house was decontrolled, and gave judgment for damages, agreed at £35, against the defendant. This judgment was affirmed, and I agree that this appeal should be dismissed with costs. A

In *Barker v. Hutson* the freeholder was in possession of No. 3, Oxford Road, Ealing, a previous statutory tenant having given up possession. The freeholder let the whole house to the plaintiff, who then sub-let two rooms to the defendant. He gave the defendant due notice to quit. The defendant refused to quit, and claimed apportionment. The judge, following *Cohen v. Gold* (1), held that the dwelling-house consisting of the two rooms never having been previously let, they were not decontrolled, and the Act still applied to them. His judgment was affirmed. As already indicated, my view is that the whole house was decontrolled by the possession obtained by the defendant's landlord, the plaintiff, and the judgment of the Divisional Court should be reversed, with costs here and below. B C

SANKEY, L.J.—As in every case I have reached the same result as my Lord and GREER, L.J., have, I propose, without recapitulating the facts at length, to state as briefly as possible the reasons which have led me to my conclusions. My reasons are the same as those which have commended themselves to GREER, L.J. D

These cases in a variety of ways involve the proper construction of the decontrolling section, namely, s. 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. There have been numerous decisions upon the meaning of this puzzling subsection, some of which are in direct conflict with others. In all these cases, however, it is important to ascertain the facts carefully before endeavouring to apply the law to them. The effect of the decontrolling section is to exclude certain dwelling-houses from the application of the principal Act of 1920 in certain events—in other words, to set them free from control. E

The legislature might have done nothing upon the question of decontrol. It might have repealed the Act and removed the control altogether, but it appears to have taken a middle course, possibly with the object of effecting decontrol gradually, possibly with the object of protecting the sitting tenant, and possibly, too, with the object of decontrolling where the landlord, who for the moment may be called the occupying landlord, has got into actual possession, subject to the proviso contained in s. 2 that where a tenant has sub-let a part of his dwelling-house, but has got into possession of that part, that part does not thereby become decontrolled, the desire being to prevent a tenant profiteering by a sub-tenancy at a time when his own landlord is prevented by the Act from doing so. It is to be observed that s. 12 (2) of the principal Act of 1920 applies to a house or part of a house let as a separate dwelling. Section 12 (1) (f) and (g) defines the expressions “landlord” and “tenant,” although it must be noticed that, as the language there used is that the expression “landlord” includes the person there referred to, it is not an exclusive, but an inclusive definition. Section 12 (7), which creates the greatest difficulty, makes the Act apply to certain dwelling-houses as if a certain tenancy had never existed, and s. 4 of the 1923 Act says that that Act is to be construed as one with the principal Act. It must be taken now that the Act operates in rem and not in personam: see remarks of SARGANT, J., when sitting in the Court of Appeal, in *Prout v. Hunter* (6). The decontrolling section—s. 2 of the Act of 1923—effects its object, broadly speaking, by saying that where after the passing of the Act—that is to say, after July 31, 1923—the landlord gets into possession of the whole of the dwelling-house—sub-s. (1), subject to the proviso—or grants to the tenant a valid lease for a certain term—sub-s. (2)—the house becomes decontrolled. Sub-section (3) defines possession as meaning actual possession. F G H I

The way, however, in which the section is drafted, coupled with the very puzzling s. 12 (7) of the 1920 Act, makes a logical interpretation of the Act almost impossible, and it becomes necessary to see what is the real meaning of the word “landlord” as used in the section. I am forced to the conclusion that the meaning of the word must to some extent be governed by the context in which it is used and the circumstances

A under consideration. In my view, the draftsman was considering the position at the time at which, in the particular case, a question arose for determination, and what the parties to an action would have to prove to establish their rights. The word "landlord" in s. 2 (1) must be loosely used because, strictly speaking, there cannot be a landlord without a tenant and a tenure, and the subsection deals with a case where there is neither tenant nor landlord: see *Brooks v. Liffen* (3). I cannot think that the word "landlord," when used in the section, always means the freeholder, or a person who has a tenant. I agree with the view expressed by MACKINNON, J., in *Ratkinsky v. Jacobs* (2) (138 L.T. at p. 742):

C "In my opinion the highly technical meaning placed on the word 'landlord' in *Cohen v. Gold* (1) is wrong, and that for the purpose of s. 2 (1) of the Act of 1923, the words meant the owner of the premises or one of the two parties to the litigation contemplated by s. 5 of the principal Act of 1920 . . . the landlord was in possession of one of those rooms and came into possession of the others after the passing of the Act; the Act therefore ceases to apply."

D The word may include, in certain circumstances, the freeholder. It may include a person who is tenant to the freeholder, for such a person may be the landlord of some sub-tenant. You must look at the relationship which exists between the two parties to the action and see whether one stands in the relation of tenant to the other. For example, supposing A. lets to B., and B. sub-lets to C. In an action between A. and B., A. is the landlord. In an action between B. and C., B. is the landlord. I am of opinion that "landlord" may be any person who, since Aug. 3, 1914, has let or has been entitled to let conditionally or unconditionally a dwelling-house to which the Act applies, or any part thereof.

E Discussing the cases under appeal, it is convenient to deal with several of those which have already been decided, and chiefly with *Cohen v. Gold* (1). In my view, that case was wrongly decided, and should be overruled. The learned judge (ACTON, J.) is reported to have said during the course of the argument in that case:

F "How can you say that the plaintiff was landlord of his dwelling-house at the passing of the Act of 1923, when there was no tenancy existing?"

G The decision proceeds upon that ground. In my opinion, the plaintiff in that case was the landlord of the dwelling-house, he did come into actual possession of it and the premises did become decontrolled, and he should have been entitled to succeed. I agree with the decision of BRANSON, J., and MACKINNON, J., in *Ratkinsky v. Jacobs* (2), and I think that case was rightly decided and on proper reasoning. I think, too, that the judgment of DARLING, J., in *Jenkinson v. Wright* (5) is correct.

I now propose to deal in detail with each of the cases under appeal.

H *Goudge v. Broughton*.—In this case the plaintiff brought his action for possession. The learned county court judge found as a fact that the plaintiff did get actual possession of the premises. There was evidence upon which he could so find. The Divisional Court reversed that decision, SALTER, J., saying:

"We must hold, on the authority of *Cohen v. Gold* (1), that the plaintiff failed in showing that he was landlord of the premises,"

I and reversed the decision of the county court judge. Being of opinion that *Cohen v. Gold* (1) is wrong, I come to the conclusion that the plaintiff did get into actual possession, that he was the landlord, that the premises did become decontrolled, and that therefore the decision of the Divisional Court should be reversed.

With regard to *Lloyd v. Cook*, the learned judge in the county court held that the dwelling-house, consisting of two rooms let to Lloyd, had become decontrolled by reason of having been in the actual possession of Mrs. Cook between the time when Churchman vacated the rooms and Lloyd came in. The Divisional Court reversed this decision, relying on the authority of *Cohen v. Gold* (1). I think in this case also the decision of the Divisional Court must be set aside. It must be remembered with regard to this case that an appellant cannot succeed upon a point not taken before the county court judge.

In *Simson v. Miatt* the facts were of a complicated character, and it is not easy to follow exactly what took place in the county court, but, in my view, the county court judge omitted to consider the effect of sub-s. (7) of s. 12 of the 1920 Act. The long lease of Miller must be disregarded; the plaintiff was a landlord within the meaning of s. 2 of the 1923 Act, and had been in actual possession of the dwelling-house since July 31, 1923. The house, therefore, was decontrolled, and the plaintiff was entitled to judgment. The appeal should be allowed.

In *Bartram v. Brown* the facts again were complicated. I am of opinion that that case was rightly decided. The word "tenant" in s. 2 (2) of the Act of 1923 must, in my view, refer to the particular person who is the tenant at the time when the lease referred to in the subsection is granted, and to no other person. In this case, again, the question was one of fact, for the county court judge, upon which I do not think he in any way misdirected himself. He was entitled to find and did find that Brown never came into actual possession of the whole of the dwelling-house, and therefore the premises did not become decontrolled. Mrs. Simpson was not there merely by leave and licence. There is evidence she paid rent.

In *Barker v. Hutson* the plaintiff, as landlord, brought an action for possession. There was a cross-summons for apportionment. The learned judge, acting on the authority of *Cohen v. Gold* (1), said:

"The dwelling-house the subject of these proceedings, namely, the two rooms let to the defendant, had never previously been separately let—that first became a separate dwelling on such letting to the defendant and no one quâ landlord has since had or recovered possession of the premises. The case of *Cohen v. Gold* (1) applies."

The following facts, however, were proved. The plaintiff took a tenancy of two years from December, 1926, from the freeholders of the premises who were at that time in possession of the house. Previously to that a Mrs. Eldridge had been in possession as statutory tenant and had given up possession to the landlord. The judge's judgment is very brief, probably quite rightly, as he says that as far as he was concerned he was bound to say that the case was concluded by *Cohen v. Gold* (1). The Divisional Court upheld the judgment upon the same ground, and for reasons already given the appeal must be allowed and judgment entered for the appellant.

Solicitors: *E. M. Tringham*; *A' Deane Gent Wood*; *George Brown, Son & Vardy*, for *Bacon, Phillips & Pringle*, Redhill; *Westbury, Preston & Stavridi*, for *Grece & Patten*, Redhill; *William Bird*; *A' Deane Gent Wood*, *Alfred Double & Sons*; *Henneker, Rance & Co.*; *Lambert & Hale*, for *Lambert, Hale & Proctor*, Ealing; *A' Deane Gent Wood*.

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

STATHAM v. STATHAM

[COURT OF APPEAL (Lord Hanworth, M.R., Greer and Russell, L.J.J.), November 9, 12, 13, 14, 15, December 3, 1928]

[Reported [1929] P. 131; 98 L.J.P. 113; 140 L.T. 292;
45 T.L.R. 127; 72 Sol. Jo. 847]

Divorce—Cruelty—Filthy sexual practices—Solicitation thereto—Need to prove danger to petitioner's health.

Divorce—Sodomy—Proof—Degree of evidence required—Need of corroboration—Warning to jury of acting on uncorroborated evidence.

Where a wife petitions for divorce on the ground that her husband has been guilty of sodomy with her cogent evidence is required to overcome the presumption that the husband is innocent. The same principles apply in such divorce proceedings as those which apply on the trial of a charge of sodomy in a criminal court. The fact must be proved beyond reasonable doubt with due and cautious consideration of the witnesses and their evidence, and the judge must warn the jury of the gravity of returning a verdict in favour of the wife on such a ground in the absence of evidence to corroborate her story in some material particular tending to show that her husband had committed the offence. Notwithstanding the warning the jury may find for the wife, but if no warning is given and they do so their verdict may be set aside.

In her petition for divorce a wife alleged that the husband had treated her with cruelty by, inter alia, indulging in filthy sexual practices with her and soliciting her thereto.

Held: commission of these acts did not amount to cruelty per se, and so would not constitute legal cruelty in the absence of proof that owing to them the wife had been exposed to danger to life, limb, or health, bodily or mental, or reasonable apprehension of it: see *Russell v. Russell*, per LOPES, L.J. (1), [1895] P. 315, 322.

Notes. Sections 176, 178, and 185 of the Supreme Court of Judicature (Consolidation) Act, 1925, were repealed by the Matrimonial Causes Act, 1950 (see 29 HALSBURY'S STATUTES (2nd Edn.) 388). See now ss. 1, 4, and 14 of the later Act.

Considered: *D. B. v. W. B.*, [1935] P. 80; *Fairman v. Fairman*, [1949] 1 All E.R. 938; *Galler v. Galler*, [1954] 1 All E.R. 536. Distinguished: *Lawson v. Lawson*, [1955] 1 All E.R. 341. Considered: *Marczuk v. Marczuk*, [1956] 1 All E.R. 657. Referred to: *Perry v. Perry*, [1952] 1 All E.R. 1076.

As to the matrimonial offence of cruelty, see 12 HALSBURY'S LAWS (3rd Edn.) 269 et seq.; and as to that of sodomy see *ibid.*, 281–283. For cases see 27 DIGEST (Repl.) 293 et seq., and 332, 333.

Cases referred to:

- (1) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; 44 W.R. 213; 11 T.L.R. 579; 39 Sol. Jo. 722, C.A.; on appeal, [1897] A.C. 395; 77 L.T. 249, H.L.; 27 Digest 356, 2948.
- (2) *N—— v. N——* (1862), 3 Sw. & Tr. 234; 9 L.T. 265; 9 Jur. N.S. 1203; 164 E.R. 1264; 27 Digest (Repl.) 333, 2765.
- (3) *Thompson v. R.*, [1918] A.C. 221; 87 L.J.Q.B. 478; 118 L.T. 418; 82 J.P. 145; 34 T.L.R. 204; 62 Sol. Jo. 266; 26 Cox, C.C. 189; 13 Cr. App. Rep. 61, H.L.; 14 Digest (Repl.) 405, 3961.
- (4) *R. v. Jellyman* (1838), 8 C. & P. 604; 14 Digest (Repl.) 520, 5036.
- (5) *R. v. Tate*, [1908] 2 K.B. 680; 77 L.J.K.B. 1043; 99 L.T. 620; 72 J.P. 391; 52 Sol. Jo. 699; 21 Cox, C.C. 693; 1 Cr. App. Rep. 39, C.C.A.; 14 Digest (Repl.) 539, 5240.
- (6) *R. v. Baskerville*, [1916] 2 K.B. 658; 86 L.J.K.B. 28; 115 L.T. 453; 80 J.P. 446; 60 Sol. Jo. 696; 25 Cox, C.C. 524; 12 Cr. App. Rep. 81, C.C.A.; 14 Digest (Repl.) 5232.
- (7) *Curtis v. Curtis* (1859), 4 Sw. & Tr. 234; 27 Digest (Repl.) 543, 4908.

- (8) *Moosbrugger v. Moosbrugger*, *Moosbrugger v. Moosbrugger and Martin* (1913), 29 T.L.R. 658; 27 Digest (Repl.) 267, 2146. **A**
- (9) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 25 T.L.R. 29; 53 Sol. Jo. 265, C.A.; 27 Digest (Repl.) 580, 5382.
- (10) *Re Meunier*, [1894] 2 Q.B. 415; 63 L.J.M.C. 198; 71 L.T. 403; 42 W.R. 637; 18 Cox, C.C. 15; 10 R. 400, D.C.; 14 Digest (Repl.) 225, 1878. **B**

Appeal by the husband from the decision of HILL, J., on July 5, 1927, granting the wife a divorce. **C**

The facts are stated in the judgment of the Master of the Rolls.

W. O. Willis, K.C., and *Noel Middleton* for the husband.

Cotes-Predy, K.C., and *Bush James* for the wife.

Cur. adv. vult. **C**

Dec. 3. The following judgments were read.

LORD HANWORTH, M.R.—In this case, on July 5, 1928, after a verdict given by a jury, HILL, J., granted a decree nisi for a divorce upon the petition of the wife. The husband appeals and asks that the petition should be dismissed on the ground that there was no evidence to go to the jury in support of it, or, alternatively, that a new trial should be ordered on the ground of misdirection of the judge. **D**

The relevant facts must be stated. The marriage was solemnised on Feb. 4, 1922, the age of the husband being forty-nine years and that of the wife twenty years. The husband was a big-game hunter, and with his wife started upon an expedition from Portuguese West Africa in March, 1922, which lasted until April, 1923. On their return to England they acquired the Manor House, Loose, near Maidstone, where they lived together as man and wife continuously till July, 1927, except for a visit which they made together to Tunis from December, 1925, to March, 1926, and to Algiers for a few weeks in December, 1926. In July, 1926, there was a temporary quarrel and the wife left the Manor House for a fortnight or thereabouts. In July, 1927, the wife left the house at Loose and did not return. On Aug. 3 the husband wrote to his wife expressing surprise at her departure, and a hope for her return. This was answered on Aug. 9 by the wife's solicitors who charged the husband with cruelty in temper towards, and abuse of, his wife, and asked what terms of separation could be arranged. On Aug. 10 the husband's solicitors gave a denial to these charges and hoped for a reconciliation. On Aug. 19 the wife's solicitors tabulated the charge of cruelty described above, and insisted on a separation. On Aug. 26 the husband wrote to the wife an affectionate letter, while his solicitors repudiated seriatim the charges of cruelty set out in the solicitors' letter of the 19th. Further letters passed. On Sept. 6 the wife's solicitors stated that she would not return, and complained of the husband's conduct as above which had "rendered her life intolerable and seriously affected her nerves." On Sept. 7 the husband's solicitors again asked the wife to return home, and declared that the husband would resist the allegations made against him. On Sept. 15 the wife's solicitors wrote that if an adequate allowance were provided for the wife there would be no necessity for legal proceedings. On the next day the husband's solicitors replied that so long as the wife persisted in her charges the husband would not consider a separation or discuss the matter. On Sept. 22 the wife's solicitors wrote that there were very grave charges which the wife had now reluctantly revealed to her advisers, and in reply the husband's solicitors answered that they were unable to take instructions from the husband as he was to undergo immediately an operation in a nursing home, as in fact he did. While he was thus away from the Manor House the wife and her father paid one or more visits to the house, and brought away from it some books from the husband's shelves, which the wife indicated as containing accounts of depraved vice. Three of the books were in German and one in French. The petition was dated Nov. 2, 1927. It prayed for a divorce founded upon an act of sodomy committed upon the wife on Mar. 12, 1922. It also alleged acts of cruelty which it is unnecessary to specify herein. They may be classed (a) as acts of shameless uncleanness and invitations to a repetition of them, and (b) acts of cruelty more generally known—such as acts of ill-temper, abuse, and the like. The case was tried with a jury before HILL, J., on July 3, 4, and 5, 1928, **E** **F** **G** **H** **I**

A and the verdict given was: (i) That the husband had committed sodomy as alleged. (ii) That the husband had been guilty of cruelty (a) as above. (iii) That the husband had not been guilty of cruelty (b) as above. HILL, J., thereupon made the decree nisi which is appealed from.

B It is obvious that a number of questions of law arise upon the matters and issues raised in the case and upon the result reached. They may be stated as follows: (i) What evidence can be accepted to prove the offence charged? (ii) Was there not condonation? (iii) What proof is required of the cruelty (a), and what amounts to such cruelty? (iv) If proved, do such acts fall within s. 185 of the Supreme Court of Judicature (Consolidation) Act, 1925, and require the court to order a judicial separation?

C First, then, as to the evidence necessary to prove the offence charged. It is quite clear from the authorities cited that cogent evidence is required to overcome the presumption of innocence where such a charge is made. As SIR CRESSWELL CRESSWELL said in *N—— v. N——* (2), (3 Sw. & Tr. at p. 238):

“The crime here imputed is so heinous and so contrary to experience, that it would be most unreasonable to find a verdict of guilty where there is simply oath against oath, without any further evidence, direct or circumstantial, to support the charge.”

D The same principles apply, in my judgment, in divorce proceedings as in a criminal court, for it is the very nature of the charge, easy to make and difficult to repel, which demands such proof as is adequate to establish the guilt of the person charged in the minds of reasonable men. Whatever may be the consequences to the party charged, whether it be, in a criminal court, punishment, or in a civil court, loss of status, the nature of the fact remains the same; and that fact must be proved beyond reasonable doubt with due and cautious consideration of the witnesses and their evidence. As LORD DUNEDIN said in *Thompson v. R.* (3) ([1918] A.C. at p. 226):

“The law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth as to guilt without causing undue prejudice to the prisoner.”

F It is on this ground that the evidence of an accomplice is not accepted simpliciter and without corroboration: see per PATERSON, J., in *R. v. Jellyman* (4); and a conviction may be quashed in a court of appeal where the judge at the trial has omitted to caution the jury against conviction upon the uncorroborated evidence of an accomplice: see *R. v. Tate* (5). Further, that corroboration must be found in some material particulars tending to show that the accused committed the acts charged. It must be evidence which affects the accused by connecting or tending to connect him with the crime: see *R. v. Baskerville* (6).

G In the present case the wife was an accomplice. Furthermore, there is, according to her own story, strong evidence of consent on the part of the wife. Her evidence proves that what was desired was explained to her, and although in its very essence every person must realise that such an act is against nature, she accepted it until she found that it caused her pain. There was no corroborative evidence at the time the crime was committed in March, 1922. The evidence relied upon by means of extracts taken from the German books and laid before the jury was most unsatisfactory. It is unnecessary to deal with the French book separately and there is a dispute as to how it came into the possession of either the husband or the wife. The chain suggested to connect these I extracts with the husband appears to have been that a man who had such books in his possession would be likely to engage in the act or acts charged. The passages that were translated and handed to the jury were passages which gave an account of depraved and filthy conduct and of perverted vice. No evidence was given which connected the husband with those particular extracts. There was some evidence that the husband and wife had discussed the books when they were unpacking them at Loose on their arrival from the Cameroons, where they had been on the shelves of the German quarters occupied by the husband, and that the husband had told the wife the nature of the books and translated some paragraphs in them to establish his description of them.

But there was not any evidence that he had read the passages laid before the jury, or that he had read the books for pleasure, or at all. Those excerpts were such that they could not fail to influence the jury when placed before them at large as evidence against the husband. Further, there was no warning by the judge as to the necessity of corroboration of the wife's evidence upon such a charge apart from her being an accomplice. The warning is not required by any enactment; but the necessity for it is illustrated by the case of *R. v. Tate* (5), although after the warning the jury may feel able, and, if so, are entitled, to accept the evidence actually presented to them without corroboration and give their verdict upon it: see per LORD ALVERSTONE, [1908] 2 K.B. at p. 682, and the cases there referred to; and *R. v. Baskerville* (6), [1916] 2 K.B. at p. 663. The absence of this warning and the loose way in which the extracts from the books were placed before them makes the verdict of the jury, in my judgment, unsatisfactory and I cannot hold that the verdict on this main charge, which is categorically denied by the husband, can stand.

Next as to condonation. After the act charged against the husband the spouses lived and cohabitated for more than five years and during this time lived happily together, for the letters produced reveal both affection and interest in each other. It was thus apparent that there was strong evidence of condonation. It was contended on behalf of the wife that condonation was not pleaded by the husband. This omission was for reasons which are obvious. None the less, in my judgment, it is the duty of the court to take it into consideration as a matter of law, and this was the decision of the full court which was presided over by LORD CAMPBELL, C.J., and included MARTIN, B., in *Curtis v. Curtis* (7). This decision was followed in *Moosbrugger v. Moosbrugger* (8), where SIR SAMUEL EVANS, P., dealt with the question of condonation as one of law for the judge to decide, whether or not it had been pleaded, for the court has a duty to the public in matters of divorce and not merely to the parties before it: see *Harriman v. Harriman* (9). [And see now Matrimonial Causes Act, 1950, s. 4 (1).] Upon the facts of this case it is clear in my mind that there was condonation which cannot be overlooked, and such condonation as would operate to wipe out all the facts charged right down to the final rupture in July, 1927, except for one answer made by the wife in her evidence as to cruelty (a) which was relied upon to revive the charge of sodomy: "(Q.) I want to find out if you can tell me up to how long before you finally left your husband in July, 1927, were these revolting suggestions made, how long before you left? (A.) Up to just before I left." No question was put to the jury in reference to this evidence, for instance, whether these "suggestions" were the cause of her departure. It must be observed, too, as appears from the letters that I have referred to, that no charge in respect of these matters was made until a separation accompanied with adequate provision for the wife was definitely refused by the husband who demanded that the charges of cruelty (b) should first be withdrawn.

Next as to the cruelty. Cruelty (b) was negated by the jury. The judge rightly directed them in law upon that matter in accordance with the definition of legal cruelty laid down by LOPES, L.J., in *Russell v. Russell* (1) ([1895] P. at p. 322): "There must be danger to life, limb or health, bodily or mental or a reasonable apprehension of it." We cannot find any such direction in reference to cruelty (a). There is a passage in the summing-up which may have been intended to embrace both cruelty (a) as well as cruelty (b); but it is not clear that it does so. In view of the explicit statement previously made by the judge:

"Short of that (consent, not mere submission), in my view the doing of these acts or the solicitation of a wife who is not herself a willing actor in the matter, is cruelty,"

it is difficult not to think that there may have appeared to the minds of the jury to be a differentiation indicated by the judge between cruelty (a) and cruelty (b), namely, that whereas in the latter injury to health was an essential ingredient it was not so in the former. Yet, in my judgment, the definition given above must be satisfied as well in respect of both classes of cruelty. This is clear from the judgments in *Russell v. Russell* (1). Without evidence of danger to health, or of reasonable apprehension of it,

A legal cruelty is not established. It must be added that the evidence of ill-health or of danger to health is vague and inconclusive. It is not proved by the doctors called, and the verdict of the jury on the question of cruelty (b) coincides with this failure of proof. It is unfortunate that a close examination of the summing-up of so careful a judge as HILL, J., reveals these omissions. They are, however, important, more particularly in a case which entails such overwhelming results to the husband, if the charges are established. These involve not only the consequent divorce from his wife, but also the conviction of a crime of a peculiarly nauseous character.

Upon a review of the whole of the charges made, apart from the omissions in the summing-up which have been pointed out, I think the evidence upon which they were put before the jury, evidence which went to the very root of the case, was not only unsatisfactory but unsound. It is, therefore, not possible to accept the verdict and the question of making any order under s. 185 of the Supreme Court of Judicature (Consolidation) Act, 1925, does not arise. There remains the question whether there ought to be a new trial or whether the petition ought to be dismissed. This is a difficult question. In view, however, of the evidence of the consent of the wife to the act at the time, of the distance of time which separated the act alleged from any charge made in respect of it, the condonation over a long period of time, the doubt whether there is any sure evidence on which the reviver of the charge can be established, the negation of the evidence of cruelty which was the pretext for separation, and the abundant opportunity afforded of collecting all the available and material evidence, I have come to the conclusion that it would not be right upon this evidence to send the case for a new trial and that the right order will be that the petition be dismissed with costs here and below.

E GREER, L.J.—The petitioner in this case, Mrs. Jessie Throsk Statham, petitions in the Divorce Division for a decree that her marriage with the respondent should be dissolved, and for such further or other relief that may be just. By her petition she based her claim on an allegation that, in March, 1922, within a few weeks after their marriage, the husband, by force and against her will, committed sodomy with her, and that he was guilty of various acts of cruelty which she detailed in particulars, and which were of the two kinds mentioned in my Lord's judgment. Before the case came on for trial the questions to be submitted to the jury were, according to the practice of the Divorce Division, settled by the parties. They were: (i) Whether John Charles Barron Statham, the respondent, has committed sodomy on the person of Jessie Throsk Statham, the petitioner. (ii) Whether John Charles Barron Statham, the respondent, has been guilty of cruelty towards Jessie Throsk Statham, the petitioner. These were the only issues raised by the pleadings. It follows that all other questions which the evidence disclosed as necessary for determination were for the judge and not for the jury: see *Moosbrugger v. Moosbrugger* (8). In summing-up the learned judge, HILL, J., asked the jury to deal separately with the charges of cruelty which consisted of sexual malpractices and those which consisted of ill-temper, abusive language, and compulsion to do unsuitable labour, &c. The jury found the allegation of sodomy proved, and the sexual malpractices proved, but they negatived the other alleged acts of cruelty. The husband appeals to this court and asks that the petition should be dismissed with costs on the ground that there was no evidence on which the jury were entitled to decide either of the issues as they did. It is obvious, from the nature of the charges made against the husband, that he could not afford to base his defence on anything but a denial of all the charges against him, especially the charge of sodomy. It is, therefore, not surprising that there is no plea of connivance, and no pleas of condonation in his answer to the petition, but when asked to make a decree of divorce or judicial separation, the court is not confined to the issues raised by the parties, but is bound to consider any facts proved in the course of the case which disentitle the petitioner to the decree for which she asks. Section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides as follows:

“178 (1). On a petition for divorce it shall be the duty of the court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the

petitioner has been accessory to or has connived at or condoned the adultery or not, and also to inquire into any countercharge which is made against the petitioner."

It is curious that this section only speaks of the petitioner being accessory to or conniving at or condoning adultery, that is to say, the cause of divorce mentioned in sub-s. (a) of s. 176, and there is nothing about connivance or condonation of the causes of divorce mentioned in the first part of sub-s. (b), which include sodomy, but it is difficult to suppose that the court is bound to grant a decree for dissolution of marriage to a wife who upon her own evidence has consented to the act of which she complains. [See now s. 4 of the Matrimonial Causes Act, 1950.] The rules with regard to the condonation and connivance as a bar to a decree for divorce were well established in the practice of the ecclesiastical courts before the Act of 1857: see the cases cited in RAYDEN ON DIVORCE (2nd Edn.) 107-110, and especially, *Curtis v. Curtis* (7). In my judgment, these rules apply to cases in which the ground alleged for divorce is sodomy. It seems to me impossible to say that where two people commit sodomy together, either of them is entitled to ask the court for a decree based on an act to which he or she was a party, and if the facts appear in the evidence, the judge, who is the guardian of the public interest, cannot shut his eyes to them. The evidence given by the wife in this case gives rise to the question whether the judge ought not to have come to the conclusion that she was a willing party to the act of sodomy of which she complained, and was, therefore, disentitled to a decree of divorce in respect of it. Her evidence on the question shows that she understood what the husband was doing, that she turned over in order to enable him to do what he wanted, that she made no protest until she found it hurt her, that she then screamed, and that she never allowed him to do it again because, as she says, it hurt her too much and she could not stand it again. If this stood alone, it would, in my judgment, be conclusive that she was, equally with the husband, guilty of the offence about which she complained in her petition. It is quite clear that the act was not done, as she alleges in her petition, by force and against her will. In cross-examination she stated that her husband was forty-nine, and that she was only twenty, and when asked whether she tried to prevent him she said: "No, I did not try to prevent him. I did as I was told. I did not know much about things when I was married." This falls far short of showing that she did not understand that what she was consenting to was wrong. She must have known that it was wrong, improper, and unnatural, and she does not venture to say that she did not. There is no indication of any sort of duress exercised by the husband, and it is noteworthy that when he suggested doing it again, she maintained her refusal without difficulty. In my judgment, the learned judge ought to have dismissed the claim for divorce on the ground that the wife was a willing party to the act on which she founded her claim.

With regard to the question of condonation, it is quite clear from the wife's own evidence that down to a very late date she had condoned the act of sodomy by cohabitation which continued, with the one interval in 1926, down to the time when she and the husband separated in 1927; but it is said that the right to complain of the sodomy was revived by reason of the sexual cruelty of which the husband was found to be guilty by the verdict of the jury, because she says the acts and suggestions complained of continued until just before she left in July, 1927. Condonation is conditional forgiveness and deprives the injured spouse of the right to claim a dissolution of marriage or a judicial separation based on a matrimonial offence which has been condoned by subsequent cohabitation. But the condonation may itself be blotted out, and the right to complain of the condoned offence may be revived if after a condonation of a new matrimonial offence, such as cruelty, is committed. But in the present case cohabitation continued, except for a short period in 1926, until the parties separated in 1927 for a reason that had nothing whatever to do with the sexual malpractices or suggestions on which the jury based their finding of cruelty. It is, therefore, impossible to hold that the right to complain of sodomy has been revived. If I am right in this view condonation affords another reason why the petition for divorce should be dismissed.

But, inasmuch as the learned judge upon the petition might have granted a decree for judicial separation, it is necessary to consider whether the petition so far as it is a

A claim for judicial separation ought to be dismissed, or whether a new trial ought to be ordered on that part of the case. In my judgment, this claim also ought to be dismissed. The finding of the jury with regard to the cruelty which consisted of sexual malpractices would not justify an order for judicial separation if the court thought that the evidence conclusively showed that these matrimonial offences had been condoned, and that there was no evidence justifying a finding that after condonation there had been a renewal of matrimonial offences.

B For the reasons already expressed with regard to the question of condonation as affecting the charge of sodomy, I am of opinion that all the acts complained of in the form of sexual malpractices were condoned by cohabitation down to the time when the parties separated in July, 1927, and there is nothing whatever to show that cohabitation ceased after the last of the filthy acts and solicitations which the jury have found to be cruelty. It seems to me that on this ground the petition, so far as it covers a claim for judicial separation, must also be dismissed.

C Having regard to the conclusions arrived at, as already stated, it is, strictly speaking, unnecessary to deal with the questions much discussed at the trial with reference to misdirection as to cruelty, and as to the need for corroboration on the charge of sodomy, but it may prove useful for the court to express its views on these points as they bear upon the question whether there could in any event on the findings in this case be any better result possible for the wife than a new trial on the ground of misdirection. I agree with the Master of the Rolls that there was misdirection in relation to the charge of cruelty which consisted of sexual malpractices. The learned judge used these words in summing up:

E "The law is that solicitations to sodomy or other beastly acts are in themselves cruelty unless indeed they proceed at the invitation or with the consent of the wife. Of course à fortiori the doing of them is itself cruelty and a ground for divorce, provided always that it is without the real consent of the wife . . . it is not that she has submitted or that it is forced upon her, but that she is really agreeing to the act, that she is a willing actor. Short of that, in my view, the doing of these acts or the solicitation of a wife who is not herself a willing actor in the matter, is cruelty."

F Having regard to these words I cannot read the words which appear later in the summing-up with reference to the injury to health in mind or body as having any reference to the kind of cruelty which consisted of sexual malpractices, and I think the jury were probably misled by the distinction which appears to be drawn between the two kinds of cruelty. They may have thought that the sexual malpractices had not caused any injury to the petitioner's health, but that they still amounted in law to cruelty. It is to be observed that they negatived the cruelty which the learned judge told them had to result in injury to health, and they found the cruelty with regard to the acts and solicitations as to which the judge had told them that they were in themselves cruelty. In my view, therefore, on this part of the case there was misdirection on which a new trial would have been ordered if we had not on other grounds decided to dismiss the petition.

G After the definition of cruelty given by the Court of Appeal in *Russell v. Russell* (1), affirmed by the House of Lords, it seems reasonably clear that it is a misdirection to tell a jury that any acts relied on in support of a plea of cruelty can amount to cruelty in law in the absence of any injury to health of body or mind or reasonable apprehension of such injury. I do not think one can say that if properly directed the jury would have been wrong in finding that the malpractices did affect the health of the wife. There are to be found in the evidence some facts stated which do amount to evidence which the jury might think sufficient to justify a finding that these continued malpractices had in fact affected from time to time the wife's health. The evidence is not very convincing, but I cannot say there was no evidence, and that, therefore, the petition ought to be dismissed on this ground.

I I also think the judge misdirected the jury in failing to give them a proper warning as to the danger of finding sodomy on the evidence of the wife alone. As the point was very much discussed I desire to add that I agree that in cases of this sort it is right that the judge should give to the jury a warning similar to that which SIR CRESWELL

CRESSWELL gave to himself in *N—— v. N——* (2) (3 Sw. & Tr. at p. 238), and that the absence of such warning amounts to a misdirection which justifies an order for a new trial, but I do not agree that, as a matter of law, the jury cannot act on the evidence of an accomplice, or on the evidence of a victim of sodomy alone, if after a proper warning they come to the conclusion that they still can believe such evidence. If after proper warning a jury come to the conclusion that they can believe the complainant notwithstanding the absence of corroboration, the court will not disturb the verdict merely on the ground of absence of corroboration: see *R. v. Tate* (5); and *R. v. Baskerville* (6). In *R. v. Tate* (5) LORD ALVERSTONE, C.J., quotes with approval the statement of the law made by CAVE, J., in *Re Meunier* (10), that there is no power to withdraw the case from the jury for want of corroborative evidence provided the jury is cautioned in accordance with the ordinary practice. In *R. v. Baskerville* (6) LORD READING, C.J., says, in giving the judgment of the court:

“If after a proper caution by the judge the jury nevertheless convict the prisoner, this court will not quash the conviction merely upon the ground that the accomplice’s testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances.”

It seems to me impossible to hold that the absence of corroboration in this case would of itself have justified this court in holding that the wife should be dismissed. I think it would, if it were the only point in the case, only entitle us to say that, inasmuch as there was no proper warning, there ought to be a new trial. For the reasons stated in the earlier part of my judgment I agree that the right order to make is that the appeal be allowed and the petition dismissed.

RUSSELL, L.J. (read by LORD HANWORTH)—I agree with the judgments already delivered. Before, however, considering whether it is open to us and proper for us to dismiss this petition, I desire to state shortly why the verdict obtained at the trial should, in my view, be set aside. There are, in my opinion, several features in this case of a nature so unsatisfactory that a verdict which may have been affected or influenced by them ought not to be allowed to stand.

(1) In the first place, in regard to sodomy, there is no evidence of the commission of this offence except the statement of the wife. The offence of sodomy is an offence of so serious a nature that a rule has grown up, that in criminal trials for certain offences (which include sodomy) the judge must warn the jury of the seriousness of convicting, in the absence of some evidence to corroborate the story of the other party to the act alleged. If no such warning has been given a conviction will be quashed. Notwithstanding the warning the jury may convict, but the warning must be given or the conviction will not stand. Is this rule to be confined to criminal trials for the offence? I can see no reason why it should be so confined. It cannot be that the reason for the rule is to be found in the fact that imprisonment is the result of an adverse verdict; the rule must be based on the nature of the offence charged and the privacy which is normally associated with it. On the one hand, the corroboration is necessarily difficult to obtain; on the other hand, unless juries act with extra care, a man may be at the mercy of an unscrupulous perjurer. Hence the necessity of a formal warning. The same principles should, in my opinion, apply to all judicial proceedings in which the commission or not of sodomy is an issue to be determined in the case. If no corroboration exists, the jury may still find that the offence was committed, but they should first receive warning. The corroboration which is required is corroboration in some material particular tending to show that the offence was committed by the person charged: *R. v. Baskerville* (6). In the present case I can find no trace of any such corroboration; the German books are no such corroboration. Nor can I find any warning by the judge. It may be that the warning, if given, would have produced a different verdict; or it may be not. I cannot tell. In the absence of any warning the verdict ought not, in my opinion, to stand. I wish to add this, that, had the warning been given and the same verdict returned, then (if no other unsatisfactory feature had existed in the case) I would not have felt justified in upsetting the verdict merely because I might have taken

A a different view of the evidence. I could not have said that there was no evidence to support the verdict.

(2) The second feature to which I desire to call attention is the direction of the judge on the subject of the alleged cruelty. It is to be observed that the primary object of the petition was to obtain a dissolution of the marriage. No doubt under the general prayer for further or other relief it would be open to the wife, if she failed on the sodomy charge and established cruelty, to ask for and obtain a judicial separation. [Note. Cruelty is now a ground for divorce: Matrimonial Causes Act, 1950, s. 1 (1) (c).] If she succeeded in establishing sodomy, allegation and proof of cruelty would be necessary but for the special circumstances of this case. The sole act of sodomy alleged was alleged to have occurred in 1922. If it ever in fact occurred, there can be no doubt that it was condoned over and over again. From the wife's point of view it was essential to

B prove that it had been revived by some subsequent matrimonial offence—hence the necessity of proving cruelty, not for the purpose of obtaining a judicial separation, but for the purpose of reviving the sodomy as a ground for divorce. The cruelty alleged was of two kinds (a) what may be termed ordinary cruelty such as violent fits of temper, cursing and swearing and physical injury; and (b) cruelty by means of filthy sexual practices and solicitations to filthy practices. The jury found as to (a) in favour of the husband. As to (b) they found the husband guilty of cruelty in relation to sexual practices. According to the definition laid down and approved in *Russell v. Russell* (1) it is necessary, in order to establish that the conduct complained of constitutes cruelty, that there be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it. I turn to the judge's summing-up and I find what appears to me to be a misdirection. He tells the jury that the law is that solicitations

E “to sodomy or other beastly acts are in themselves cruelty, unless indeed they proceed at the invitation or with the consent of the wife.”

and a few lines further on—

“the doing of these acts or the solicitation (i.e., by the husband) of a wife who is not herself a willing actor in the matter, is cruelty.”

F In other words he has said nothing about the necessary ingredient of danger actual or apprehended to life, limb or health. True it is that a little later on, when dealing with the case of what I have called ordinary cruelty, he directs the jury correctly in using the following language:

G “The law, I think, you must take it from me, is this, that conduct calculated to injure the health of the wife in mind or body and having that effect is cruelty even though it involves no actual physical act, not actual physical violence; but, of course, that must be conduct against her will of such a nature as to affect her health in mind or body.”

It was said that that direction was general in its terms and applied to both kinds of cruelty alleged, so that the jury were in fact given a correct direction. Having read the summing-up very carefully, I do not agree with this view. It seems to me that the judge has kept the two kinds of cruelty distinct throughout and has given a wrong direction as to the alleged cruelty by sexual practices. But even if the passage which I have last cited might properly be construed as relating to all the cruelty alleged, still it is not expressed with a clearness sufficient to undo the ill produced by the two earlier passages. Had the jury been sufficiently directed on this point they would have had to consider whether there was any and (if any) sufficient evidence of injury to health, actual or apprehended. For my own part I think there was none. The wife gave none; I can find none in the evidence of the doctors. The only trace of such evidence is a passage of the father's cross-examination when he stated that his daughter always looked ill after she had been long with her husband. But the moment or weight of such evidence is for this purpose immaterial—the point is that the jury were told that the matters complained of amounted per se to cruelty. On this ground the verdict finding the husband guilty of cruelty in relation to sexual practices ought not to stand.

(3) A further unsatisfactory feature exists in regard to the allegations of cruelty by

sexual practices. I have already pointed out their importance in relation to condonation. A Condonation is not pleaded by the husband and for obvious reasons: his case is an unequivocal denial of the sodomy charge, he declines to put forward any alternative plea based on an assumption that the sodomy charge is true. Nevertheless, condonation must inevitably arise as an issue in the case. The sole ground for divorce is one B act alleged to have occurred in March, 1922; the petition was presented in November, 1927, and the case proceeded upon the footing that (as was the fact) the parties, except for a brief interval of separation in 1926, lived together as man and wife until July 30, 1927. In these circumstances the court would have been bound to refuse a divorce unless this single offence had in some way been revived. Thus next to the issue of sodomy, the most vital issue in the case was the issue of revival. Yet this all-important issue is dealt with by HILL, J., as a kind of afterthought in the following manner: C

"I am not sure that I must not ascertain how late the cruelty in relation to sexual matters continued, must I not? From the point of view of condonation are you finding the husband guilty only in respect of Africa or after? The foreman of the jury: Sexual solicitation we took, my Lord, throughout. HILL, J.: At Loose? The foreman of the jury: Solicitation throughout, my Lord. Bush James: Then, D in my submission, sodomy is revived without question, as I understand the jury to find cruelty. HILL, J.: They find there was solicitation to bestial sexual practices throughout. That brings you down to the time of July, 1927. Bush James: Then, my Lord, I ask for a decree nisi with costs. HILL, J.: Yes."

At this point it is of great importance to see how the evidence stands in regard to these practices. The only acts proved by the wife (as distinct from solicitations to acts) E were an act of the wife in 1922 in passing water at the husband's request, and acts by her in relation to the husband's private parts about two or three times a year. As to solicitations (as distinct from acts) the wife said that her husband solicited sodomy three times, solicited her once (in 1923 in Africa) to join him in doing the *soixante-neuf*, and solicited her once (in 1922 in Africa) to pass a motion. The husband admitted that on two or three occasions he had kissed his wife's private parts. This admission agrees F substantially with the wife's particulars, though the husband says that he did it at the wife's request. All other acts and solicitations the husband denied. I have called attention to all the matters as to which specific evidence was given. No other evidence is given by the wife except in general terms. She was asked, after she had mentioned the various things above referred to: "Were those practices of his continued when you got to the Manor House?" Answer: "He was always wanting me to do them." G I ask myself what "practices" are referred to. No evidence had been given of any "practice" by her husband. It is impossible to say what the answer means. The only other evidence of the wife is this. She was asked "How long before you finally left your husband in July, 1927, were these revolting suggestions made?" Answer: "Up to just before I left." Again I ask what "revolting suggestions" are referred to? It is again impossible to say what the answer means. Consider how matters stood between these H two spouses in regard to condonation. When the wife returned after the first parting in 1926 everything was condoned. About that there can be no doubt. From that time until July 30, 1927, they lived together as man and wife; assuming that the sodomy is subsequently revived by cruelty occurring from time to time, equally must there be renewed condonation from time to time by the wife living with the husband. The slate is cleaned at short intervals. In these circumstances I should have thought that it I was essential to establish revival with the greatest precision of detail as to the nature and time of the alleged act of revival. So far from this being done, the matter depends upon the single answer by the wife which I have cited. The jury are asked as an afterthought and answer airily: "Sexual solicitation we took, my Lord, throughout." Upon that the condonation, as to which no doubt can exist, is wiped out by some sexual solicitation by the husband of which the nature is uncertain and the date unknown. This question of revival, which, once sodomy was found by the jury, became the vital issue in the case, required for its proper decision precise evidence and precise findings of

A the nature and time of the act or acts relied upon as constituting revival. Upon this point also the matter should go back for a fresh trial.

(4) A fourth unsatisfactory feature of the trial was the use made thereof of the German books. They came into the possession of the husband when the German colony in the Cameroons was occupied by British troops during the war; they were packed up with his belongings and sent to England where they remained stored until they reached B Loose in 1925. The evidence shows that the husband told the wife that they were dirty books, but there is nothing to show that any particular passages or extracts from the books were translated to the wife by the husband or even known by him to be found in the books. What happened at and in connection with the trial is this. Someone with sufficient knowledge of German perused the books on behalf of the wife and selected two or three extracts for translation into English. The extracts which were translated were C the filthiest possible description, at least I can conceive nothing filthier. These English translations were handed to the jury, who were invited by the judge to consider whether a man who had these books in his possession was not "therefore" likely to have committed the foul offences charged against him. It is not easy to imagine anything more calculated to inflame the jury against the husband than such a procedure, or any doctrine more dangerous than the theory that the possession of books is any D evidence that the possessor practises the methods or perpetrates the deeds described therein. Upon the four grounds stated above I am satisfied that the jury's verdict cannot stand.

In the result I am of opinion that we ought not to order any new trial, but that the appeal should be allowed, the verdict and the decree nisi set aside, and the petition dismissed with costs here and below.

E *Appeal allowed.*

Solicitors: Shirley, Woolmer & Co.; Wedlake, Letts & Bird.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

F

SMITH AND OTHERS v. WOOD

G [COURT OF APPEAL (Lord Hanworth, M.R., Sankey and Russell, L.J.J.), July 5, 1928]

[Reported [1929] 1 Ch. 14; 98 L.J.Ch. 59; 139 L.T. 250;
72 Sol. Jo. 517]

Guarantee—Principal and surety—Joint and several memorandum of charge of properties—Release by chargee of deeds deposited by one surety—No consent by other sureties—Release of all deeds.

H

By a joint and several memorandum of charge twelve persons deposited with the defendant title deeds to certain properties and certain insurance policies to secure payment to the defendant of sums due or to become due from a company for whom he was guaranteeing advances from a bank. At the request of one of the depositors, the defendant allowed her to have back the deeds deposited by her for the purpose of raising a loan. The company having gone into liquidation, the bank called on the defendant to fulfil his guarantee. The defendant having announced his intention of realising the deposited securities (other than the deeds already released), the plaintiffs, who were seven of the depositors, brought this action, claiming a declaration that the securities deposited by them had been released from liability under the memorandum of charge, since one of the depositor's deeds had been released.

I

Held: the deeds of the plaintiffs who had not consented to the release of the deeds of the one depositor were released from all liability under the memorandum of charge, since the release of one affected the right of marshalling of the others, and,

therefore, there had been a substantial alteration made in the position of those depositors whose deeds remained deposited as securities.

Polak v. Everett (1) (1876), 1 Q.B.D. 669, *Holme v. Brunskill* (2) (1877), 3 Q.B.D. 495, and *Bolton v. Salmon* (3), [1891] 2 Ch. 48, applied.

Notes. Referred to: *Re Conley, Ex parte Trustee v. Barclays Bank, Ltd.*, [1938] 2 All E.R. 127.

As to discharge of a surety by conduct of a creditor, see 18 HALSBURY'S LAWS (3rd Edn.) 502 et seq.; and for cases see 26 DIGEST 156 et seq.

Cases referred to:

(1) *Polak v. Everett* (1876), 1 Q.B.D. 669; 46 L.J.Q.B. 218; 35 L.T. 350; 24 W.R. 689, C.A.; 26 Digest 162, 1222.

(2) *Holme v. Brunskill* (1878), 3 Q.B.D. 495; 47 L.J.Q.B. 610; 38 L.T. 838; 42 J.P. 757, C.A.; 26 Digest 161, 1216.

(3) *Bolton v. Salmon*, [1891] 2 Ch. 48; 60 L.J.Ch. 239; 64 L.T. 222; 39 W.R. 589; 26 Digest 163, 1223.

(4) *Pearl v. Deacon* (1857), 24 Beav. 186; 26 L.J.Ch. 761; 29 L.T.O.S. 289; 3 Jur. N.S. 879; 5 W.R. 702; 53 E.R. 328; affirmed, 1 De G. & J. 461, L.J.J.; 26 Digest 115, 814.

(5) *Rees v. Berrington* (1795), 2 Ves. 540; 30 E.R. 765, L.C.; 26 Digest 178, 1342.

(6) *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596; 55 L.J.P.C. 47; 55 L.T. 444; 2 T.L.R. 742, P.C.; 26 Digest 191, 1478.

(7) *Samuell v. Howarth* (1817), 3 Mer. 272; 36 E.R. 105; 26 Digest 176, 1329.

(8) *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 62 L.T. 541; 38 W.R. 537; 26 Digest 157, 1186.

(9) *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755; 52 L.J.P.C. 65; 49 L.T. 315, P.C.; 26 Digest 203, 1582.

Appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

Smith Brothers (Burnley), Ltd., who were builders, were formed as a private company with a capital of £10,000. The company had obtained an advance from the Manchester and County Bank, who held some debentures of the company. Being in need of further money, the company approached the defendant, Edward Wood, and informed him that there was due to the bank £34,000, which had been earned and represented retention money on building contracts. The defendant agreed to give a guarantee for £5,000 to the bank on which the company secured further advances. By a joint and several memorandum of charge dated Feb. 2, 1924, the plaintiffs, John Smith, Helen Smith, Albert Edward Smith, Agnes Smith, Emily Smith, Violetta Dracup and Bramley Smith, together with other persons who were not parties to the action, joined to put together certain securities (title deeds of various properties and certain insurance policies) for securing payment to the defendant of any money which should become due to him from the company in the event of the bank enforcing the guarantee against him. Clause 2 of the deed, after setting out the persons concerned and the hereditaments comprised in the title deeds and documents, continued "... do hereby respectively charge the said hereditaments to which the said title deeds and documents or any of them relate with the repayment of all moneys due or to become due from Smith Brothers (Burnley), Ltd., to the said Edward Wood as aforesaid." Clause 3 related to properties similarly charged, but subject to existing mortgages. By cl. 4, the depositors undertook to execute legal mortgages when called on, and by cl. 5, the defendant was appointed the attorney of them and each of them to perfect any such mortgage, or any deed, assurance or act required on any sale by him of the hereditaments or any part thereof under the power of sale applicable thereto. Clause 7 stated "we hereby declare that the said Edward Wood may grant time or other indulgence to or compound with Smith Brothers (Burnley), Ltd., aforesaid or their assigns without discharging or affecting the security."

In April, 1924, Mrs. Caroline Sophia Smith, who was one of the parties to the deed of Feb. 2, 1924, was allowed by the defendant to take back the title deeds she had deposited in order to raise money on them to enable her to fit out her son who was going to South Africa, and she later used them to secure a loan of £600. In October, 1924, the company

A went into liquidation and the bank called on the defendant to make good his guarantee. In May, 1927, the defendant bought the property which had belonged to Mrs. Caroline Smith and paid off the mortgage debt of £600. The defendant having announced his intention of realising the securities deposited under the deed of Feb. 2, 1924, the plaintiffs, commenced this action, claiming "a declaration that the said memorandum of charge has been discharged and that the plaintiffs and the securities deposited by the
B plaintiffs with the defendant on the execution of the said memorandum of charge have been released from all claims demands and liability under the said memorandum of charge by reason of the release by the defendant of the title deeds deposited by the said Caroline Sophia Smith on the execution of the said memorandum of charge from liability thereunder or otherwise." The plaintiffs also asked for delivery to them of the deeds and documents deposited by them. The Vice-Chancellor held that the release
C by the defendant of any one of the securities was an interference with the contractual right of the other sureties and, therefore, released them absolutely and entirely, except in the case of John Smith who had acquiesced in the release, and, as he had since died, his estate was debarred from obtaining any relief in the action. The defendant appealed.

D *Cyril Atkinson, K.C.*, and *A. H. Montgomery* for the defendant.
Sir Herbert Cunliffe, K.C., and *E. C. C. Firth* for the plaintiffs.

LORD HANWORTH, M.R.—This is an appeal from a decision of the Vice-Chancellor of the Palatine Court, delivered on April 24, 1928. I desire to associate myself with the measured language of the Vice-Chancellor where he says: "The action in my opinion is a very ungracious one." [His Lordship stated the facts and continued:] It is said by
E the plaintiffs that, by virtue of the arrangement shown by his kindness to Mrs. Caroline Smith, he had altered the position under the contract with those several persons so as to discharge them. But in simple language, it is this: The defendant, in April of 1924, allowed Mrs. Caroline Smith to take away the title deeds of her properties which were contributed by her and which stood charged under cl. 2 with the repayment of all moneys due by Smith Bros. (Burnley), Ltd., to the defendant, and, by releasing her
F properties, the plaintiffs' position had been altered, with the consequent discharge to them of all their properties from the debt to which they contributed by the document of Feb. 2. I think it is quite clear that, supposing there had been separate deeds under which each of the parties to the deed of Feb. 2 had separately and independently charged their properties with the repayment of this money, the other persons who had in the nature of sureties undertaken a similar responsibility towards the defendant would have
G been entitled to the benefit of the deposited sureties, even though they had not had notice of them, given by the defendant to them individually. In *Pearl v. Deacon* (4), this proposition is stated and, I think, rightly stated, shortly in the headnote (24 Beav. 186):

"A surety is entitled to the benefit of all securities taken by the creditor, whether he has notice of them or not."

H That right of the surety is because there is an inter-relation between them in respect of the responsibility which they have incurred by their contribution. In the present case, the parties to this deed stood in this position. There were, I think, more than ten of them, but it is simpler to take the number ten and say: Ten persons have each of them contributed certain properties which are to stand as security for the possible debt.
I They are not made personally liable, it is their properties which are to stand charged for the repayment of the debt, and each of those properties is charged with the whole debt, because the words of cl. 2 are:

"do hereby respectively charge the said hereditaments to which the said title deeds and documents or any of them relate with the repayment of all moneys due or to become due."

Thus the creditor could have come down on one or other of these properties and sought repayment of the whole debt out of one of that property. It is not contested, indeed, it is conceded, that, if that had been done, there would have been a right on the part of

the owner of the properties out of which payment had been obtained to have the debt so obtained from him marshalled so that part fell *pari passu* on those who joined in the deed in contributing their securities for the same purpose. It appears to me impossible to say that, if one of those properties is withdrawn, so that the risk of the creditor coming down on the other properties is increased, there is no change in the nexus which connects the parties and the rights of the parties *inter se*. While all ten stood as liable respectively for the debts, there was so to speak a chance represented and distributed over ten persons. When one is withdrawn the chance is distributed over nine persons, and that was the result and effect of what the defendant did in the kindness of his heart in response to the tears of Mrs. Caroline Smith in April, 1924. He has thus altered the position, the responsibility and the rights of those who remain subject, or apparently subject, to the deed of Feb. 2.

In *Holme v. Brunskill* (2) it was laid down in a considered judgment of COTTON, L.J., on facts which raised the point very precisely, that it is not necessary to inquire what the gravamen of the alteration was. COTTON, L.J., says this (3 Q.B.D. at p. 505):

"The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

Applying that rule to the present case, it appears to be this, that, inasmuch as these persons *inter se* had the right of marshalling and that now there are only nine of them left by one being withdrawn, their rights *inter se* have been affected; it may be very little, but it is for them to judge and for them to decide, and it is not to be determined by a court or a jury what is the materiality of the alteration. The result of the alteration was not really large in this case, but the contributing person is to be the sole judge of whether or not he will consent to remain liable notwithstanding the alteration. There is no such consent here, and it appears, therefore, that the learned Vice-Chancellor has come to a right conclusion, although he did so with reluctance.

Let me refer also to *Bolton v. Salmon* (3), where CHITTY, J., followed and applied the rule in *Holme v. Brunskill* (2), which in itself followed the rule stated by LORD LOUGHBOROUGH in *Rees v. Berrington* (5). The rule stated by LORD LOUGHBOROUGH was (2 Ves. at p. 543):

"It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."

In *Bolton v. Salmon* (3), CHITTY, J., applied the rule by holding that not only are sureties discharged from personal liability, but also that the security which had been put up by the surety was also discharged. He says this in his judgment:

"This reasoning applies with the same force to a security given by the surety as it does to a personal obligation entered into by him."

If, therefore, it is sought to draw a difference between this case and the other cases to which I have referred, in the sense that what is contributed here are securities and not a personal liability, it appears, on the statement of CHITTY, J., that we ought to apply the same reasoning as in the case of a personal liability.

Finally, in *Taylor v. Bank of New South Wales* (6), the judgment which is read by LORD WATSON (11 App. Cas. at p. 602) says this:

A “Even if it had been shown that the benefit of the price of these 2,500 sheep was lost to the sureties through the act of the bank, the appellants would not have been thereby discharged from all liability. In that event, the present case would not have been within the principle of *Polak v. Everett* (1) and *Holme v. Brunskill* (2), which was relied on in the argument for the appellants. In both these cases there had been an alteration of the original contract between the creditor and the principal debtor, without the consent of the surety, who was held to be wholly discharged, on the plain ground that he could not be made liable for default in the performance of a contract which he had not guaranteed.”

B The reasoning of those cases—the last case is, perhaps, less relevant than the others—appears to be that, where you have an agreement entered into, as you had here between the defendant and all these parties to the deed of Feb. 2, it was not possible for the defendant to make a particular and separate bargain with one of them releasing the security put up by that one from the liability without the consent of the other parties to the deed, whose rights inter se and whose responsibility in respect of the sum for which they were making their properties liable was, or might be, altered by reason of the terms agreed on between the defendant and Mrs. Caroline Smith. For this reason, I have come to the conclusion that the judgment of the learned Vice-Chancellor is right and the appeal must be dismissed. I regret, however, as I said in opening my judgment, that I have to come to this decision, and I regret the nature of the action, in company with the learned Vice-Chancellor.

C **SANKEY, L.J.**—I agree. It is not necessary to recapitulate the facts in this case; that has been done by my Lord. In effect, the argument of the defendant is this. He says the parties to this deed were not sureties; there was no personal obligation on them; there was no joint liability, and, therefore, it is a confusion of thought to talk about the cases which refer to releases of sureties, because here there was no personal liability and there was nothing to release. In my view, it is important, before one comes to the law, to put two things into a prominent position: (i) One must regard the terms of the deed of Feb. 2, 1924, and (ii) one must regard the position at the time that the defendant handed back the deeds to Mrs. Caroline Smith. As to (i), it will be observed that the deed, in cl. 1, states that the title deeds and documents comprised in the schedule, and that schedule contains those which belong to Mrs. Caroline Smith,

F “have been delivered and deposited by us to and with Edward Wood for securing to him the payment of such sums of money as are now due or shall from time to time or at any time be due to him from Smith Bros. (Burnley), Ltd.”

G Clauses 2 and 3 are still more important, because each of the parties to the deed do “hereby respectively charge the said hereditaments to which the said title deeds and documents or any of them relate with the repayment of all moneys due or to become due from Smith Bros. (Burnley), Ltd., to the said Edward Wood as aforesaid.”

H When the defendant handed over the deeds which belonged to Mrs. Caroline Smith, the other plaintiffs in this action lost the chance of his proceeding against Mrs. Caroline Smith's property for the whole debt. His action, which was not a negligent action, but a voluntary one, affected the right of the other securities to the deed, and I adopt the language of the learned Vice-Chancellor where he says:

I “In the present case the original contract of the sureties is the charge of Feb. 2, 1924, which in my view amounts to a contract that each of the properties scheduled in that document should be and continue available as security for the debt. The release by the defendant of any one of the securities is an interference with the contractual rights of the other sureties.”

Without adopting the word “sureties,” I prefer to say: “The release by the defendant of any one of the securities is an interference with a contractual right of the other parties to the deed,” and although it may be that, strictly speaking, these persons might not have been sureties, I think the principles of law which have been applied in the surety cases are applicable in the present circumstances.

In *Polak v. Everett* (1) we have the opinion of a great common lawyer, LORD BLACKBURN. In argument he says: A

“There is a great distinction between a negligent act injuring the surety and an intentional act which injures him.”

Then LORD BLACKBURN again puts in argument the views of LORD ELDON, L.C., in *Samuell v. Howarth* (7), where that distinguished Chancellor says (3 Mer. 272): B

“If there be an alteration of the rights of the surety, though only nominal, and for his benefit, he is discharged.”

The reply to that by the learned counsel arguing the case was: ‘Where time is given, or the agreement varied in respect only of part of the debt or security, the rule does not apply.’ BLACKBURN, L.J., as he then was, said: “This point is quite new to me.” Those were only statements in argument, but they will be found also in the judgment of LORD BLACKBURN, to which I need not refer. That being the opinion of a great common lawyer, we have in *Holme v. Brunskill* (2), the opinion of a great Chancery lawyer, COTTON, L.J., and there is the passage read by my Lord, to which I need not again refer, but it is quoted in nearly every text-book on this subject; that is the passage which begins on p. 505 of 3 Q.B.D.: C

“if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged.” D

And then he goes on in the way my Lord has read. If it is not self-evident that the alteration is unsubstantial, then, unless the surety has consented, he will be discharged. Now, says counsel for the defendant, those cases do not apply at all, because this is an exceptional case in which the rule in *Holme v. Brunskill* (2) and *Polak v. Everett* (1) does not apply, and for authority as to that he refers to *Taylor v. Bank of New South Wales* (6), in 1886. LORD WATSON, who was giving judgment, says (11 App. Cas. at pp. 602, 603): E

“In that event, the present case would not have been within the principle of *Polak v. Everett* (1) and *Holme v. Brunskill* (2), which were relied on in the argument for the appellants. In both these cases there had been an alteration of the original contract between the creditor and the principal debtor, without the consent of the surety, who was held to be wholly discharged, on the plain ground that he could not be made liable for default in the performance of a contract which he had not guaranteed.” F

The learned law lord points out the difference in the facts there, and the difference in the facts is referred to in the headnote, and shows where *Taylor v. Bank of New South Wales* (6) differed from those two cases. The headnote states: G

“The appellants having become sureties on the faith of a mortgage granted by the principal debtor to his creditor, claimed to be released wholly or pro tanto from liability, on the ground that the creditor had without notice to them sold parts of the mortgaged property in a manner unwarranted by the terms of the mortgage deed, and that inasmuch as the purchaser had failed to pay the price, they had been deprived of the benefit of a security upon which they were entitled to rely for protection.” H

It was held: I

“On the evidence the sale was effected by the mortgagor, although with the previous consent of the mortgagee, in the due course of his management and in a manner contemplated by the mortgage deed, and that the liability of the sureties was not affected thereby.”

Again LORD WATSON says in the course of the argument: “Was it not within the contract contained in the mortgage and contemplated by the sureties?” and Mr. Lumley Smith, in the course of his argument, “contended that the evidence showed that the

A sale took place under such circumstances as were contemplated by the deed and the contract of suretyship." Therefore that was the view accepted by the Privy Council and it at once distinguishes *Taylor v. Bank of New South Wales* (6) from *Polak v. Everett* (1) and *Holme v. Brunskill* (2).

Finally, it is only necessary in my view to look at *Bolton v. Salmon* (3), because if that is carefully investigated, it seems to be on all fours with the present case, and, unfortunately for him, against the defendant. The argument for the defendant here being that the parties to the deed were not sureties, that there was no personal obligation, no joint liability, it is important to look at the argument which was advanced in *Bolton v. Salmon* (3) for the unsuccessful claimant, and which was exactly the argument put forward here on behalf of the defendant. Mr. Bryne, who appeared for the plaintiff, contended: "The fact that the defendant's personal liability on the covenant in the mortgage of Sept. 4, 1857, has been released by giving time to the principal debtor, does not necessarily release the securities mortgaged by that deed, and which are now vested in the plaintiff." The facts there were the same as here; no personal liability on the surety covenant. Mr. Jason Smith, for the defendants, contended: "On principle and on authority the surety is released by giving time to the principal debtor by transactions to which the surety is no party, and this release extends not only to the surety's personal liability on the covenant, but also to the property charged." CHITTY, J., in giving his judgment, calls attention to the fact that the plaintiff's counsel contend that:

"although Miss Buckenham's covenant is gone, by reason of time having been given to the principal debtor, the surety which she gave remains."

Then the learned judge continues:

E "With all their learning and research, the plaintiff's counsel were not able to produce any authority for this proposition. The reason may be, that no one has ever previously thought of raising such a contention."

May I say this is the second time the contention has been raised, and raised, in my view, unsuccessfully. The learned judge points out ([1891] 2 Ch. at p. 54), as my Lord has already pointed out:

F "This reasoning applies with the same force to a security given by the surety as it does to a personal obligation entered into by him."

Although that was a surety case, it was on all fours with the present case, because the personal liability has gone and only the documents remained, as indeed in the present case, where there is no personal liability and only the deposit of the deeds. Therefore I have come to the conclusion, for the reasons that my Lord has given and for the reasons that I have endeavoured to give, that this appeal should be dismissed. I also should like to say I very much regret having to give this decision, and, if I could have seen my way to do it, I personally should have liked to give it the other way.

H **RUSSELL, L.J.**—I agree, and I also desire to associate myself with what has fallen from the Vice-Chancellor, the Master of the Rolls, and SANKEY, L.J., with regard to the nature of this action and its ungraciousness. Indeed, if I were in a position of greater freedom and less responsibility, I should use the word "discreditable." None the less, we are bound to decide in accordance with what we believe to be the true legal rights of the parties, and, in my opinion, this appeal fails. I will endeavour shortly to state the reasons which have forced me reluctantly to come to that conclusion. The question of release in this case arises not in consequence of any transactions which have taken place between the debtor and the creditor—that is to say, between the company and the defendant. It arises solely in consequence of a transaction which took place between the defendant and one of the co-mortgagors. The question for our determination is: Has that transaction or dealing between those two parties operated to release the property of the other co-mortgagors from their obligation to indemnify the defendant from the unpaid liability to him of the company? The bank has been mentioned in this case, but the bank really only comes in as a matter of history. It was the guarantee given by the defendant to the bank which was the cause of the deed poll of Feb. 2, 1924,

being executed. The effect of that deed poll is that the twelve parties to it each provided some property of his or her own as a security to indemnify the defendant against any liability to him of the company which the company is unable to pay.

In considering the legal position of the co-mortgagors under the deed in question, two points must be borne in mind. The first is that there is no personal liability of any sort or kind imposed on them by the deed. The second is this, that each person's property is liable as between him and the defendant for the whole of the company's indebtedness to the defendant. One consequence of that is this, that, as between each party to the deed, the defendant is entitled to repay himself the amount of the company's indebtedness to him by the sale of any one of the properties mortgaged to him. Another consequence of the deed is this, that if, in point of fact, the defendant does repay himself the indebtedness of the company by selling only the property of one of the parties to the deed, that person whose property has been applied in payment of the whole of the company's indebtedness is entitled, as between himself and the other mortgagors, to have all the properties marshalled so as to throw the entire burden among them in an equitable manner. I think as to those propositions there has been no dispute between the parties in the present litigation.

That being so, and again bearing in mind that this is not a case where it is suggested that the surety has been discharged by reason of some transaction or dealing between the creditor and the principal debtor, but is simply a question whether one of several persons in a position analogous to that of co-mortgagors has been discharged by reason of some dealing or transaction with one of the co-sureties, let me consider what the position in law is of a case of that latter class. Speaking for myself, I do not wish to investigate further than to read the opinion stated by STIRLING, J., in *Re Wolmer-shausen* (8). After referring to certain other cases, he says (62 L.T. at p. 545):

"The question there is as to the effect of an agreement entered into, not between the creditor and the principal debtor, but between the creditor and one of several sureties. The cases appear to show that the creditor (i) must not act in a manner inconsistent with the contract or arrangements under which the obligation of suretyship was incurred; and (ii) [it is the latter which is relevant to the present case] must not act so that the right of contribution between the co-sureties is destroyed or prejudiced."

In the present case, there is no right of contribution because there was no personal liability attaching to the parties to the deed, but there was a right equivalent to contribution in regard to the liabilities of their properties, and that was the equitable right of having the properties marshalled. In regard to that, as is pointed out in *Ward v. National Bank of New Zealand* (9), the interference with such a right is not an interference with the contract between the parties but is an interference of a right conferred by equity. It is pointed out in the judgment in that case (8 App. Cas. at p. 765):

"Where it is no part of the contract of the surety that other persons shall join in it, in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety, the surety cannot therefrom claim to be released on the ground of breach of contract. It is true that he is entitled to contribution against other several sureties to the same extent as if they had been joint, but the right of contribution among such sureties depends not upon contract but on principles established by courts of equity."

Then the judgment proceeds on the next page:

"The claim of a several surety to be released upon the creditor releasing another surety, arises not from the creditor having broken his contract, but from his having deprived the surety of his remedy for contribution in equity. The surety, therefore, in order to support his claim [that is, in order to support his claim that he has been released] must show that he has a right to contribution, and that that right has been taken away or injuriously affected."

As I have already said, this is not a case where there is a right of contribution. But the position appears to me to be exactly the same in cases not of persons being joined

A becoming personally liable but where persons have joined to constitute a fund and have placed all their several properties to form a fund out of which a certain liability can be met. That is not a right of contribution, but a right to marshal; that is a right which adjusts matters inter se.

Applying that in this case, I now consider the transaction which took place here as between the defendant and Mrs. Caroline Smith—in entering into that transaction, did **B** the defendant act so that the right of marshalling between these co-mortgagors was destroyed or prejudiced? Now what was the act which he did that was complained of? To find that I turn to the evidence, and I find from Mrs. Caroline Smith's evidence this, that she went to him and told him she wanted her deeds back so that she could raise money on them, and that he handed her back her deeds in order that she might do so and she did raise money on them to the extent of £600 immediately after she received **C** the deeds back. It has been said by counsel for the defendant, and quite rightly said, that, in the document we are now considering, there is a charge by Mrs. Caroline Smith of her property, and that, although the deeds had been handed back to her, the defendant never executed in her favour a release of her property from the charge, so that it is true to say that the property remained strictly still subject to a charge, but what he did do was this. He executed no release but he acted in such a way as that he enabled her **D** to put in front of his rights and in front of the rights of the co-mortgagors under the doctrine of marshalling a sum of £600. Once one realises that that was the act that he did, and that that was the effect of the act he did, then, in my opinion, there can be only one answer to the question whether the act which he did was such that the right—whether it be by contribution, or as it is in this case of marshalling—as between these several individuals was in any way prejudiced. The answer, in my opinion, must clearly **E** be Yes. But I am not satisfied on the authorities that it would be strictly necessary even to establish actual prejudice. It is a matter done behind the backs of the other persons, and, if it in any way may affect their position, they ought to be consulted, and if they are not consulted, in law, in my opinion, their obligation is discharged. For these reasons, which I have endeavoured to state shortly, I agree that this appeal fails.

Appeal dismissed.

F Solicitors: *Littledale & Lefroy* for *Southern*, *Ritchie & Southern*, *Burnley*; *Jackson & Jackson* for *Steele & Mackrell*, *Burnley*.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

WILLIAMS v. WILLIAMS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), December 3, 1928]

[Reported [1929] P. 114; 98 L.J.P. 40; 140 L.T. 383; 45 T.L.R. 157;
73 Sol. Jo. 77]

B

*Divorce—Costs—Security for wife's costs—Discretion of registrar—Grounds for appeal—
Separate estate—Matters to be considered—Matrimonial Causes Rules, 1924, r. 91.*

The decision regarding an application by a wife for security of costs in a matrimonial suit is a matter for the discretion of the registrar, and it cannot be reviewed on appeal unless the registrar has proceeded on some wrong principle or has overlooked matters which he should have taken into account.

C

In deciding whether or not to grant such an application by a wife, the registrar must consider whether the wife has any separate estate, a term which includes both her capital and her income, and also the husband's capital and income, and how far the capital of both parties is easily realisable, and, further, if there is a deed of separation, the amount receivable by the wife thereunder.

Notes. The rule now corresponding to the Matrimonial Causes Rules, 1924, r. 91, is the Matrimonial Causes Rules, 1957, r. 67.

D

Applied: *Vincent v. Vincent*, [1952] 2 All E.R. 978. Referred to: *King v. King*, [1943] 2 All E.R. 253; *Brightstein v. Brightstein*, [1947] 2 All E.R. 121; *Luff v. Luff*, [1949] 2 All E.R. 753; *Gower v. Gower*, [1950] 1 All E.R. 27; *Evans v. Evans*, [1953] 1 All E.R. 70.

As to security for a wife's costs, see 12 HALSBURY'S LAWS (3rd Edn.) 358-361; and for cases see 27 DIGEST (Repl.) 505 et seq. For the Matrimonial Causes Rules, 1957, see 10 HALSBURY'S STATUTORY INSTRUMENTS.

E

Case referred to:

- (1) *Allen v. Allen*, *Allen v. Allen and Bell*, [1894] P. 134; 63 L.J.P. 78; 70 L.T. 326; 42 W.R. 230; 10 T.L.R. 161; 38 Sol. Jo. 128; 6 R. 585, C.A.; 27 Digest (Repl.) 505, 4483.

F

Appeal from registrar's order.

On Feb. 1, 1928, the wife filed her petition for divorce, and answers were filed by the husband and the intervener denying the adultery. On Sept. 14, 1928, the wife's solicitors brought in their bill of costs, and took out a summons for security. The summons was argued before the registrar on Oct. 12 and 27, and the registrar decided to make no order, having taken into consideration the amount of the wife's separate estate. The case had been stayed by the petitioner's solicitors, but on Oct. 22, 1922, they took action to remove the stay. They did not appeal against the registrar's decision within the specified time, and the case came into the list for trial. After a trial of several days before HILL, J., and a jury the jury disagreed and were discharged. The appeal against the registrar's decision was made after the time had run out, and the trial was in progress.

G

H

Clifford Mortimer for the wife.

Bayford, K.C., and *G. Tyndale* for the husband.

HILL, J.—This is an appeal from a refusal by the registrar to make any order in respect of the wife's costs before trial. He refused either to tax a bill of costs up to setting down or to order security for further costs. Is there any ground upon which I can set aside the order of the registrar? Rule 91 of the Matrimonial Causes Rules, 1924, directs that the registrar shall deal with the costs and ascertain what is a sufficient sum of money to be paid into court or sufficient security to cover the costs of and incidental to the hearing. He is to consider the costs already incurred and the security, and may thereupon, unless the husband shall prove to his satisfaction, that the wife has sufficient separate estate or show other good cause, issue an order to give security. To my mind, that is a matter for the registrar's discretion and, by old-established principles, the

I

A judge does not interfere with matters which are in the discretion of the registrar unless it is clear that he has proceeded upon some wrong principle or has overlooked matters which he ought to have taken into account. With regard to the present matter, in my view, it is absolutely in the discretion of the registrar to exercise his mind upon the materials mentioned in the rule, that is, the question of the wife having sufficient separate estate or there being other good grounds for not making the order.

B The words "separate estate" are absolutely general. They are not limited to the income of the wife or the capital of the wife. They are her "separate estate." No doubt, the rule repeats words which were first used when the wife had no separate estate or very little separate estate. I am sorry to say that I have forgotten so much of whatever I knew about the position of married women's property before the Married Women's Property Act that I cannot say what separate estate she could have, but, at any rate,

C the effect of the Married Women's Property Act is that the power of a married woman to hold separate estate has been enormously increased, that is to say, the existence of the subject-matter which the registrar may have to consider, namely, a wife's separate estate, is very much greater than it used to be, and the registrar has now to consider a great deal more than at one time he could have considered when considering the whole of the wife's separate estate. Is there anything to limit that? Counsel for the wife

D says that *Allen v. Allen* (1) in the Court of Appeal limits it. I do not so understand it. *Allen v. Allen* (1) said in substance: "This case has been decided by the judge, which under the then existing rule was in his discretion, and we do not interfere." Therefore, the registrar, in my view, under the rule had a right to consider the income of the husband, the income of the wife, the capital of the husband and the capital of the wife. Has he considered it on any wrong basis? Counsel says that he has, but I cannot read

E that into the decision nor can I find how that is necessarily involved in the decision.

The wife, under a separation deed, was receiving for herself and two of her children weekly payments working out at £384 a year. The husband had obtained the third child and had undertaken to pay the schooling and doctor's bills of the two children with the wife, and his total income on the three years' average was between about £700 or £800 a year. It may well be that you ought not to take into account the whole of the

F amount secured by a separation deed and treat it as if it was absolutely, as it were, free wife's income, because part of it at any rate is paid for the support of herself and the children just as would be done if an order for alimony pendente lite were made, and I quite follow the argument that if you give them alimony pendente lite with one hand you must not take it away with the other. But here it must be considered, and it seems highly probable that, having regard to the income of the husband and the liabilities

G of the husband and the position of the wife and her liabilities with regard to the two children, nothing like £384 would have been awarded as alimony pendente lite, and I think the figure counsel for the husband suggested, something like £220, would probably have been nearer the mark. So it seems to me quite legitimate for the registrar to take into account that the wife under the separation deed was getting more income than she would have got under an order for alimony pendente lite, and it was for him to consider

H how much more. Then, on the other hand, it seems to be pretty clear that the wife had realisable capital and that the husband had capital rather in excess in the aggregate of the wife's capital, which was not realisable, or most of it was not realisable. The wife at any rate had got £100 of war loan and some Midland Bank shares on which there would have been no difficulty in raising money. These matters are, to my mind, all for the consideration of the registrar, and he was entitled to consider what income the wife

I is receiving, what would be given her for alimony pendente lite, what capital she has, what income the husband is receiving, what capital the husband has, whether the wife's capital is easily available, and whether the husband's capital is easily available? They are all matters to be taken into account because, on the one hand, you have to consider whether the wife has sufficient separate estate, and, on the other hand, you have to consider the husband's ability to pay. Those matters are all for the registrar's discretion. It is quite impossible for me to say he has exercised his discretion in a wrong way by saying: "Looking at it on the whole I see no reason for giving the wife any security."

The main object of security in recent years at any rate, is that justice may be done by the wife being able to procure the assistance of solicitor and counsel and come to court. That is the main object in modern times. The old basis for the rule, namely, that all the wife's property on marriage passed to the husband, and, therefore, the husband alone could foot the bill, has gone altogether, and you must now consider in the circumstances whether the wife can foot the bill, and it is a very important matter to consider whether the solicitor can conduct the business without somebody in court to pay up to setting down and then having security. Here it is quite obvious that the solicitor could, and was willing to, conduct the business and, up to a point, without security, and indeed he only applied for security a very short time before the case came on for trial. It was in his power then to appeal or to say to the wife: "I am very sorry I cannot go on. I am out of funds, and the matter must stay over until something is done, until I have got some order against the husband." But in fact he does neither of these things. There was simply a stay until the question had been settled, and on Oct. 24, when the question had to be finally settled, the stay is removed and the case came on for trial the following morning. When the trial started, counsel for the wife made his application for security. It is quite clear briefs had been delivered, and witnesses had been brought up from the neighbourhood of Birmingham. Therefore it cannot be in this case that it was essential to the administration of justice that the wife's solicitors should be put in funds, and that is not necessary to consider in this case.

In my view, the matter is in the discretion of the registrar, and he has not done anything wrong. He has taken into account, as far as I can see, the things he was entitled to take into account, and he has arrived at a decision, and I cannot upset it. The summons was dismissed with costs, his Lordship saying that he did not like to encourage appeals on matters within the registrar's discretion.

Solicitors: *Foster, Grave & Jay* for *Philip Baker & Co.*, Birmingham; *Robbins, Olivey & Lake* for *William Waldron & Son*, Brierley Hill.

[Reported by WILLIAM LATEY, ESQ., Barrister-at-Law.]

RECTOR AND CHURCHWARDENS OF ST. NICHOLAS ACONS v. LONDON COUNTY COUNCIL

[PRIVY COUNCIL (Lord Hailsham, L.C., Lord Blanesburgh and Lord Atkin with the Archbishop of Canterbury, the Bishop of Norwich and the Bishop of Chichester as Ecclesiastical Assessors), June 11, 25, 1928]

[Reported [1928] A.C. 469; 97 L.J.P.C. 113; 139 L.T. 530;
92 J.P. 185; 44 T.L.R. 656; 26 L.G.R. 583]

Ecclesiastical Law—Disused burial ground—Erection of "building"—Transformer chamber under churchyard—Projection of ventilation shaft some inches above ground—Disused Burial Grounds Act, 1884 (47 & 48 Vict., c. 72), s. 3.

The appellants sought a faculty permitting the user of part of their churchyard (which, it was not disputed, was a "disused burial ground" within s. 3 of the Disused Burial Grounds Act, 1884) for the enlargement under the churchyard of an electric transformer chamber and entrance thereto. The proposed chamber was to be built of brick supported by steel girders and reinforced concrete, and the roof would be under the surface of the churchyard except for two ventilators which would protrude some nine inches above the surface of the churchyard.

Held: a building was erected on the site on which it was built none the less because no part of it was raised above the ground level as existing at the date of its erection, and, therefore, the proposed transformer chamber was a "building" within s. 3;

A under that section it was not lawful to erect it; and the appellants' application for a faculty must be refused.

Paddington Corpn. v. A.-G. (1), [1906] A.C. 1, distinguished.

Notes. Considered: *Re St. Mark's Church, Lincoln*, [1955] 3 All E.R. 699. Distinguished: *Re St. Mark's Church, Lincoln*, [1956] 2 All E.R. 579.

B As to the use of consecrated ground for secular purposes, see 13 HALSBURY'S LAWS (3rd Edn.) 396, 397; and for cases see 7 DIGEST 551 et seq. For Disused Burial Grounds Act, 1884, see 2 HALSBURY'S STATUTES (2nd Edn.) 792.

Cases referred to:

(1) *Paddington Corpn. v. A.-G.*, [1906] A.C. 1; 75 L.J.Ch. 4; 93 L.T. 673; 70 J.P. 41; 54 W.R. 317; 22 T.L.R. 55; 50 Sol. Jo. 41; 4 L.G.R. 19, H.L.; 7 Digest 553, 300.

C (2) *Re St. Nicholas Cole Abbey, Re St. Benet Fink, Churchyard*, [1893] P. 58; 7 Digest 554, 309.

Appeal by the rector and churchwardens of the parish of St. Nicholas Acons, in the city of London, from a decision of the Arches Court of Canterbury, dismissing their appeal from an order of the Chancellor of the Consistory Court of the Diocese of London.

D By that order the Chancellor refused to decree a faculty authorising the appellants to enter into an agreement with the City of London Electric Lighting Co., Ltd., to grant to the company the user of further portions of the churchyard of the parish for the enlargement of a transformer chamber and entrance under the churchyard. The sole question raised in the appeal was whether the Consistory Court had jurisdiction to decree the faculty prayed in view of the provisions of s. 3 of the Disused Burial Grounds Act, 1884, which was in the following terms:

"It shall not be lawful to erect any buildings upon any disused burial ground except for the purpose of enlarging a church, chapel, meeting house, or other places of worship."

F The churchyard in question was closed for burials by an Order in Council in 1854 and had since that date been kept as a private open space enclosed by railings. The parish church, which was destroyed in the Great Fire, had never been rebuilt.

G The appellants contended that the proposed extension to the transformer chamber would not constitute a building upon the disused burial ground as it would lie wholly beneath the ground (with the exception of a small ventilation shaft which would protrude a few inches above the ground). The respondents, who by virtue of the Metropolitan Board of Works (Various Powers) Act, 1885, s. 56, and the Local Government Act, 1888, s. 40 (8), were the authority for enforcing the observance of the provisions of the Disused Burial Grounds Act, 1884, opposed the grant upon the ground that the transformer chamber, if erected, would constitute a building upon a disused burial ground within s. 3 of the Act.

H *Stafford Cripps, K.C.*, *G. Wightman Powers* and *G. C. Honeyman* for the appellants. *Sir Malcolm Macnaghten, K.C.*, and *Sydney G. Turner* for the respondents.

I June 25. **LORD HAILSHAM, L.C.**—This is an appeal by the rector and churchwardens of the parish of St. Nicholas Acons, in the city of London, against an order made on Jan. 24, 1928, by the Dean of the Arches, dismissing an appeal from an order made by the Chancellor of the Consistory Court of London, and refusing to decree a faculty authorising the appellants to enter into an agreement with the City of London Electric Lighting Co., Ltd., for the construction of a transformer chamber in the churchyard of the parish. There was no opposition to the application upon its merits, but the respondents, the London County Council, objected to the grant of the faculty in pursuance of their statutory duty on the ground that the proposed transformer chamber would infringe the provisions of s. 3 of the Disused Burial Grounds Act, 1884, and that on that ground there was no jurisdiction to grant it.

From the evidence it appears that the parish church of St. Nicholas Acons was destroyed in the Great Fire, and has never been rebuilt, and that the churchyard was

closed for burials by Order in Council in the year 1854 and has since that date been kept as a private open space enclosed by railings. It further appears that the City of London Electric Lighting Co., Ltd., is an electricity undertaking supplying electricity for lighting and other purposes to a large number of persons in the city. For the purpose of its undertaking the company had erected a transformer chamber in Nicholas Lane; and in the year 1892 the company was granted a licence to use a portion of the churchyard for the building of an entrance to the said transformer chamber, and for railing off the entrance from the rest of the churchyard. This licence was granted for a period of twenty-one years by virtue of a faculty decreed by Chancellor Tristram on April 6, 1892, and was renewed for a further period of twenty-one years by virtue of a faculty granted in March, 1914. Since the grant of the licence the use of electricity has very largely increased, and evidence was called to prove that it was essential in order to supply the public need that the transformer chamber should be enlarged and that there was no site available for the enlargement except the churchyard. The transformer chamber which it is proposed to place in the churchyard is described in the judgment of the learned Chancellor as:

"A brick-built structure with a roof of asphalt supported by wrought steel girders and by reinforced concrete. That roof is under the surface of the churchyard and the only parts of the transformer chamber which will, so to speak, emerge in the churchyard are two ventilators, which, I think, are something like nine inches above the surface of the churchyard, and they will be practically concealed from sight by certain beds of flowers which the company undertake to place there. So far as noise is concerned, there will be no noise connected with the machines which are used in the transformer chamber. They are, in fact, as I understand, motionless machines. . . . So what is contemplated is a chamber mainly under the churchyard, but with two ventilator lights just above the surface, and containing noiseless machinery, machinery which is simply used for transforming current."

The relevant section of the Disused Burial Grounds Act, 1884, is in these terms:

"Section 3. After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground except for the purpose of enlarging a church, chapel, meeting house, or other places of worship."

It was not disputed that the churchyard in question is a disused burial ground within the meaning of the Act. For the appellants it was contended that the construction of this transformer chamber would be of great public advantage; that it was so designed as not to interfere with the use of the churchyard as an open space; that the grant of the licence would add materially to the revenue of the church; and that a necessary consequence of the decision appealed against, if upheld, would be that the faculties already granted in this and other cases were *ultra vires*, a conclusion which might lead to much public inconvenience. Many of these considerations are matters eminently proper to be considered by Parliament upon an application to amend the law, but they can have very little relevance to the question of law which their Lordships have to determine. The first question which has to be considered is whether the proposed transformer chamber is a building.

Having regard to the nature of the structure as described above, their Lordships can entertain no doubt that that question must be answered in the affirmative, and, indeed, this was not seriously contested on behalf of the appellants. But the appellants' counsel contended that, even if the chamber were a building, it would not be a "building erected upon" the churchyard. It was argued that this expression must be limited to buildings raised substantially above the ground level and interfering with the use of the churchyard for the purposes of an open space. In their Lordship's view the language of the statute cannot be so limited. The erection of the building is commenced as soon as the foundation has been excavated, and a building is erected upon the site upon which it is built none the less because no part of it is raised above the ground level as existing at the date of its erection. It was argued that this view was inconsistent with the decision of the House of Lords in *Paddington Corp'n. v. A.-G.* (1). In that case the

A borough council sought to erect a screen in a disused burial ground in order to prevent adjoining houses from acquiring an easement of light. The House of Lords held that a screen erected for such a purpose would not necessarily be a building, but their Lordships find nothing in the language of the opinions in that case to support the limited construction sought to be put upon the statute by the appellants in the present case.

B It was further contended for the appellants that, since faculties had been granted in the year 1892 in this and other cases, their Lordships ought to treat the law as settled by those decisions and ought not now to disturb them. The cases in which faculties were granted are reported in the LAW REPORTS under the heading *Re St. Nicholas Cole Abbey* (2), [1893] P. 58, and in the note to that case on p. 66. These were all unopposed petitions and in none of them was the Disused Burial Grounds Act, 1884, referred to, either in argument or in the judgment. The learned Chancellor appears to have treated the grant of the licence in the case of St. Nicholas Acons as being equivalent only to the grant of an easement of a right of way, and to have held that on that ground there was jurisdiction to make the order. The question whether the entrance to the transformer chamber then sanctioned constituted a building erected on the churchyard was never discussed or decided. Their Lordships are quite unable to treat a decision given in an unopposed case, without any reference to the Act of Parliament, authorising the grant of a licence for a limited period as a decision which determines the construction to be put upon the Act of Parliament or as a factor which should in any way affect their Lordships' judgment upon the question of construction now that it is before them. It follows that, in their Lordships' opinion, this appeal fails and should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

E *Appeal dismissed.*
Solicitors: *Phillips, Son & Rollinson; T. Bullivant.*
[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

F

OTTOMAN BANK v. JEBARA

G [HOUSE OF LORDS (Viscount Dunedin, Lord Shaw, Lord Phillimore, Lord Carson and Lord Blanesburgh), December 1, 2, 6, 8, 1927, May 1, 1928]
[Reported [1928] A.C. 269; 97 L.J.K.B. 502; 139 L.T. 194;
44 T.L.R. 525; 72 Sol. Jo. 516; 33 Com. Cas. 260]

H *Trading with the Enemy—Contract rendered illegal—Executory contract—Price of goods collected in enemy country in local currency—Amount determined by rate of exchange with London—Liability, at end of war, to pay seller of goods in sterling—Treaty of Lausanne, 1923, between Great Britain and Turkey, art. 84.*

I The respondent carried on business as an exporter of Manchester goods to Syria. He drew bills on his customers in the following form: "Please pay to our order value cheque on London the sum of £—— sterling value received. Shipping documents attached to be given up on payment." His course of business was to hand the bills and the bills of lading to the Manchester branch of the appellant bank who sent them to the Beirut branch of the bank. On receipt of the goods at Beirut the respondent's customers would pay the bills at the Beirut branch in Turkish currency, the amount of that currency being determined in accordance with the then existing rate of exchange with London. The Beirut branch then advised the Manchester branch of each payment, and the Manchester branch then credited the respondent with the amount of the bill. On Nov. 5, 1914, war was declared between Great Britain and Turkey. At that date several consignments

of goods had reached Beirut, and the bills and the shipping documents were in the hands of the bank at Beirut. The buyers of the goods paid for them in Turkish currency, the amounts being, as customary, determined by reference to the rate of exchange with London (as ascertained through neutral markets), but owing to the war a remittance from Beirut to England was illegal under Turkish law. By the end of, and after, the war the value of the Turkish piastre greatly depreciated. In an action by the respondent against the bank for the amount in sterling of the bills collected on his behalf by the Beirut branch the bank contended that he was entitled, not to sterling, but only to the actual number of piastres which the Beirut branch had received in respect of the bills.

Held: it was not every contract that was abrogated by war, but only a contract which was still executory and for its execution required intercourse between a British subject and the enemy; in the present case the contract with each customer had been partially carried out by the endorsement of the bills and their transfer to the bank with the shipping documents, and the fact that the purchase price could not lawfully be remitted to England did not abrogate what had been already done; the acceptance by the bank at Beirut of the purchase price of the goods in the equivalent of sterling and the transfer to the customer by the bank of the goods or shipping documents was not illegal as it only necessitated intercourse between the bank and the customer, both Turkish subjects; the bank had parted with the goods for the equivalent of sterling, and, therefore, they were debtors to the respondent in sterling, and were not entitled, under art. 84 of the Treaty of Lausanne between Great Britain and Turkey, to discharge their debt "by handing over the sums actually collected in the currency in which they were collected."

Decision of Court of Appeal, [1927] 2 K.B. 254, reversed.

Notes. Considered: *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] 1 All E.R. 36. Referred to: *Simpson v. Maurice's Executors* (1929), 14 Tax Cas. 580; *Sachs v. Miklos*, [1948] 1 All E.R. 67; *Munro v. Willmott*, [1948] 2 All E.R. 983; *Re Banque des Marchands de Mosou (Koupetschesky) Royal Exchange Assurance v. The Liquidator, Re Banquet de Moscou (Koupetschesky), Wilenkin v. The Liquidator*, [1952] 1 All E.R. 1269; *Arab Bank, Ltd. v. Barclays Bank (D. C. & O.)*, [1953] 2 All E.R. 263.

Appeal from an order of the Court of Appeal (BANKES, SCRUTTON and ATKIN, L.J.J.), reported [1927] 2 K.B. 254.

The facts appear in the headnote and the opinions of their Lordships.

Geoffrey Lawrence, K.C., *D. B. Somervell* and *I. W. G. Barry* for the appellants, the Ottoman Bank.

Cyril Atkinson, K.C., and *Sir Cassie Holden* for the respondent.

The House took time for consideration.

May 1. The following opinions were read.

VISCOUNT DUNEDIN.—This is an action brought at the instance of a Manchester merchant against the Ottoman Bank for the proceeds of certain bills of exchange collected by the bank. The course of dealing out of which the question arose was as follows. The respondent, who is a domiciled Englishman residing in Manchester, bought Manchester goods for dispatch to correspondents in Syria. He drew bills on these correspondents and handed the bills to the appellants' bank in Manchester along with the bills of lading of the goods which had been shipped. Upon this the bank made an advance of 80 per cent. on the amount of the bill. The bills and the bills of lading were then sent to Beirut. On the arrival of the goods at Beirut the Syrian correspondent on whom the bill was drawn paid the bill and received the bill of lading, or, if the goods had already been removed from the ship, the goods themselves, and the Manchester branch of the appellant bank then, on advice of the Beirut branch, credited the respondent with the amount of the bill. War was declared between England and Turkey on Nov. 5, 1914. At that date several consignments of goods had reached Beirut, but the documents of title and the bills were still in the hands of the bank at Beirut. The persons for whom the goods were destined came forward and paid the

A bills and got the goods. The payments were actually made in Turkish currency, but the calculation of the amount of that currency needful for the sum expressed on the face of the bills was made on the rate of exchange with London. A remittance from Beirut to England direct was impossible, and no sum has as yet been credited to the respondent in respect of the bills. The respondent raised action for the amount on the face of the bills. The appellants refused to pay, but offered the amount represented by the number of Turkish piastres actually received calculated on the exchange of the day. **B** The action depended before ROWLATT, J., who gave judgment for the respondent. He held that in the circumstances above mentioned the appellants had in law been paid in sterling and must repay in sterling. On appeal the Court of Appeal recalled that judgment. They held that the true view of the case was that the effect of the war was to preclude the appellants at the Beirut branch dealing with the goods at all; that in **C** handing the goods to the Syrian merchant they acted without authority and not as agents of necessity; and that, consequently, they were liable for conversion; and the court directed an inquiry as to what the damages of that conversion would be. Appeal from that judgment has been taken to your Lordships' House. All the bills were in the same form, so one may be taken as a specimen. It is in this form. It is dated Manchester.

D "Please pay to our order value cheque on London the sum of one hundred and sixty-three pounds eleven shillings sterling value received. Shipping documents attached to be given up on payment."

It is addressed to Messrs. Gandour Frères, Beirut. It is signed Jebara, and is indorsed "pay to the order of the Imperial Ottoman Bank."

E The first question to be considered is: What is the proper meaning of this document. The bill is expressed for a sum in English currency, or, in other words, in sterling, and the ordinary result is that only payment in sterling will be a proper payment in respect of the bill. But the appellants argue that the words "value cheque on London" alter what would otherwise be the effect of the bill. They say that these words mean that the only proper payment of the bill could be made by tendering a cheque on London; **F** that this was admittedly not done, and that, consequently, their only liability arose, not from the terms of the bill, but from the fact that they had got Turkish piastres for the goods. These Turkish piastres they say they are willing to return just as if they had put them in a box and kept them there. As a matter of fact they did not keep them in a box, they traded with them, but in the view which I take of the bill I need not explore this subject further. I do not agree with this view of what the words "value cheque on **G** London" meant. I think they meant no more than this, that it must be quite understood that the payment which obviously would not be made in Beirut in actual English currency must be so calculated as to represent what a cheque on London for the amount on the bill would cost. That the words are pleonastic may be admitted, but what an absurd result is reached by the interpretation the other way. The Syrian merchant comes forward to take up the bill and get the goods. The bank itself would sell a cheque **H** on London, the price of such a cheque for the sum in the bill being calculated on the exchange of the day; and just because the merchant pays in piastres the same sum instead of asking for a cheque and then handing back the cheque as soon as received, it is to be held that he has not properly taken up the bill. My view is this, that as the bank in Beirut accepted the payment in lawful money from the Syrian merchant and handed over the goods, it constituted itself, as in a question with the drawer, debtor **I** for the sterling amount on the face of the bill. This is really the view of ROWLATT, J., though expressed in somewhat different words.

I am not able to take the view which commended itself to the Court of Appeal. Their judgment is rested on this, that the bank in Beirut had no right to deal with the goods, the right to deal with them depending on the mandate which the respondent had given the bank in Manchester to collect the proceeds of the bill, and that mandate having been as a contract abrogated by the war. But it is not every contract that is abrogated by the war, it is only a contract which is still executory and which for its execution requires intercourse between the English subject and the enemy. Now this contract

had been partially carried out, the bills had been endorsed, and the bank had been handed them and the endorsed bills of lading. From that a subsidiary contract arose, i.e., the contract that on payment of the bills the shipping document should be handed over. To execute that no intercourse between an English subject and the enemy was necessary. The bank was a Turkish subject and the Syrian merchant was a Turkish subject. The bank, therefore, was, in my view, perfectly entitled to do what it did; nay, more, it might have been forced to do it by the Syrian merchant on producing proof that he was the real consignee of the goods and proffering payment of the bill. That, in my view, shuts out any idea of conversion. It is true that the part of the original contract which provided for a remittance of the proceeds could not be carried out. But that fact did not abrogate what had been already done, i.e., the indorsements and what followed thereon. The liability of the bank, in my view, rests, not on the original mandate, but on the fact that, being entrusted with the goods, they parted with them on payment of the bill; and thus we come back again to the original question of what acceptance of the payment really meant, which is what I have already dealt with. They constituted themselves debtors in sterling, and, therefore, in sterling they must pay.

Another point was raised by the appellants which did not commend itself to either court, but which, as it was strenuously argued before your Lordships, must be mentioned. Article 84 of the Treaty of Lausanne between Great Britain and Turkey, which by the Order in Council of Aug. 12, 1924, has the force of law, is as follows:

“The High Contracting Parties are in agreement in recognising that debts which were payable before the war or which became payable during the war under contracts entered into before the war, and which remained unpaid owing to the war, must be settled and paid, in accordance with the provisions of the contracts, in the currency agreed upon at the rate current in its country of origin. Without prejudice to the provisions of the Annex to s. II of this Part, it is agreed that where payments to be made under a pre-war contract are represented by sums collected during the war in whole or in part in a currency other than that mentioned in the said contract, such payments can be made by handing over the sums actually collected, in the currency in which they were collected. This provision shall not affect settlements inconsistent with the foregoing provisions arrived at by voluntary agreement between the parties before the coming into force of the present Treaty.”

I am of opinion for the reasons already stated that the sum now due was not collected in piastres. The bank at Beirut were not agents of the respondents to collect piastres, but for the reasons already given became debtors by their own act in a sterling sum. Here again I take the same view as ROWLATT, J. On the whole matter I am of opinion that the judgment of the Court of Appeal should be recalled and the judgment of ROWLATT, J., be restored, the respondent to have his costs before this House and in the courts below. I move accordingly.

LORD SHAW.—The transaction, to begin with, was entirely English; it was between the respondent, as an Englishman, and a branch of the appellants' bank in Manchester. The bill in question is a sample of several of the same character, which were granted in the course of similar business. The respondent bought Manchester goods for Beirut, where he had correspondents to whom he dispatched those goods. He drew a bill of exchange upon them in the terms to be noted, and handed to the bank this bill for collection in Beirut. He also handed to the bank the bills of lading for the goods which had been shipped. The situation, accordingly, was plain to the effect that upon the bill being paid the corresponding bills of lading for the goods would be handed over by the bank as the counterpart. The transaction was unquestionably an English transaction for payment in England in English sterling money and delivery of the bills of lading for goods shipped in England. War broke out between Turkey and England on Nov. 5, 1914. Subsequent to the war, however, the business was continued by the appellants' bank at its branch at Beirut. The goods had gone to Beirut; the bills of lading had gone to the Ottoman Bank at Beirut; the person to make payment under the bill was the Beirut merchant. In short, the scene of the completion of the transaction was in Turkey. The duties to be performed were that, upon payment of what

A in the bill of exchange is called "value cheque upon London," he was entitled to the delivery to him of the bills of lading and, of course, of the goods. The transaction was interpreted in this sense in Beirut. The merchant presented himself at the bank, paid the equivalent of the sterling price in the official number of piastres, which had been regularly fixed and was known to the commercial public. This amount was accepted in piastres and the bank thereupon proceeded not only to enter the sterling amount in **B** its own books, but to fill up a document called a bordereau, under which they purported to hold to the credit of their Manchester branch a sum of sterling equal to the amount of the bill of exchange. This bordereau was, on Feb. 4, 1919, actually sent from Beirut to the Manchester branch of the appellants' bank. They were, accordingly, in this position as advised from Beirut by the bank: that the respondent was entitled to be credited with that sum of sterling money.

C The contention of the bank, however, now is that the respondent is only to be credited with the value of piastres at the greatly fallen price at which they subsequently stood; and the simple question in the case is: Was the transaction in Beirut a transaction in which "value cheque on London" had been paid, that is to say, the equivalent of sterling money? In my opinion, the case is substantially concluded upon facts by the evidence of Mr. Naville, formerly in the employment of the defendant bank and manager of the **D** branch at Beirut up to July 15, 1915. This is the record:

"(Q.) Have you any doubt whatever that the bank acted in the same way precisely as they always acted?—(A.) To the best of my knowledge, I should think they did.

(Q.) When they come to estimate—say that they have got a bill sterling—how do they estimate how much money they are going to make this man pay?—(A.) The man would have the moneys that he brings to the counter at the rate at which you can get a cheque in London, or Paris. ROWLATT, J.: Therefore, they did not ask for more, and they would not take less because he had got to pay for it at the rate?—

E (A.) The sterling rate of London. MR. CYRIL ATKINSON: And you understand that, as the result of what he is paying you, you are going to credit Manchester with so much sterling?—(A.) Yes. (Q.) And you fix the price which you want to enable

F you to do that?—(A.) The Ottoman Bank in Beirut fixes on Monday morning an official price, which is distributed and is absolutely official, and the bank provide for any normal amount, and any balance that is wanted, they buy in the market. ROWLATT, J.: The long and short of it is that the drawee paid in sterling, but you could not remit it?—(A.) That is so. That is the whole thing in a nutshell.

G It is perfectly true that after the outbreak of war the Beirut branch of the Ottoman Bank could not make any remittances of money to any English national—which would include its agent in Manchester. But it is to be observed that there was no bar whatsoever to the acceptance in sterling or in the full market equivalent of the day of a cheque upon London from another Turkish subject, namely, the customer in Beirut. Both bank and customer were Turkish subjects there; and the legitimacy of the payment to the bank in Beirut is, therefore, beyond question, there being no international quality **H** about that part of the transaction. In Turkey the bill of exchange was retired in full by a payment which, although in piastres, was acknowledged by the bank not only to the customer, but to their own English branch, to have been full payment for the goods. In my view, it is a mere juggle on the part of the appellants to suggest that these goods were got on a payment which meant something less or something different in result from full payment in English sterling. The piastres that passed were passed into the **I** hands of the bank itself at the bank's official valuation of the equivalent of sterling. When they have now fallen in value it does not seem to me to be open to them to plead that the transaction, so far as regards the English merchant, was not fully completed by delivery of the goods by them, on the one hand, and full payment of the bill by the merchant, on the other. There are other elements in the case which would confirm this view, as I hold it to be established that not only were the amounts of Turkish currency in all cases fixed by the appellants themselves as the price of providing the sterling credit, but that it was open to the bank to have converted the Turkish currency into Swiss or United States currency. That they did not do so was simply because, as I

hold, they thought themselves then fully paid at the Turkish piastres rate of the day. In my view, they were right in so thinking; and they have been paid in "value cheque on London." Prohibitions against doing business with English or other enemy nationals cannot apply to a case of a payment made between two Turkish nationals and goods delivered on the head of that payment, documents and goods passing from one Turkish national in Beirut to another. The appellants' Manchester branch was given credit for the sum of sterling money which they have been advised by the bank itself is the proper sum to credit on this particular account. A B

In this view all questions of conversion or as to agency by necessity drop out of the case. There remains, however, art. 84 of the Treaty of Lausanne between Great Britain and Turkey of date Aug. 12, 1924. The appellants desire to utilise the words of that article as justifying them in payment of the currency agreed upon at the rate of the currency in its country of origin. I do not think the currency agreed upon in this transaction was piastres, and, therefore, in my view, the reference to the treaty fails, but upon this subject I desire to agree expressly with the language of my noble and learned friend, Lord Dunedin. In the Court of Appeal the case was decided on the footing of wrongful conversion, and the result would probably be that the sum to be awarded after inquiry on that ground, the value of the goods having greatly increased, would be in amount more onerous to the bank, but, as your Lordships hold that this was made and concluded and credited as a sterling transaction, such inquiries are out of place. It should be added that the House was informed at the Bar that on the judgment of the Court of Appeal being delivered, intimation was made by letter to the appellants that all the respondent wanted was to be credited and paid in sterling, as per the judgment of ROWLATT, J. This offer was declined and the appeal was brought to this House. In these circumstances the respondent should have his costs of the entire cause, including this appeal. I think the judgment of ROWLATT, J., fully and correctly covered the case, and that his judgment should be restored. C D E

LORD PHILLIMORE.—The plaintiff carries on business in Manchester. The defendant bank carries on business in Great Britain, Turkey, Syria and elsewhere, having one of its head offices in London and branch offices among others at Manchester and at Beirut in Syria. The plaintiff before the war was in the habit of buying Manchester goods and transmitting them to correspondents in Syria. Business was conducted in the following manner. The plaintiff took a bill of lading making the goods deliverable to the bank; he also drew a bill upon his particular correspondent for whom the goods were destined and endorsed it to the bank; he took the bill of lading and the bill of exchange and other shipping documents to the Manchester branch of the bank, and obtained an advance of 80 per cent. on the value of the bill. When the goods reached Beirut, if the Syrian correspondent had come forward in time and paid the bank, he took delivery; if not, the bank took delivery ex ship, and the correspondent, when he came along, took delivery from the bank. The form of the bill of exchange required payment to be made of the value as if payment were made in London; the words ran: "Please pay to our order value cheque on London the sum of £——." The practice of the bank—a perfectly reasonable one in time of peace—was to take payment in Turkish piastres (the current coin of Syria), and then to credit in account the head office in London with the sum in sterling. The head office then paid to the plaintiff the balance due to him. When the war broke out, several consignments were in transit, or at any rate had not been delivered to the correspondent. As each came along, however, the bank handed the goods to him on receiving that sum in piastres, which at the moment was equivalent to sterling in London. There being war between the two countries, Turkish law did not permit money to be remitted to Great Britain, but for the purpose of ascertaining a correspondency between the sterling sum in London and Turkish piastres in Beirut, it was possible to calculate the exchange through the neutral country of Switzerland. By the time that Syria ceased to be in possession of the enemy, and thenceforward till the war came to an end, and thereafter, the value of the piastre greatly depreciated. The defendant bank then offered to pay the plaintiff an equal number of piastres to those which the bank had received when they handed over the F G H I

A several parcels of goods or—which came to the same thing—the sterling value of the depreciated piastres.

The plaintiff refused to accept this and brought the present action for the sterling value of the several consignments, amounting in all to £3,161 6s. 6d., and he also claimed interest from a certain date. Alternatively, he claimed to treat the delivery of the several parcels as having become wrongful during the war and damages for the conversion. The defendant bank pleaded the Turkish law precluding it from making payment to any person in Great Britain during the war, and said that any previous agreement had become illegal, or, alternatively, impossible of performance, that it had acted reasonably in parting with the goods, as otherwise there would have been charges for storage and insurance and the goods might have deteriorated and were liable to confiscation if they were held still to belong to the plaintiff, and that it acted reasonably and in a businesslike way in collecting from the various recipients the equivalent of the sterling value; and it pleaded art. 84 of the Treaty of Lausanne and said that under that article its liability was limited to paying now the sums as collected in Turkish currency. ROWLATT, J., gave judgment for the plaintiff for the sum sued for. He did not think it was a case of conversion or of giving damages for conversion; but he thought that, however the branch of the defendant bank in Syria collected the price of the several parcels, the defendant bank rendered itself accountable for the value in sterling in London, and that, though this could not be paid while the war suspended all payments, it did become payable when the war came to an end. There might have been some question whether the duty to pay first arose when the war came to an end, or whether it did not arise earlier when the Allies came into possession of Syria, but the plaintiff only asked for interest from Mar. 13, 1919, and that date appears to have been accepted by the defendant bank, and judgment was, accordingly, given for interest as from that date.

The defendant bank appealed to the Court of Appeal. The learned lords justices thought that ROWLATT, J., had put his judgment on a wrong footing, that the plaintiff would have failed if that were the only ground, but that the true view was that the defendant bank never should have delivered the parcels to the several recipients, and that the bank was, therefore, liable in damages for wrongful conversion, and they directed an inquiry into damages. This view of the case would operate more hardly upon the defendant bank than the judgment of ROWLATT, J., and the bank has, accordingly, appealed to your Lordships' House claiming that neither judgment is right, and that it is only liable for that which it has always offered, the present value of an equal sum in piastres to that which it had received. The respondent, in his printed Case, supported both judgments, but his solicitors had previously written to the bank's solicitors saying that he would be satisfied if he could hold the judgment of ROWLATT, J. Your Lordships at an early stage of the argument came to the conclusion that the judgment of the Court of Appeal, so far as it differed from that of ROWLATT, J., could not be supported.

As each recipient came along in time of peace the branch of the bank at Beirut was entitled to deliver to him his parcel of goods, provided that the bank made itself debtor to the plaintiff for the proper sum in sterling in London. After the war had begun there was nothing unlawful in two parties, both subjects of the Ottoman Empire, dealing with each other. So far, therefore, there was nothing wrong in the bank delivering parcels to the several recipients. As between the branch bank in Beirut considered as a Turkish subject and the plaintiff as a British subject, all dealings were suspended during the war, and, therefore, the bank was not bound to carry out the plaintiff's mandate. But the plaintiff could not complain that his mandate was carried out. Indeed, he may be presumed to have desired it. Provided that the proper payment was made in the proper manner, no harm was done; and the bank either in fact took proper payment in the proper manner or must be deemed to have done so. Indeed, it not merely admits, but contends, that it did so. The plaintiff's case, therefore, must rest upon the judgment of ROWLATT, J. So far as the plaintiff was concerned, though he had framed his case in such a way as to claim the alternative relief given by the Court of Appeal, he was content, as already stated, with the judgment given by ROWLATT, J.

It was the bank who, by appealing from this judgment, brought upon itself the more A
severe order of the Court of Appeal.

I think that ROWLATT, J., was right. The bank escapes from a judgment for wrong-
ful conversion of the goods upon the supposition that it took in return for them that
which it was bound to take, a credit on London—a credit unavailable at the moment
because things were put to sleep by the war, and, therefore, not producing interest B
during the war, but becoming available when the war came to a close. That which it
could easily do through its machinery by the simple process of debiting the Syrian
branch and crediting the London head office it had, as soon as the war was over, to do;
and, therefore, it is liable both for principal and for interest from the agreed date.
For the same reason the article in the Treaty of Lausanne on which the bank relied does
not protect it. The bank cannot say that it collected the money “in a currency other
than that mentioned in the contract” because the only way in which it can show that it C
performed its duty is by accepting the position that it took or procured or produced a
London cheque. For these reasons I am of opinion that the judgment of ROWLATT, J.,
should be restored. As to the further costs from the date of his judgment, those of
going unnecessarily to the Court of Appeal ought to be paid by the bank. With regard
to the costs of the appeal to your Lordships’ House, this appeal was no doubt necessary
because the bank had brought an order of the Court of Appeal upon itself, and the
bank was informed that the respondent would be content with the judgment of Row- D
latt, J. It ought, therefore, to pay these costs also.

LORD CARSON.—I have had the advantage of reading and considering the speech
of my noble and learned friend upon the Woolsack, with which I entirely concur, and
I do not desire to add anything. E

LORD BLANESBURGH.—I find myself in entire agreement with the rest of your
Lordships as to the proper result of this appeal. In reaching that conclusion, however,
I have had a special difficulty of my own to overcome. To me, it has appeared that the
very unusual terms in which the bills of exchange employed in these transactions were
invariably couched had, and were intended to have, a meaning and effect sufficient to F
invest the appellants’ argument on s. 84 of the Treaty of Lausanne with a cogency which,
had it not been neutralised by other considerations, might have carried their appeal.

As I read it, the effect of the expression “value cheque on London” found in each of
these English bills of exchange addressed to a drawee resident and carrying on business
in Turkey was to make it incumbent upon the appellants’ branch at Beirut, as their only
duty, to receive from the drawee in Turkish currency the sum which the bank accepted G
as the equivalent in value of the sum in sterling mentioned in the bill. This is, I think,
the effect of the words, whether they are merely construed according to their natural
meaning in the setting in which they are found or whether they are interpreted with due
regard to the invariable course of dealing between the parties in these transactions
and to the business requirements or convenience of one or other of them. It was not,
I think, supposed by anybody that payment for the bill in any other than Turkish H
currency would ever be made or asked for. Tender by the Turkish acceptor of a cheque
on London, good, bad, or indifferent, for the amount in sterling named in the bill would
not, in my view, have been such a payment as, in their natural signification, is connoted
by the words used. Such a payment gives no effect to the word “value,” which strikes
me as the governing word in the phrase. It would, moreover, have failed to be a pay-
ment which in a business sense would have subserved either the interest or convenience I
of any of the parties concerned. And it is not without significance in this connection
to note that an allegation originally made by the respondent’s statement of claim that it
was the duty of the appellants’ branch at Beirut to transmit to the respondent cheques
on London so collected was, before the trial, at the respondent’s own instance struck
out.

In each transaction, there were three parties concerned whose interests had presum-
ably to be adjusted in carrying it to completion. There was, first of all, the respondent,
entitled as the result of his arrangement with his Beirut correspondent, to receive in

A England, if he so required, his agreed price in sterling for goods supplied. There were, next, the appellants, entitled normally in respect of their advances to the respondent to 80 per cent. of the sterling amount named in the bill, and interested, moreover, as exchange bankers, to secure for themselves the ordinary profit on any exchange transaction involved. There was lastly the Turkish correspondent of the respondent, drawee of the bill, who, while in account liable to the respondent in sterling for the agreed price of the goods supplied, had for his own convenience to be enabled to discharge that liability by a payment made in Beirut in local currency. Only by an arrangement under which the appellants' branch at Beirut collected from the respondent's Turkish correspondent the amount in Turkish currency which the appellants were ready to accept as the equivalent in value of the sum in sterling mentioned in the bill could either the convenience or the interests of the parties as so described have been met. But by it all were subserved. As the exchange rate accepted was the rate published by themselves, the appellants thereby secured their own profit on the transaction viewing it as one of exchange, and they were also thereby left at liberty, so far as their own share of the proceeds of the bill was concerned, either to retain these in Turkey or otherwise dispose of them as their occasions, for the moment, dictated. In other words, so far as it touched the appellants' own interests, collection in Turkish currency was of the essence. That it was in accord also with the interest and convenience of the Turkish acceptor seems obvious: nor was it otherwise than to the interest of the respondent, for it might well have been, on occasion, highly useful for him to have his share of the currency proceeds applied or retained in Turkey on his account.

D Accordingly, if that were all, I should myself, on this interpretation of these bills of exchange, have difficulty in resisting the case made by the appellants on art. 84 of the Treaty of Lausanne. The currency "mentioned" in the contract is, I think, sterling, and the collection, although conventionally so made, has in fact been made in Turkish currency. But, in the circumstances, this is not, I think, enough for the appellants. It is, I think, clear that as between the appellants and the respondent the collection in Turkish currency actually made was only authorised, and, as between the respondent's Turkish correspondent and the appellants' Beirut branch, payment in Turkish currency was only made, on the terms that thereupon and without any variation by reason of any subsequent alteration in the rate of exchange, whether up or down, the appellants became accountable to the respondent in sterling for the precise sum representing his final share of the sterling value of the bill. And, in my view, the effect of this additional term in the transaction was to make art. 84 of the treaty inapplicable to the present case.

F In the result, therefore, I agree that the order of ROWLATT, J., should be restored.

G I am satisfied that there was in this case no wrongful conversion by the appellants, and I am relieved to find that the respondent's alternate claim on that footing, a claim really unconscionable, cannot, for the reasons given by your Lordships who have preceded me, be supported; and in ordinary circumstances it would, I think, have been proper that the costs of litigating that issue should have fallen upon him. But the respondent has throughout been ready to accept the order of ROWLATT, J., and, as the appeals of the bank to the Court of Appeal and to this House have been brought really in order to obtain a reversal of that order, I agree in the view that, although the appellants have not succeeded in displacing the order of the Court of Appeal, they should bear the costs of both appeals, as the final result has been only to restore an order with which from its date the respondent was well content.

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Solicitors: *Bischoff, Coxe, Bischoff & Thompson*; *Pritchard, Englefield & Co.*, for Brett & Co., Manchester.

Appeal dismissed.

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

GENERAL MEDICAL COUNCIL *v.* INLAND REVENUE
COMMISSIONERS
ENGLISH BRANCH COUNCIL OF GENERAL MEDICAL
COUNCIL *v.* INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Hanworth, M.R., Sargant and Lawrence, L.J.J.), March 28, 1928]

[Reported 97 L.J.K.B. 578; 139 L.T. 225; 44 T.L.R. 439;
13 Tax Cas. 819]

Income Tax—Charity—Purpose beneficial to community—Test of “charity”—General Medical Council—Regulation of medical profession—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 37 (1) (b).

The fourth category of purposes which constitute a charitable trust contained in the opinion of LORD MACNAGHTEN in *Income Tax Comrs. v. Pemsel* (1), [1891] A.C. 531, 583, namely, “trusts for purposes beneficial to the community,” is illustrative and not exhaustive, and it cannot truly be said that, if a trust can be found for a purpose beneficial to the community, it is necessarily a charity. For the meaning of charity one must go back to the definition in the statute 43 Eliz. 1, c. 4 (see now Mortmain and Charitable Uses Act, 1888, s. 13).

The General Medical Council was established under the Medical Act, 1858, by which the council were placed under a duty to keep and publish a register of qualified medical practitioners and to strike off the register any person convicted of a criminal offence or found by the council to have been guilty of infamous conduct in any professional respect, to exercise the oversight of medical studies and examinations, and to publish in the BRITISH PHARMACOPŒIA a correct list of drugs.

Held: while the performance by the council of their duties would result in benefit to the public by reason of the guarantee they had that persons on the register were properly qualified and that drugs which were prescribed would be of the proper quality and standard, primarily it would operate for the benefit of members of the medical profession, and, therefore, the funds of the council were not “applied to charitable purposes only” within s. 37 (1) (b) of the Income Tax Act, 1918 (now replaced by s. 447 (1) (b) of the Income Tax Act, 1952), and yearly interest forming part of the income of the council was not exempt from liability to income tax under that section.

Notes. Referred to: *Institution of Civil Engineers v. I.R. Comrs.*, [1931] All E.R. Rep. 454; *Peterborough Royal Foxhound Show Society v. I.R. Comrs.*, [1936] 1 All E.R. 813; *Re Corelli, Watt v. Bridges*, [1943] 2 All E.R. 519; *Re Bland-Sutton’s Will Trusts*, *National Provincial Bank, Ltd. v. Middlesex Hospital*, [1951] Ch. 485; *General Nursing Council, v. St. Marylebone Corpn.* [1957] 3 All E. R. 685; [1959] 1 All E. R. 325.

As to charities for income tax purposes, see 20 HALSBURY’S LAWS (3rd Edn.) 603 et seq.; and for cases see 28 DIGEST 10–14, 82–84. For Income Tax Act, 1952, see 31 HALSBURY’S STATUTES (2nd Edn.) 1.

Cases referred to:

- (1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 28 Digest 10, 51.
- (2) *Re Foveaux, Cross v. London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 43 W.R. 661; 11 T.L.R. 540; 39 Sol. Jo. 671; 13 R. 730; 8 Digest (Repl.) 348, 291.
- (3) *Re Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G.*, [1916] 1 Ch. 100; 85 L.J.Ch. 115; 113 L.T. 1208; 80 J.P. 89; 60 Sol. Jo. 141; 14 L.G.R. 171; 8 Digest (Repl.) 351, 308.
- (4) *I.R. Comrs. v. Yorkshire Agricultural Society*, [1928] 1 K.B. 611; 97 L.J.K.B. 100; 138 L.T. 192; 44 T.L.R. 59; 72 Sol. Jo. 68; 13 Tax Cas. 58, C.A.; Digest Supp.

- A (5) *Morice v. Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 836.
- (6) *Society of Writers to the Signet v. I.R. Comrs.* (1886), 2 Tax Cas. 257; 14 R. (Ct. of Sess.) 34; 24 Sc.L.R. 27; 28 Digest 13, m.
- (7) *I.R. Comrs. v. Forrest* (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 39 W.R. 33; 6 T.L.R. 456; 3 Tax Cas. 117, H.L.; 39 Digest 299 780.
- B (8) *Brighton College v. Marriott*, [1926] A.C. 192; 134 L.T. 417; 42 T.L.R. 228; 70 Sol. Jo. 245, H.L.; 28 Digest 24, 127.
- (9) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, 879.
- (10) *Sulley v. Royal College of Surgeons, Edinburgh* (1892), 3 Tax Cas. 173; 28 Digest 13, o.
- C (11) *Farmer v. Juridical Society of Edinburgh* (1914), 6 Tax Cas. 467; 28 Digest 13, n.

Appeal from a decision of ROWLATT, J., on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division.

D At a meeting of the commissioners held on Oct. 25, 1926, the General Medical Council claimed exemption from income tax for the four years ending on April 5, 1924, under s. 37 of the Income Tax Act, 1918, on the ground that they were a charity within the meaning of the Income Tax Acts. The council was first established under the Medical Act, 1858, and was incorporated by s. 1 of the Medical Council Act, 1862. Its composition was altered from time to time, and at the relevant time it consisted of thirty-eight members of whom eighteen were appointed by universities in the United Kingdom, nine by the medical corporations, five by His Majesty in Council, and six were elected by members of the medical profession. From the establishment of the council until the end of the four years to which this case relates all the members of the council had been members of the medical profession, but since April 5, 1924, a lay member had been appointed by His Majesty in Council.

F The preamble of the Medical Act, 1858, was as follows:

"Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners: Be it therefore enacted. . ."

G Section 3 of the Act established the council, and s. 6 set up branch councils for England, Scotland and Ireland, to which branch councils the council was empowered to delegate powers and duties, and through which the council did a great deal of its work. The chief duties imposed by the Act upon the council were (a) to keep and publish a register of qualified practitioners, (b) to exercise oversight upon medical studies and examinations, and (c) to publish the BRITISH PHARMACOPEIA. With regard to registration, every person who possessed the required medical qualification was entitled on payment of certain fees to have his name entered upon the register kept by the appropriate branch council (s. 15). The combined branch registers formed the complete register which was published by the council and not by the branches. The name of a practitioner once registered might be struck off the register in circumstances set out in ss. 28 and 29 of the Act, which read as follows:

I "28. If any of the said colleges or the said bodies at any time exercise any power they possess by law of striking off from the list of such college or body the name shall signify to the General Council the name of the member so struck off; and the General Council may, if they see fit, direct the registrar to erase forthwith from the register the qualification derived from such college or body in respect of which such member was registered, and the registrar shall note the same therein: provided always, that the name of no person shall be erased from the register on the ground of his having adopted any theory of medicine or surgery.

29. If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence or shall after due inquiry be judged by the General Council to have been guilty of

infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register." A

By s. 31 of the Act and by s. 6 of the Medical Act, 1886, it is provided that any person registered under the Act of 1858 shall be entitled according to his qualification or qualifications to practise medicine or surgery or both and to demand and recover in any court of law reasonable charges for professional aid, advice or visits and for any medicines or medical or surgical appliances and by s. 32 of the Act of 1858 an unregistered person was not entitled to recover any such charges. Section 34 of the Act was as follows: B

"The words 'legally qualified medical practitioner' or 'duly qualified medical practitioner,' or any words importing a person recognised by law as a medical practitioner or member of the medical profession, when used in any Act of Parliament, shall be construed to mean a person registered under this Act." C

An unregistered person was not prohibited from practising medicine, but he suffered certain disabilities. For example, he could not recover fees by legal process, he could not give a valid certificate, he was debarred from certain appointments (vide s. 36 of the Act), and he was unable to join in practice with a registered practitioner in such a way as to lead the public to believe that he was "covered" by the qualifications of the latter. There were certain penalties prescribed by the Act in the event of any person taking any name, title, addition or description implying that he is registered under the Act. By s. 35 of the Act a registered person was, if he so desired, exempt from service on juries and inquests. Sections 18 to 21 of the Act gave power to the council to require information from medical teaching and examining bodies as to the sources of study and examinations to be gone through in order to obtain the qualifications granted by them, and empower a representative of the council to be present at examinations. If it appeared to the council that the course of study and examinations for any qualification were not such as to secure the possession by persons obtaining such qualification of the requisite knowledge and skill for the efficient practice of their profession, the council was empowered to make representations to the Privy Council, and the Privy Council might order that the possession of the qualification in question should no longer confer a right upon its holder to be registered under the Act. D E F

The powers given by the Act of 1858 to the council in the matter of supervising medical examinations were expanded by ss. 2, 3 and 4 of the Medical Act, 1886, which were as follows:

"2. Examination before registration.—On and after the appointed day a person shall not be registered under the Medical Acts in respect of any qualification referred to in any of those Acts, unless he has passed such qualifying examination in medicine, surgery and midwifery, as is in this Act mentioned. G

3. Qualifying examinations held by medical authorities. (1) A qualifying examination shall be an examination in medicine, surgery, and midwifery held, for the purpose of granting a diploma or diplomas conferring the right of registration under the Medical Acts, by any of the following bodies—that is to say: (a) any university in the United Kingdom or any medical corporation, legally qualified at the passing of this Act to grant such diploma or diplomas in respect of medicine and surgery, or (b) any combination of two or more medical corporations in the same part of the United Kingdom who may agree to hold a joint examination in medicine, surgery and midwifery, and of whom one at least is capable of granting such diploma as aforesaid in respect of medicine, and one at least is capable of granting such diploma in respect of surgery, or (c) any combination of any such university as aforesaid with any other such university or universities, or of any such university or universities with a medical corporation or corporations, the bodies forming such combination being in the same part of the United Kingdom. (2) The standard of proficiency required from candidates at the said qualifying examinations shall be such as sufficiently to guarantee the possession of the knowledge and skill requisite for the efficient practice of medicine, surgery and midwifery; and it shall be the H I

A duty of the General Council to secure the maintenance of such standard or proficiency as aforesaid; and for that purpose such number of inspectors as may be determined by the General Council shall be appointed by the General Council, and shall attend, as the General Council may direct, at all or any of the qualifying examinations held by any of the bodies aforesaid. (3) Inspectors of examinations appointed under this section shall not interfere with the conduct of any examination, but it shall be their duty to report to the General Council their opinion as to the sufficiency or insufficiency of every examination which they attend, and any other matters in relation to such examination which the General Council may require them to report; and the General Council shall forward a copy of every such report to the body or to each of the bodies which held the examination in respect of which the said report was made, and shall also forward a copy of such report, together with any observations thereon made by the said body or bodies, to the Privy Council. (4) An inspector of examinations appointed under this section shall receive such remuneration, to be paid as part of the expenses of the General Council, as the General Council, with the sanction of the Privy Council, may determine.

4. Withdrawal from medical authorities of right to hold qualifying examinations —

D (1) If at any time it appears to the General Council that the standard of proficiency in medicine, surgery and midwifery, or in any of those subjects or any branch thereof, required from candidates at the qualifying examinations held by any of the bodies for the time being holding such examinations is insufficient, the General Council shall make a representation to that effect to the Privy Council, and the Privy Council, if they think fit, after considering such representation, and also any objections thereto made by any body or bodies to which such representation relates, may by order declare that the examinations of any such body or bodies shall not be deemed to be qualifying examinations for the purpose of registration under the Medical Act; and Her Majesty with the advice of Her Privy Council, if upon further representation from the General Council or from any body or bodies to which such order relates, it seems to Her expedient so to do, shall have power at any time to revoke any such order. (2) During the continuance of any such order the examinations held by the body or bodies to which it relates shall not be deemed qualifying examinations under this Act and any diploma granted to persons on passing such examinations shall not entitle such persons to be registered under the Medical Acts, and any such body shall not choose either separately or collectively with any other body a member of the General Council; and the member (if any) for the time being representing such body in the General Council shall, unless he was chosen by such body collectively with any other body not subject to an Order under this section, be suspended from taking part in the proceedings of the General Council."

Mr. Norman Carew King, the registrar of the council, gave evidence to the effect that the council carried out their statutory duties of supervising and inspecting medical studies and examinations and reporting thereon, of preparing, revising and issuing the BRITISH PHARMACOPŒIA (the statutory standard of reference for medicinal preparations throughout the Empire), of registering qualified practitioners, and of sitting as a judicial body to hear complaints against practitioners in respect of alleged "infamous conduct in any professional respect," a phrase as to the meaning of which the council are the sole judges. A good deal of the time of the council was taken up in hearing such complaints. The expenditure of the council consisted mainly of (a) fees and expenses paid members of the council and its committees; (b) the cost of inspecting examinations for medical qualifications; (c) printing (including the cost of printing the medical register); (d) office expenses and sundries. The council's income from registration fees in connection with colonial and foreign qualifications, from interest on its investments, and from the sale of publications, fell far short of its expenditure, and this deficit was annually made up, and the account exactly balanced, by contributions from the English, Scottish and Irish Branch Councils calculated on a basis proportionate to the incomes of those branch councils. These branch councils had ordinarily a considerable surplus of income over expenditure because registration fees paid by English, Scottish and Irish

practitioners were paid direct to the respective branch councils and not to the general council. A

Counsel on behalf of the council contended: (a) that the purpose for which the council was established as expressed by Parliament in the preamble to the Medical Act, 1858, viz., "to enable persons requiring medical aid to distinguish qualified from unqualified practitioners" was a charitable purpose and that there was nothing in that Act or in any other Act or otherwise which had any effect other than to carry out the overriding object expressed in the preamble; (b) that the council was a body of persons established for charitable purposes only; (c) that the income of the council was applicable and had been applied to charitable purposes only; and (d) that the council was entitled to exemption from income tax. On behalf of the Crown it was contended inter alia; (a) that the council was a professional institution whose objects, aims and activities were directed mainly to the interests of the medical profession; (b) that the council was not established for charitable purposes only; (c) that the income of the council was not applicable to charitable purposes only and was not applied to charitable purposes only. B C

The commissioners who heard the claim held that the council was not established for charitable purposes only and refused the claim. The appellants required a Case for the opinion of the High Court. On the hearing of the appeal ROWLATT, J., decided in favour of the Crown. The council appealed. D

Vaisey, K.C., and *Raymond Needham*, for the appellants, referred to *Income Tax Special Comrs. v. Pemsel* (1); *Re Foveaux, Cross v. London Anti-Vivisection Society* (2); *Re Verrall National Trust v. A.-G.* (3); and *I.R. Comrs. v. Yorkshire Agricultural Society* (4).

The Solicitor-General (*Sir Thomas Inskip, K.C.*), *J. H. Stamp* and *R. P. Hills*, for the respondents, referred to *Morice v. Bishop of Durham* (5), *Society of Writers to the Signet v. I.R. Comrs.* (6), *I.R. Comrs. v. Forrest* (7), and distinguished *I.R. Comrs. v. Yorkshire Agricultural Society* (4). E

LORD HANWORTH, M.R.—These two appeals come before this court on appeal from the decision of ROWLATT, J., who affirmed in each case the decision of the commissioners. The two Cases are stated, one at the instance of the General Medical Council, as it is called for short, and the other at the instance of the English Branch Council of the General Medical Council, but the two cases involve precisely the same point. They have both been decided in the same way by the commissioners and ROWLATT, J., and it is agreed that the decision in the first case will govern the second case. Therefore, I take the first case, which is the appeal of the General Council of Medical Education and Registration of the United Kingdom. The second case is in relation to the appeal of the council particularly appointed for the English branch, which is a component part, or acts under the jurisdiction of, or in association with, this General Council of Medical Education and Registration of the United Kingdom. F G

The Case and the appeals seek to secure exemption for the General Medical Council on the ground that a part of their income ought to be immune from taxation, as it is brought within the exemption which is allowed in the case of charitable funds. It cannot be too often or too plainly stated that there is no general exemption from the Income Tax Acts of what is called a charity. The exemption is granted in certain cases and in respect of certain branches of income. Thus, under s. 37 (1) of the Income Tax Act, 1918, exemption is granted: H

"(a) From tax under Sched. A in respect of the rents and profits of any lands . . . belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes only." I

Under para. (b) of s. 37 (1), there is an exemption allowed in respect of the "interest, annuities, dividends, or shares of annuities" which are taxed under Sched. C, and there is also exemption from tax granted under Sched. D

"in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament

A . . . are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only."

The council in the present case point to certain items in their income in the year ending Dec. 31, 1922, and they say that that income is in respect of a yearly interest or other annual payment, and forms part of the income of the council, who are established for charitable purposes only, and that those funds are applicable to charitable purposes only. I pointed out in the judgment which I gave in *Brighton College v. Marriott* (8) the importance of bearing in mind the precise exemption which is allowed to income applied to charitable purposes, and as divided up into the various schedules under which that income falls to be taxed. It is plain, therefore, that if this exemption is to be successfully claimed, it must be shown by the council that it is a part of their income, they being a body of persons established for charitable purposes only, and that that income is applied to charitable purposes only.

C I pause to look at the purposes for which the General Medical Council has been established. Our attention has been called to various Acts and sections under which the council derive their powers. In the Medical Act, 1858, by the preamble it is declared:

D "Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners: Be it therefore enacted"

and what is enacted is that there is to be a general council which is to consist of persons chosen from the universities and from other learned bodies, and those persons, when they have been appointed, are to have charge of the register of properly qualified medical persons. That is provided under s. 27. They have the duty of seeing that none but properly qualified persons, and persons who remain properly qualified and are not guilty of infamous conduct, as it is called, remain upon that register. It is also provided that this register is to be published. By the Medical Council Act, 1862, the council was incorporated, and there was given to them the exclusive right of publishing and printing and selling the *BRITISH PHARMACOPŒIA*—the book which is the authoritative catalogue and index of the ingredients which are to be used in certain strengths by those who are engaged in the making of preparations and in compounding the medicines which are authorised and ordered by the members of the medical profession. Counsel says that one may derive from the Acts the powers which are to be entrusted to the council. The first is to keep a register of medical practitioners and strike off persons who have been guilty of infamous conduct. That is derived from ss. 15 and 29 of the Act of 1858. G Secondly, they are to exercise an oversight over the medical studies and examinations which are presented to and required of medical students. Those powers are found in ss. 18 to 21 of the Act of 1858, and they also have power as to registration and revision of the *BRITISH PHARMACOPŒIA*, which is derived from s. 2 of the Act of 1862. He claims that when one considers what those duties are, and reads into them the covering words of the preamble, that:

H "it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners"

it is clear that this body has been formed for what may be called generally, public benefit, and that it is, therefore, to be considered as a body which can ultimately be brought within the definition of a charity. As SARGANT, L.J., has pointed out during I the argument, it is not very plain how that preamble to the Act of 1858 is to be read. It is doubtful how far the duties which are imposed upon the council can be said to be wholly or mainly or only partly for the benefit of the public. When one comes to a question which is one of degree, it is important to remember that the measurement of the facts which are presented to the commissioners belongs to the commissioners, and it is for them to find what is the true appraisalment of the facts. We must not overlook that in the present case the commissioners who heard the claim held that the council was not established "for charitable purposes only," those words being interpreted in a manner to which I must refer in a moment. So far, therefore, as this is a case which

involves any consideration of the degree and a nice appreciation of whether the duties quâ the public which are imposed upon the council are primary or only secondary, I think, speaking for myself, that we should probably find ourselves bound, upon such a question, by the finding of the commissioners, for it would be a question of fact and would fall within their province to determine; but I am prepared to go further, and to give the council the benefit of the doubt, and to say: "Let it be supposed that one at least of the objects with which the council was originally started was in order that security might be given to the public that persons might be able to know who was, and who was not, a qualified medical practitioner."

To finish off the facts, I turn to the accounts of the receipts and expenditure for the year to which our attention has been called, the year ending Dec. 31, 1922. That year is similar to the other years, but we have looked at that account only. It appears that the receipts of the council are derived from a small sale of the Medical Register, an expensive book which has to be produced, but which does not command a large or extensive sale. Then there is a small sum derived from other publications; there are a certain number of persons with foreign and colonial qualifications who are able to have their names put into the list upon the payment by them of a single fee of £5, and in each year a certain income is derived from that source; then there is interest, which amounts in the year 1922 to £909 2s. 2d., and that is the immediate subject of the appeal; then there are three items which form the amounts which are to be contributed by the English, Scottish and Irish branch councils and are computed according to the ratio of members in each branch; that is imposed on the branches as a sum to be found by those branches and to be paid over by them to the council. When one turns to the expenditure side, one finds that a very large amount, more than a quarter of the whole expenditure, is paid away in fees and expenses of the council. They are a body of busy, able, learned and well-qualified men, and they are allowed, and rightly allowed, a fee for giving their services to the purposes of the council, but it is to be noted that in this particular case this large sum has to be provided for the purpose of paying out these fees and expenses, and, indeed, the total of the sums derived from the Scottish and Irish branches together are only, I think, just sufficient to cover this important item of expenditure. Then there are other matters, such as visitation and inspection of examinations; there is a large and heavy bill for printing the Medical Register and the Students' Register, and other things which have to be printed and published and do not pay their expenses, and then there are certain sums for law expenses, because one of the duties charged on the council is to hear the cases and to see whether some of the members upon the register have or have not been found guilty of what is termed in the Act "infamous conduct or otherwise," which means whether they have been guilty of conduct which disentitled them any longer to the high position of being a registered medical practitioner. When one looks at those receipts and at that expenditure, even giving a very wide interpretation to the meaning of the word "charitable," it appears to me very difficult to say that these facts would justify a finding on the part of the commissioners that this yearly interest which formed part of the income of this body of persons had been "applicable to charitable purposes only, and so far as the same are applied to charitable purposes only."

I pass now to the question whether or not this body can bring themselves within the definition of "charity." We are accustomed to look for a definition of that term to the well-known opinion of LORD MACNAGHTEN in *Income Tax Special Purposes Comrs. v. Pemsel* (1). The passage to which I refer is where LORD MACNAGHTEN says this ([1891] A.C. at p. 583):

" 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

It has often been pointed out that that last or fourth category is not complete, that it is illustrative and not exhaustive, and that it cannot be truly said that, if a trust can be found for a purpose beneficial to the community, it is necessarily a charity. That

A fourth category is introduced as embracing within it a number of charities which would not be classified under the previous three divisions, but it must also be remembered that not all the purposes which could fall, or do fall, within the fourth head are to be deemed charities. For the meaning of "charity" we have to go back to the definition which was originally found in the statute of 43 Eliz., c. 4, now repealed by the Mortmain and Charitable Uses Act, 1888, which, by s. 13, retains the catalogue in the statute of Elizabeth and when one looks at that catalogue it is difficult to see that such a purpose as that with which the General Medical Council is charged with, *primâ facie*, appears to be within the catalogue or definition of charities in the statute of Elizabeth. It is important also to recall this, as has been pointed out by LORD LINDLEY in *Re Macduff*, *Macduff v. Macduff* (9) that the words which are used by LORD MACNAGHTEN find their origin in the argument of Sir Samuel Romilly in *Morice v. Bishop of Durham* (5) (10 Ves. at p. 531), and that for succinctness he left out the words which are to be found in Sir Samuel Romilly's fourth category, viz., "which is the most difficult"—the advancement of objects of general public utility.

In *Re Macduff* (9) the question arose whether or not there had been a charitable bequest. The bequest was "for some one or more purposes, charitable, philanthropic, or," and so on. It was held that such a bequest was not given as a charitable bequest because it embraced philanthropic purposes, and that many purposes might be philanthropic, and so within the terms of the will, and yet not be within the term "charitable." LINDLEY, L.J., says this:

"In deciding the case we must fall back upon the statute of Elizabeth, not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As LORD ELDON says, this court has taken great liberties with charities; but the liberty is always restricted by falling back or professing to fall back upon the statute of Elizabeth."

It is to be noticed that in the present case it is not said that the work of the General Medical Council is educational; it is not claimed that its work can be brought within any of the first three categories tabled by LORD MACNAGHTEN—poverty, education, or religion, and that, therefore, it is left to claim that it does fall within a purpose beneficial to the community; but to that must be added "beneficial to the community in the spirit and sense of the original statute of Elizabeth."

I have pointed out upon the facts the difficulty that I have in finding that this income is devoted to charitable purposes only. But what are the charitable purposes? We have got a certain number of illustrations which fall on the one side and on the other, and I think it is unnecessary to do more than refer to the two cases to which the Solicitor-General himself referred, the one *Society of Writers to the Signet v. I.R. Comrs.* (6), and the other *I.R. Comrs. v. Forrest* (7). The first was the case in which it was claimed by the writers to the signet in Scotland that they were entitled to an exemption, but it was determined in that case that the main object of the body was professional. The Lord President (LORD INGLIS) says (2 Tax Cas. at p. 272):

"People become members of the Society of Writers to the Signet, not for the purpose of studying literature or the fine arts, or science, nor yet for the purpose of being educated. They become writers to the Signet for the purpose of making pecuniary gain by a profession, and that is the object of every member of this society; and everything that the society has done in its collective capacity in the way of creating a library and other things of that kind are incidental and accessory to that one great object of making professional gain."

The *Forrest Case* (7) is illustrative from this point of view. It was a case in which it was found that the promotion of science in the abstract was held to be its main purpose, and because that was its main purpose it was held that it was entitled to exemption.

I apply that reasoning to the present case, bearing in mind that the commissioners have found as they have found. When I consider the duties of the council, which are, no doubt, of deep importance to the public, namely, keeping this register, exercising an oversight over the examinations, and the preparation and revision of the BRITISH

PHARMACOPŒIA. I ask myself whether it could be said that those were for the benefit of the public in the same sense, or within the same definition, which was applied in the *Forrest Case* (7), where the main purpose was found to be that of the promotion of science in the abstract. I find it impossible to accept that view. On the other hand, when one turns to the *Writers to the Signet Case* (6), or *Sulley v. Royal College of Surgeons, Edinburgh* (10), or *Farmer v. Juridical Society of Edinburgh* (11), one finds all those cases very similar to the present case. In those cases there was—perhaps not remotely—a service to the public by the standard which was maintained by those societies for their members. Equally there is in the present case a very high standard maintained by the General Medical Council. The public interest is served, but professional interest is also served; there is a safeguard for the public, true, but there is also an advantage to the professional members of this society, who are given the privilege of suing if they are members of this body of registered medical practitioners. Therefore, I find myself in great difficulty in answering in favour of the council the question which I think is the question which has to be put when one is considering public utility: Is this body formed for the promotion of abstract science? On the other hand, to the question: Is this society formed for professional purposes? I think I should feel bound to answer the question: Yes, it is. Then, when I find what the actual expenditure of the council is, and when I find the facts as found by the commissioners, I feel bound to say that the General Medical Council have not proved themselves entitled to this exemption, because they have not established that this income is received by them under a trust for “charitable purposes only.” The General Medical Council, no doubt, is charged with very grave and responsible duties, but, unless those duties are exclusive, and fall within the spirit of the statute of Elizabeth, I do not think that the General Medical Council are able to claim exemption. I feel bound to say that, in my judgment, the appeal fails, and must be dismissed with costs.

SARGANT, L.J.—I am of the same opinion. Counsel insisted strongly in his argument on this view of the matter, namely, that the main and principal object of the council was to benefit the public, and that it was only incidental and secondary that the benefit of the profession was involved. On the other hand, the Solicitor-General took up a precisely contrary position, and argued that the main and principal object of the council was to regulate the profession, and that the benefit of the public was a secondary and incidental result. Counsel representing the council quoted the preamble of the Act of 1858, which recited that it was “expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners,” but I believe that that recital is at best neutral only. The expediency referred to may either be the expediency of the public or the expediency of those qualified members of the medical profession who are held out to the public as having the qualifications in question. Therefore, I leave the recital aside, and look for the solution of the contest between the parties in the duties of the council as they are conveniently set out in the Case. In para. 4 of the Case it is stated that “the chief duties imposed by the Act upon the council were (a) to keep and publish a register of qualified practitioners, (b) to exercise oversight upon medical studies and examinations, and (c) to publish the *BRITISH PHARMACOPŒIA*. Looking at those objects, it is quite clear that they are professional objects simply and solely, professional objects which may, perhaps, be aimed at with a view to the benefit of the public, but they are themselves strictly professional objects limited to the subject-matter of the profession exercised by medical men. In my judgment, those duties involve that the first and main thing which has to be looked to is the keeping of the register properly, and freed of improper persons; secondly, the ensuring or the guaranteeing that the medical studies and examinations which have to be passed to qualify for the profession are sufficient, and properly carried out; and, thirdly, the publishing of a list of drugs which shall be professionally available and correct. Although all these objects will ultimately, no doubt, result in a benefit to the public by reason of the guarantee that they have that the persons on the register are properly qualified and of good character, and that the drugs which are supplied will be of proper quality and standard, nevertheless, it seems to me that those results are in them-

A selves in the nature of secondary results, and are only arrived at by virtue of the primary results in connection with the profession itself. I think myself that the whole scheme of this legislation is to regulate the profession of medical men, who in consequence have certain privileges conferred upon them by the legislation, and that it is in the first instance as a professional measure that the legislation is to be regarded. No doubt, as I have said, the result of that strict qualification and supervision will be to the public advantage. Exactly the same thing might be said of the regulations which govern the admission of qualified persons to the ranks of solicitors and barristers, or any other scientific profession.

B I agree with the Master of the Rolls that a very great deal is to be learnt from the judgments in *I.R. Comrs. v. Forrest* (7) with regard to the Institution of Civil Engineers, and particularly in the distinctions which are drawn there by LORD WATSON between that case and the case with regard to the *Society of Writers to the Signet* (6). It seems to me that here we clearly have an institution or society which is of the same nature as the society known as Writers to the Signet, and that it differs from the Institution of Civil Engineers. I think here that, though I am agreeing with the commissioners, I am probably differing to some slight extent on the question of fact from ROWLATT, J., but if I am right in the view I have taken of the facts, it follows that, if the main purpose were to benefit the profession and a secondary purpose or result is that there is a benefit to the public, the council cannot succeed; but, of course, I am not in any way intimating that, if my view of the facts is wrong, and if in fact the main purpose of these regulations is to benefit the public, it must, therefore, follow that he would be entitled to succeed. I think that is a very different proposition. Without saying that I consider he would be entitled to succeed in that case, I will simply say that I think it is very doubtful indeed whether, on the decisions, he would be entitled to succeed, even if the main object were to benefit the public. I think that this may well be more one of the perhaps numerous cases in which the public would be benefited and yet there would not be a charity, than of the smaller class of cases where the public are benefited, and there is a good charity. I agree that the appeal should be dismissed.

F **LAWRENCE, L.J.**—I agree. I think this case, when the facts are investigated, is fairly plain. Speaking broadly, the purpose for which the General Medical Council was constituted was that of supervising and regulating the medical profession. The main functions of the council were, firstly, to keep a register of medical practitioners, including the duty of striking off any of those who were guilty of infamous conduct; secondly, the exercise of control or supervision over medical studies and examinations, and to report on that subject to the Privy Council, and, thirdly, the preparation, revision and publication of the *BRITISH PHARMACOPŒIA*. The business of the council was conducted at meetings of the members of the council, who consisted of persons who were nominated, chosen and elected in accordance with s. 7 of the Act of 1886—with certain changes and additions which are not material to be mentioned—all of whom were paid certain fees for attending at the annual meeting. The funds necessary to defray the expenses of carrying out the duties of the council were obtained by demanding certain fees from the medical practitioners on being entered in the register with their names and qualifications. I think it is pretty plain, when it is seen what the constitution and functions of this council are, that in one sense it may be said to be a body constituted for the benefit of the public. But that is only telling half the truth. It is no doubt to the benefit of the public that such an important profession as the medical profession should be properly regulated and supervised; but it is also to the greatest interest to the medical profession that that should be done in an authoritative manner, such as that which this Act of Parliament has provided here. When the object and functions of such a body as this are considered, it seems to me to be far remote from anything which comes within the spirit or intention of the statute of Elizabeth. It does not seem to me to be a body which can possibly be said to be set up to promote the science of the medical profession or the education of the medical profession, nor can it be said to do anything other than regulate the conduct of the members of that profession with a view to protecting the profession itself, and, no doubt, protecting the public to the

extent that the public would be able to choose or see who is properly qualified to attend them if they become ill. Having considered the objects and constitution of the body, it seems to me to be a plain answer to the question, that this medical council is not a charity within the meaning of s. 37 of the Income Tax Act. In my view, the income which is sought to be exempted from tax is certainly not money which is applied for "charitable purposes only," and the objects of the medical council are, in my opinion, clearly not objects which are "charitable only." Therefore, that is quite sufficient to preclude its being exempt. I agree that this appeal fails and ought to be dismissed with costs.

Solicitors: *Charles I. S. Harper*; Solicitor of Inland Revenue.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

ROE v. RUSSELL

[COURT OF APPEAL (Scrutton and Sargant, L.J.J., and Eve, J.), January 16, 17, 30, 1928]

[Reported [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253;
92 J.P. 81; 44 T.L.R. 278; 26 L.G.R. 145]

Rent Restriction—Sub-tenancy—Part of premises—Right of statutory tenant to grant—No prohibition against sub-letting in contractual tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 15 (1).

A statutory tenant in whose contract of tenancy no prohibition against sub-letting was contained has power to sublet part of his premises, although he cannot, by a number of sub-lettings, part with the whole of the premises which he holds as statutory tenant.

Notes. Considered: *J. Lovibond & Sons v. Vincent*, [1929] All E.R. Rep. 59; *Sutton v. Dorf*, [1932] All E.R. Rep. 70. Applied: *Oak Property Co. v. Chapman*, [1947] 2 All E.R. 1. Considered: *Hyde v. Pimley*, [1952] 2 All E.R. 102. Referred to: *Haskins v. Lewis*, [1930] All E.R. Rep. 227; *Fordree v. Barrell* (1931), 95 J.P. 141; *Skinner v. Geary*, [1931] All E.R. 302; *Baker v. Turner*, [1950] 1 All E.R. 834; *Regional Properties, Ltd. v. Frankenschwerth and Chapman*, [1951] 1 All E.R. 178; *Lewis v. Reeves*, [1951] 2 All E.R. 855; *Berkeley v. Papadoyannis*, [1954] 2 All E.R. 409.

As to sub-letting by a statutory tenant, see 23 HALSBURY'S LAWS (3rd Edn.) 826 et seq.; and for cases see 31 DIGEST (Repl.) 694, 695. For Rent Restriction Acts, see 13 HALSBURY'S STATUTES (2nd Edn.) 1033 et seq.

Cases referred to:

- (1) *Remon v. City of London Real Property Co., Ltd.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 36 T.L.R. 869; 18 L.G.R. 691; 84 J.P. Jo. 349, C.A.; 31 Digest (Repl.) 638, 7455.
- (2) *Wheeler v. Smith* (1926), unreported. Estates Gazette, May 14, Digest of Cases.
- (3) *Aston v. Smith*, [1924] 2 K.B. 143; 93 L.J.K.B. 733; 131 L.T. 565; 40 T.L.R. 576; 68 Sol. Jo. 706; 22 L.G.R. 607, D.C.; 31 Digest (Repl.) 684, 7759.
- (4) *Keeves v. Dean*, *Nunn v. Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 40 T.L.R. 211; 68 Sol. Jo. 321; 22 L.G.R. 127, C.A.; 31 Digest (Repl.) 694, 7865.

- A (5) *Parkinson v. Noel*, [1923] 1 K.B. 117; 92 L.J.K.B. 361; 128 L.T. 538; 67 Sol. Jo. 184; 21 L.G.R. 130; 31 Digest (Repl.) 697, 7887.
- (6) *Terrell v. Chatterton*, [1922] 2 Ch. 647; 91 L.J.Ch. 816; 127 L.T. 621; 38 T.L.R. 786; 66 Sol. Jo. 631, C.A.; affirmed sub nom. *Chatterton v. Terrell*, [1923] A.C. 578; 92 L.J.Ch. 605; 129 L.T. 769; 39 T.L.R. 589, H.L.; 31 Digest 418, 5471.
- B (7) *Campbell v. Lill* (1926), 135 L.T. 26; 42 T.L.R. 397; 70 Sol. Jo. 621, D.C.; 31 Digest (Repl.) 693, 7846.
- (8) *Kerr v. Bryde*, [1923] A.C. 16; 92 L.J.P.C. 1; 128 L.T. 140; 87 J.P. 16; 39 T.L.R. 61; 67 Sol. Jo. 112; 21 L.G.R. 1, H.L.; 31 Digest (Repl.) 683, 7754.
- (9) *Grove v. Portal*, [1902] 1 Ch. 727; 71 L.J.Ch. 299; 86 L.T. 350; 18 T.L.R. 319; 46 Sol. Jo. 296; 31 Digest (Repl.) 414, 5436.

C **Appeal** from a decision of the Divisional Court (SHEARMAN and FINLAY, JJ.).

In September, 1915, one Jameson became tenant of premises to which the Rent Restrictions Acts applied. The landlord of these premises at that time was a Mrs. Alders, and under his tenancy agreement Jameson was not prohibited from sub-letting. In November, 1919, Mrs. Alders assigned her interest in the premises to the plaintiff Roe. In October, 1921, the plaintiff served a notice to quit on Jameson, who became thereafter a statutory tenant. In November, 1925, Jameson sublet certain rooms, a portion of the above premises, to the defendant Russell. In July, 1926, the plaintiff obtained an order for possession of the whole of the premises against Jameson for non-payment of rent, and Jameson left the premises in May, 1927, leaving the defendant in occupation of the rooms which had been sublet to him. The plaintiff then brought an action in the county court for the ejectment of the defendant from the rooms sublet to him and occupied by him. The county court judge gave judgment in favour of the plaintiff landlord, and the defendant (the sub-tenant) appealed to the Divisional Court who dismissed the appeal. The sub-tenant then appealed to the Court of Appeal.

F *Doughty, K.C.*, and *H. S. Schultess-Young* for the sub-tenant.
Sidney Isaacs for the landlord.

Cur. adv. vult.

Jan. 30. The following judgments were read.

G **SCRUTTON, L.J.**—This appeal raises a question of great importance to a number of persons in occupation of a few rooms in houses of low rental and rateable value. The question is whether, when their title to be in those rooms depends on a sub-letting by a person who himself had only a tenancy under the Rent Restrictions Acts—when a man is not in by the consent of his landlord, but because his landlord can only turn him out under conditions limited by those Acts—they have a good title. In other words, can a statutory tenant sublet part of the premises of which he is a statutory tenant? The phrase “statutory tenant” comes from the marginal note to s. 15 of the Act of 1920, “conditions of statutory tenancy,” which is not part of the Act, but applies to the person who, in s. 15, is described as a person “who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies.” The courts have interpreted this as referring to the provisions of s. 5 of the Increase of Rent, &c. (Restrictions) Act, 1920, and s. 4 of the amending Act of 1923, which prevent a landlord from getting rid of a tenant whose contractual tenancy has expired, except under the provisions of those sections. He stays in, not by the will of the landlord, who may desire to get rid of him, but by the provisions of the statute: see *Remon v. City of London Real Property Co., Ltd.* (1). But, as I said in that case, Parliament originally “omitted expressly to provide what sort of a legal interest the person who stayed in by permission of Parliament, and against the will of the landlord,” should have. The provision in s. 15 of the Act of 1920, that so long as he retains possession he shall observe and be entitled to the benefit of all the terms and conditions of his original contract of tenancy, so far as the same are consistent with the provisions

of the Act, did not help very much when one came to the practical facts of life, and I think citizens are entitled to complain that their legislators did not address their minds to the probable events that might happen in cases of statutory tenancy, and consider how the legal interest which they were granting was affected by those probable events. A

[His Lordship referred to questions which were decided in later cases and continued:] This brings me, after a too lengthy preamble, the justification for which is the obscurity of the Acts, to the question in this case. Can the statutory tenant, while in possession, sublet part of the premises that he holds under his tenancy, remaining in possession of the rest of the premises? I can quite understand and sympathise with the Divisional Courts which approached this question on the lines of the reasoning of two of the judges in *Keeves v. Dean* (4). They would say that the right to sublet part of a contractual tenancy, in cases where there is no express provision to the contrary in the contract, is not "a term or condition of the contract," but only an incident of the tenancy thereby created, and it does not, therefore, pass to the statutory tenant who has only a personal right to occupy so long as he observes the terms and conditions, which does not give him a right to exercise other incidents of the grant than that of occupying the demised premises. Two Divisional Courts said that statutory tenants cannot sublet even part of the demised premises. This is the view of SHEARMAN and FINLAY, JJ., in the judgments appealed from, where a sub-tenancy of part was created by the statutory tenant, who has himself now been ejected from the rest of the premises. It was also the view of SALTER and TALBOT, JJ., in *Wheeler v. Smith* (2) (1926), reported in the *Estates Gazette Digest of Cases*, a report which was certified by counsel engaged in it as being a correct report. It was also the view of SWIFT, J., obiter, in *Aston v. Smith* (3) ([1924] 2 K.B. at p. 146). On the other hand, GREER, J., before the decision in *Keeves v. Dean* (4), had in *Parkinson v. Noel* (5) stated, also obiter, that a statutory tenant could sublet. B

But certain matters had to be considered. First, BANKES, L.J., and LUSH, J., who expressed their opinion as to the personal right on the ground that incidents of tenancy or estate did not pass, expressly reserved the question of the sub-letting of whole or part of the premises. BANKES, L.J., in *Keeves v. Dean* (4) said ([1924] 1 K.B. at p. 693): E

"I say nothing about sub-letting, because it may be that a statutory tenant who has sublet part only of the premises which he claims the right to retain and which he occupies is still entitled to the protection of the statute. What the position would be if he were to sublet the whole of the premises, and whether under those circumstances any distinction could be drawn between sub-letting and assignment, it is not necessary here to determine, and I do not decide it." G

LUSH, J., puts the difficulty in the assignor's giving up possession on an assignment, which he does not do in partial sub-letting. Secondly, the provisions of s. 5 (1) (h) of the Act of 1920, as substituted by s. 4 of the Act of 1923 [repealed by Act of 1933], apply to this case, and did not apply to *Keeves v. Dean* (4), and were, therefore, not considered by the court. That paragraph provides, as a ground for ordering possession, the fact that H

"the tenant . . . has . . . assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet," I

and, therefore, it only makes as a ground of ejectment the sub-letting of part of the dwelling-house, the remainder being already sublet. That is to say, it does not treat as a ground of ejectment sub-letting of part of the premises, the statutory tenant living in the house, part of which he sublets, but only a series of sub-lettings which between them account for the whole of the house, and leave the statutory tenant out of possession of the premises. Some explanation of the presence of this provision may be found in the fact that the decisions of the Court of Appeal and House of Lords in 1922 and 1923 in *Chatterton v. Terrell* (6) had

A just brought to attention the effect of a tenant, who could not sublet the whole of his premises, making two partial sub-lettings which in effect sublet the whole demised premises. It is very difficult after this cl. (h) to say that the statutory tenant cannot sublet part of the premises, when the landlord is not given power to eject him for doing so. It is true that this provision has very odd results. A., the statutory tenant of a house of nine rooms, sublets three to B., and three more to C.; these sub-lettings, apparently, will not be grounds for his ejection by the landlord. He then sublets the last three rooms to D., and this, it seems, will justify the landlord in ejecting him from the whole of the premises. Will the sub-tenants be able to say, under the Act of 1920, s. 5 (5), that the premises have been lawfully sublet; or will B. and C. be able to say it, but not D., though the ground of ejectment of A. is the sub-lettings to B., C., and D. and not any one sub-letting? The same point will arise under the Act of 1920, s. 15 (3), the provisions of which, for some reason which I cannot understand, also appear in s. 5 (5) of the Act.

Thirdly, a case where the provision of s. 5 (1) (h) of the Act of 1920 (as substituted) was applicable came before BANKES and WARRINGTON, L.JJ., sitting as a Divisional Court in *Campbell v. Lill* (7) in March, 1926. There the statutory tenant sublet part of the premises, remaining in possession of the rest, and the landlord endeavoured to eject him. WARRINGTON, L.J., said that he agreed with the opinions of BANKES, L.J., and LUSH, J., in *Keeves v. Dean* (4). BANKES, L.J., then had to decide the question which he had reserved in *Keeves v. Dean* (4), whether a statutory tenant who sublets part is entitled to or has lost the protection of the statute. He and WARRINGTON, L.J., did not say that sub-letting of part is an incident of estate, but not a term or condition of the tenancy, and, therefore, the power to sublet part did not pass to the statutory tenant under s. 15 (1) of the Act of 1920, but he has only a personal right. On the contrary, they took the view that the statutory tenant was protected by the omission in s. 5 (1) (h) of any mention of sub-letting only part of the premises. I personally find it very difficult to see how the statutory tenant could be protected from any consequences of sub-letting part, and yet his sub-tenant of part could be expelled. If the statutory tenant could not, by reason of his statutory tenancy, sublet part, he had by sub-letting part violated a condition of tenancy under the Act, and so become liable to ejectment under s. 5 (1) (a) of the Act of 1920 (as substituted by s. 4 (1) (a) of the Act of 1923), but he was held not liable to ejectment. In these circumstances I find it impossible to hold the decision of the majority as to assignment under s. 15 (1) of the Act of 1920 binding on a question of partial sub-letting under s. 5 (1) (h) of the Act of 1920. Further, in my view, the continual references throughout the Acts to partial sub-letting and sub-tenancies must be treated as a recognition that in the opinion of Parliament a statutory tenant remaining in possession might sublet part of his demised premises. The references are sometimes to sub-tenants; sometimes to tenants to whom the premises are lawfully let. I find it impossible to explain them by limiting them to sub-tenants created by a contractual and not by a statutory tenant. It is impossible to ignore the fact that there are a very large number of the latter class, for every landlord who has raised his rent by virtue of the Acts, and every tenant who has done the same to a sub-tenant, has only done so because of statutory tenancy. Section 7 of the Act of 1923 [repealed as to England and Wales by s. 26 (3) of, and Sched. 8 to, the Rent Act, 1957] empowers the tenant to increase the rent of his sub-tenant by a certain percentage, and s. 3 (1) of the Act of 1920 [also repealed as to England and Wales by the Act of 1957] shows that this increase cannot apply to a contractual tenancy lawfully made by the tenant. It would seem to follow that s. 7 of the Act of 1923 must relate to and recognise sub-tenancies created by statutory tenants. Again, why should s. 5 (1) (h) of the Act of 1920 [as substituted] make no mention of partial sub-letting by a tenant unless a statutory tenant had, in the view of the legislature, a right to sublet part of his holding. Section 1 (1) (b) of the Increase of Rent, &c. (Amendment) Act, 1919 [repealed by

the Act of 1920], when it spoke of the tenant not being ejected unless, among other things, by sub-letting the house or any part thereof or by taking in lodgers he was making an unreasonable profit, must have been dealing with statutory tenants among others, though, as to sub-letting the whole house, it is now extended by the Act of 1920, s. 5 (1) (h), already referred to. A

From these and other provisions I have come to the conclusion that the Rent Restrictions Acts contemplate that the statutory tenant remaining in possession might sublet part of his premises, subject to apportionment of the standard rent of the tenant's premises, so as to prevent the sub-tenant from paying an extortionate rent. He cannot, however, assign his tenancy of the whole of the premises, whether for value or not. Nor can he by a series of sub-lettings part with the whole of the premises which he holds as statutory tenant, though if he does so I desire to reserve the question of the position of the sub-tenants. I also would point out that the question whether persons occupying part of the house in which their landlord resides, though described as sub-tenants, are not really lodgers, and the effect if they were lodgers was not raised in the court below and was, therefore, not considered in this court. For these reasons I am of opinion that an order for ejectment should not have been made against the sub-tenant in this case, and his appeal must, therefore, be allowed and judgment entered for him, with costs here and below. I regret that I cannot order the costs to be paid by the draftsmen of the Rent Restrictions Acts and the members of the legislature who passed them and are responsible for the obscurity of the Acts and their failure clearly to provide for such obvious incidents of tenancy as death with or without a will, bankruptcy, power to assign, and power to sublet in whole or in part demised premises. B
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SARGANT, L.J.—I am of the same opinion. In considering the decision of the Divisional Court here it is of great importance to see what was the argument which was presented to them on the part of the sub-tenant Russell and was negatived by their judgment. Put shortly it was this. Jameson, the tenant of the whole, was not prohibited by his original contract of tenancy from sub-letting part; this ability to sublet was one of the terms and conditions of his original contract, which, under s. 15 (1) of the Act of 1920, became applicable to his subsequent statutory tenancy; and, therefore, the sub-tenancy created by him in favour of the defendant Russell was a lawful sub-letting, and is preserved against the landlord by sub-s. (3) of s. 15, notwithstanding the determination of the statutory tenancy of Jameson. Now this argument is directly in conflict with the reasoning of the majority of the Court of Appeal in *Keeves v. Dean* (4), which probably binds us and with which, moreover, I agree. For once the conclusion is reached that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property, it is difficult to apply to him, as part of the terms and conditions of his former tenancy, rights essentially incidental and due to the possession of property. It was to this argument, this argument alone, that the decision of the Divisional Court was, as I read it, directed. **SHEARMAN, J.**, for instance, put it thus: E
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"I cannot understand how the right to sublet can be considered to be one of the terms and conditions of the original contract of tenancy when the right to assign is not,"

and **FINLAY, J.**, after quoting the view of **LUSH, J.**, as to the purely personal character of the statutory tenant's rights, says: I

"It seems to me to follow that the statutory tenant . . . cannot sublet for precisely the same reason, namely, that he has no estate out of which the sub-letting can be carved."

And it would seem that the decision of another Divisional Court, consisting of **SALTER** and **TALBOT, JJ.**, in *Whceler v. Smith* (2), was founded on reasoning similar to that of **SHEARMAN** and **FINLAY, JJ.**, in the present case. In rejecting the foregoing line of argument on behalf of the sub-tenant the Divisional Courts appear to

A have been right. And it may be further noted that, even if the statutory tenant had the same estate as he previously had as a contractual tenant, that alone would not avail the sub-tenant, for a contractual tenant, though entitled under his contract to sublet part, obviously cannot give his sub-tenant an estate exceeding in duration his own estate.

B Before this court, however, the argument for the appellant sub-tenant has taken a much wider range and has been of a much more cogent character. His counsel has founded himself mainly on the proposition that the statutory tenant is the creation of statute, and has such rights as the various Acts have given him either expressly or impliedly; and that an examination of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and of the Rent and Mortgage Interest Restrictions Act, 1923 (which two Acts are hereinafter referred to briefly as the C Act of 1920 and the Act of 1923 respectively), shows that the legislature has recognised the power of statutory tenants to create sub-tenancies, and has provided protection for the sub-tenants, independently of the continuance of the statutory tenancy of the statutory tenant. To appreciate this argument it is necessary to consider the general position of tenants of small properties at the time when the Acts of 1920 and 1923 were passed.

D There can, I think, be no doubt that counsel for the sub-tenant was right in his view that at both of these dates, and particularly at the time of the operation of the latter Act (July 31, 1923), the vast majority of the tenancies of the properties to which the Acts applied had ceased to be contractual tenancies and had become statutory tenancies. For landlords had naturally taken advantage of the intermediate legislation enabling them to make the statutorily authorised increases in E the rents payable to them, and had for the most part (at any rate in England) adopted the method strictly necessary for that purpose of giving notices to determine existing contractual tenancies and subsequently giving notices of the appropriate permitted increases. Even in those cases (most common in Scotland) where landlords had adopted the method, subsequently held to be ineffective—see *Kerr v. Bryde* (8)—of giving merely a notice of increase of rent, the error had been cured F retrospectively by the Rent Restrictions (Notices of Increase) Act, 1923, which came into operation on June 7, 1923. There can also be no doubt that both contractual tenants, while their tenancies remained contractual, and statutory tenants, whether originally contractual or not, had in innumerable cases, particularly having regard to the notorious deficiency of housing accommodation, and whether they were strictly entitled to do so or not, let or affected to let portions G of their premises to sub-tenants. So far as the position and rights of these sub-tenants were concerned, the cases appear to be divisible, at the time of the passing of the Acts of 1920 and 1923, into four classes—namely, (i) sub-tenants holding under tenants who still held on contractual tenancies, which did not prohibit the sub-letting of part; (ii) sub-tenants holding under tenants who still held on contractual tenancies which prohibited the sub-letting of part; (iii) sub-tenants holding H under statutory tenants who had previously held on contractual tenancies which had prohibited the sub-letting of part; (iv) sub-tenants holding under statutory tenants who had not previously held on contractual tenancies which had prohibited the sub-letting of part. Since, as already stated, the number of statutory tenants was very much greater than the number of tenants still holding on contractual tenancies, the number of sub-tenants in classes (iii) and (iv), that is, holding from I statutory tenants, was, at the dates of operation of the two Acts of 1920 and 1923, and particularly at the latter date, enormously in excess of the sub-tenants in classes (i) and (ii), namely, those holding from tenants whose tenancies were still contractual.

Further, it is necessary to bear in mind the great practical difference between the assignment or parting with the possession of the whole of the premises held by a tenant, on the one hand, and the sub-letting of a portion of these premises, on the other hand. In the first case the direct personal relationship between the landlord and the tenant, as such, is completely put an end to. But in the second

case that direct personal relationship still remains, although, as regards a portion of the premises, and as between the tenant and the sub-tenant themselves, a new contractual relationship is created with which the landlord is not directly concerned, apart from any breach of contract in cases where the tenant was expressly prohibited from sub-letting part. [Note: Now, under the Landlord and Tenant Act, 1927, s. 19 (1) (a), consent to sub-letting is not to be unreasonably withheld.] It may well be that a non-prohibited sub-tenancy of this kind may not have all the legal characteristics of a full legal tenancy, such as the existence of a reversion in the sub-landlord to which rent is incident and which would involve full powers of assignment of the interest of either the sub-landlord or the sub-tenant. But it may still create a personal contractual relationship between the sub-landlord and sub-tenant which will subsist during the existence of the superior tenancy of the sub-landlord in respect of the whole premises. It is to be remembered that at common law a lease merely created personal contractual rights and gave nothing of the nature of indestructible estate to the lessee. It was only by the Statute of Marlebridge that the lessee was first protected against having his position destroyed—see CHALLIS ON REAL PROPERTY (3rd Edn.) at p. 426. And it was not till the reign of Henry VIII that the full assignability of the relationship of the lessee to the lessor, and vice versa, was completely established. Indeed, in practice, where an individual is placed, as the statutory tenant undoubtedly was, in the position of having an exclusive personal possession of his premises, he is necessarily in a position in which he can place a third person in actual possession of a part of the premises, while retaining possession of the remainder, and that wholly irrespective of whether his own right to exclusive undisturbed possession is purely personal or amounts to something of the nature of an estate or interest in the premises. From this point of view it is of interest to refer to the comparatively recent case of *Grove v. Portal* (9), where a mere exclusive licensee of fishing rights, restrained in terms under underletting (that is from underletting the whole rights), was nevertheless held entitled to grant a sub-licence to two "rods" to participate in the fishing rights with him. The landlords of statutory tenants were not, in view of the exclusive possession of the tenants, able to discriminate between those whom the tenants took as lodgers and those whom they affected to take as sub-tenants, and these last-named persons were in a position which, during the retention by the statutory tenants of their relationship towards their landlords, was practically indistinguishable from that of sub-tenants holding under ordinary sub-tenancies from contractual tenants.

Bearing these considerations in mind, what is the true interpretation to be put upon the Act of 1920 and the Act of 1923, and, I may add, on s. 1 (b) of the Increase of Rent, &c. (Amendment) Act, 1919, where they refer to and obviously recognise the creation and existence of sub-tenancies? Counsel for the landlord insisted, and, indeed, was bound to insist, that the sub-tenancies referred to throughout were merely those in the first of the four classes to which I have referred above, namely, sub-tenancies from tenants who still held on contractual tenancies not prohibiting sub-letting. But to confine these references to this very minute class of sub-tenancies is, in my judgment, to place altogether too narrow an interpretation on this legislation, and, indeed, in some cases, to come into conflict with the fairly obvious meaning of the passages in question. For instance, s. 1 of the Increase of Rent, &c. (Amendment) Act, 1919, is a section which must, I think, be referring to and protecting statutory tenants, and, if this is so, sub-head (b) of that section refers to and recognises sub-tenancies existing under statutory tenants, and, indeed, treats them, for the purposes of that subsection, as standing in very much the same position as lodgers of the statutory tenants. Again, s. 8 of the Act of 1920 [repealed by Landlord and Tenant (Rent Control) Act, 1949] would seem to apply quite clearly to statutory tenants; and, if this is so, there is great difficulty in limiting the sub-tenancies referred to in the proviso to that section to sub-tenancies created by tenants who still held by virtue of contractual bargains only. And in s. 12 (1) (g) of that Act the extension of the

- A meaning of "tenant and tenancy" to include sub-tenant and sub-tenancy, and the extension of the meaning of "let" to include sublet, seem to me incompatible with a limitation of these expressions to the very limited class of sub-tenancies to which counsel sought to restrict the operation of the Act of 1920. Even more clearly inconsistent with that restricted meaning is the language of s. 4 of the Act of 1923, substituting a new section for s. 5 of the Act of 1920. That new section is obviously applicable to statutory tenants generally; and, this being so, sub-s. (1) (b) of that section must be read as recognising sub-tenants of statutory tenants, and classing them for the purposes of the subsection with persons "residing or lodging" with them. Subsection 1 (h) of that section, while making an assignment by the statutory tenant or a sub-letting or sub-lettings by him of the whole of his dwelling-house an event on which a judgment of ejectment may be made, obviously treats a mere sub-letting of part as an event which does not involve a liability to forfeiture. Section 5 (1) (h) of the Act of 1920 (as substituted) was not relied on, or even referred to, in *Keeves v. Dean* (4), probably because the material facts in that case had occurred before the Act of 1923 had come into operation. But it was referred to and formed the main ground of the decision in the subsequent case of *Campbell v. Lill* (7), decided by a Divisional Court consisting of BANKES and WARRINGTON, L.JJ. The latter judge pointed out that on all sound canons of interpretation the word "tenant" should be given the same meaning in every part of the section. This is a strong authority in favour of the view that the section is not limited to contractual tenancies, but comprises statutory tenancies, and, therefore, recognises sub-tenancies of parts of the premises included in statutory tenancies. Counsel laid some stress on the circumstance that in some parts of the legislation in question, such as s. 5 (5) and s. 15 (3) of the Act of 1920, and s. 2 (2), s. 4 (5) and s. 7 (1) of the Act of 1923 [repealed, with savings, by Increase of Rent, &c. Restrictions Act, 1938], reference is made to "lawful sub-letting"; and he argued that this was but the mere formal expression of what are referred to merely as "sub-letting" or "sub-tenancies" in other sections of the two Acts, and that this confirmed his suggestion that under either form of expression all that was being dealt with was the first of the four classes of cases which have been set out above, namely, sub-lettings effected by tenants still holding under contractual tenancies that did not prohibit the sub-letting of part of the premises. But I can see no reason for thinking that this phrase has so narrow a meaning. It will be remembered that under the scheme of the Acts, where a contractual tenancy prohibited the sub-letting of part of the premises, the resulting statutory tenancy being "on the same terms and conditions" would also prohibit the sub-letting of part, and I think that the phrase "lawfully sublet" is amply and properly satisfied by being held to refer either to this first class of sub-tenancies or to the fourth class of sub-tenancies above referred to, that is, to sub-tenancies under statutory tenants who had not previously held on contractual tenancies which had prohibited the sub-letting of part of the premises.
- H A further argument for the landlord was that the legislature could hardly have intended to subject landlords, not only to the creation of an irremovable class of tenants, but also to the possible and, indeed, almost inevitable creation of a number of sub-tenants of portions of the demised premises. But, in my judgment, this argument was effectively countered by counsel for the sub-tenant who pointed out that, even on the landlord's view, this was the result with regard to all premises comprised in tenancies which still remained contractual and were not subject to a prohibition as to partial sub-letting; and that, if once it were thought expedient to subject any landlords to such an increased burden, there seemed to be no reason why this burden should be cast on those landlords only whose premises were still held by tenants on contractual and not statutory tenancies.

The whole legislation on this subject, and there have been some ten Acts dealing with these questions, though it has only been necessary to refer specifically to three, bears marks of having been passed in some haste and in view of successive emergencies that arose during and after the war through the lamentable shortage

of housing accommodation. It is patchwork legislation, has not been framed with any scientific accuracy of language, and presents great difficulties of interpretation to the courts that have to give practical effect to it. But these considerations, in my judgment, tend in favour of the sub-tenant rather than the landlord in this case. It is the landlord who has to rely on legal niceties, such a fine-drawn distinctions between the comparatively minute class of tenants whose tenancies still remain contractual and the vast class of those who are known as statutory tenants. Apart from such fine distinctions, the sub-tenant can point to the clear recognition by s. 5 (1) (h) of the Act of 1920 (as substituted) of the right of statutory tenants to sublet part of their premises without incurring forfeiture, and can also point to the words of s. 4 (5) of the Act of 1923 [repealed by Act of 1933, but see s. 15 (3) of Act of 1920] which prevent the recovery of possession against a tenant being operative against a sub-tenant. It is, no doubt, true that this last subsection contains the phrase "lawfully sublet." But the argument for the landlord admits that the word "lawfully" at least includes a condition that there shall have been no express contractual prohibition against the sub-letting of part of the premises; and there seems to be no sufficient reason for construing the word "lawfully" as implying any further condition which would limit the section to contractual tenancies not subject to this prohibition and exclude statutory tenancies not subject to a like prohibition. I agree, therefore, that the appeal should be allowed with costs.

EVE, J.—This appeal raises the important question whether the holder of a statutory tenancy under s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in whose contract of tenancy no prohibition against subletting was contained has power to sublet part of the controlled premises and thereby confer on any sub-tenant to whom such part was sublet before any proceedings for possession or ejectment were commenced against the statutory tenant, the protective provisions of s. 5 (5) [repealed, see ante] and s. 15 (3). In other words, has the part of the premises so sublet been "lawfully" sublet within the meaning of the Act as amended by the Act of 1923? It has already been decided in this court that a statutory tenant cannot assign his interest (*Keeves v. Dean* (4)), but in the same case the question of his right to sublet was expressly reserved. The decision involved a difference of opinion between the members of the court upon one important point of construction as to whether the right to assign was or was not a "term or condition" of the original contract of tenancy within the meaning of s. 15 (1) of the Act of 1920. The majority of the court held the right to be incident to the tenant's estate, and not properly, or, indeed, accurately, described as a term or condition of the tenancy agreement, and this interpretation, which I accept as binding upon us, has been applied in the present and at least one other case by the Divisional Court to negative any right of the statutory tenant to sublet. But it is to be observed that the decision in *Keeves v. Dean* (4) did not rest upon this point alone. The court examined the other relevant sections of the Act, and, in particular, s. 15 (2), and came to the conclusion that the statute was not intended to confer upon the statutory tenant a right to transfer his legal position under the Act to another person by assignment, and this conclusion is fortified by s. 5 (1) (h) of the Act of 1920 (as substituted), which excepts from the benefit of the restrictions on the right to recover possession any tenant who without the consent of the landlord has, at any time after the coming into force of the Act of 1923, assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet.

On behalf of the sub-tenant it has been argued that the very terms of that subsection clearly show that the legislature is drawing a distinction between an assignment and a sub-letting of the whole, on the one hand, and a sub-letting of a part, on the other, and we have been taken through the Acts, section by section, and invited to determine that not only is there nothing in the Act to negative the right to sublet a part, but many indications that such sub-lettings are contemplated.

A By the definition section, s. 12 (1) (f) and (g) of the Act of 1920, except where the context otherwise requires, the expression "tenant" includes any person from time to time deriving title under the original tenant, the expressions "tenant and tenancy" include "sub-tenant and sub-tenancy" and the expression "let" includes "sublet." In examining the context in which these various expressions are to be found, we are certainly entitled, if not bound, to take into account the circumstances in which the Acts came to be passed, the nature of the tenements to which they apply, and the primary object of the whole legislation. The abnormal shortage of available dwellings for persons compelled by their means and avocations to reside in dwellings of very moderate rental value, and the apprehension that an excessive demand for accommodation of this class would inevitably raise rents to an insufferable extent, were no doubt the main factors in promoting the passing of the Acts, and from the very first, and still more forcibly as the competition for habitations increased, it must have been appreciated that premises of the nature intended to be protected by the Acts were rarely occupied by one family alone, but were frequently sublet in floors, and even single rooms, to several. Indeed, unless such had been the case, it is difficult to believe that the Acts would have accomplished what they have done. Moreover, it must not be lost sight of that no one can fail to have foreseen that the tenants holding under contracts would by degrees become statutory tenants in part by the determination or expiry of their tenancy agreements, and in part also by the service of notices of intention to increase rents.

D

Bearing these matters in mind, I agree with the other members of the court that examination of the Acts, and in particular of those provisions to which counsel for the sub-tenant directed our attention—s. 5 (1) (b) and (h) of the Act of 1920 (as substituted by the Act of 1923), s. 5 (5), s. 8 [repealed by Act of 1949], and s. 15 (3) of the Act of 1920 and s. 7 of the Act of 1923 [repealed by Rent Act, 1957]—leads to the conclusion that the right of sub-letting is not restricted to sub-letting during the currency of the tenancy agreement, but is contemplated and intended to be exercisable by the statutory tenant. Reliance was naturally placed by the landlord on the expression "lawfully sublet" which occurs in both Acts, but the presence of the qualifying word is, I think, explained by this, that there are at least two forms of sub-letting which are not lawful under the Acts—one a sub-letting which sublets the whole of the dwelling-house, or sublets a part, the remainder being already sublet, and the other a sub-letting made after the commencement of proceedings for recovery of possession, or ejectment. I agree in thinking that the appeal should be allowed.

F

G *Appeal allowed.*

Solicitors: *H. B. I. Schultess-Young; Abbott & Hudson.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

MESSAGER v. BRITISH BROADCASTING CO., LTD.

[House of Lords (Lord Hailsham, L.C., Viscount Sumner, Lord Buckmaster, Lord Carson and Lord Warrington), November 8, 1928]

[Reported [1929] A.C. 151; 98 L.J.K.B. 189; 140 L.T. 227;
45 T.L.R. 50]

Copyright—Assignment Assignment by "licensors" to "licensees"—Performing rights in play—Payment of royalties and fees—Rights to revert to licensors if play not produced within stated period—Right of assignee to permit broadcast performance.

By cl. 1 of an agreement in writing, parties, described as "the licensors," granted to "the licensee" the sole right of performing a play in Great Britain and other specified countries. By cl. 4 the licensee undertook, in consideration of the rights granted, to pay to the licensors certain royalties and fees. By cl. 5, if the play were not produced in London within three months, all rights of representation were to revert to and become again the absolute property of the licensors. Clause 8 provided that "proper books showing the gross receipts of the theatre or theatres at which the said play shall be presented shall be kept by the licensee." The agreement recited that the licensors had "delivered the play to the licensee together with the full score of the music thereof with a view to its being produced by the licensee at Daly's Theatre and elsewhere" on the terms above-mentioned.

Held: neither the reference to theatres in the recitals, cl. 5, or cl. 8, nor the use of the terms "licensor" and "licensee," operated to limit the explicit grant in cl. 1, and, therefore, there had been an assignment to the licensee of the sole right of representation within the area named in cl. 1, including the right to permit a broadcast wireless performance of the play.

Decision of Court of Appeal, [1928] 1 K.B. 660, affirmed.

Notes. The statute relating to copyright is now the Copyright Act, 1956: see 36 HALSBRURY'S STATUTES 67, which repeals the Copyright Act, 1911, and other Acts: see Sched. 9. Assignments and licences are dealt with in s. 36, Sched. 7, s. 28, and Sched. 8, s. 6.

Considered: *I.R.Comrs. v. Longmans, Green & Co.* (1932), 17 Tax Cas. 272. Followed: *Loew's Inc. v. Littler*, [1958] 2 All E.R. 200, C.A. Referred to: *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.*, [1933] All E.R.Rep. 270; *Nethersole v. Withers*, [1946] 1 All E.R. 711.

As to assignment of copyright, see 8 HALSBRURY'S LAWS (3rd Edn.) 412 et seq.; and for cases see 13 DIGEST (Repl.) 84 et seq.

Appeal from an order of the Court of Appeal (SCURROX and ATKIN, L.J.J., and EVE, J.), reported [1928] 1 K.B. 660.

The plaintiff, André Messager, was the composer of a comic opera called "The Little Michus" which was produced at Daly's Theatre, London, in the year 1905. By a written agreement dated Mar. 23, 1905, the plaintiff, and Albert Vanloo and Georges Duval, the authors of the opera (called in the agreement "the licensors"), granted certain rights in the opera to George Edwardes, the theatrical producer and director ("the licensee"). The agreement recited that

"the licensors have delivered the play to the licensee together with the full score of the music thereof with a view to its being produced by the licensee at Daly's Theatre and elsewhere on the terms hereinafter mentioned"

and provided:

"1. The licensors hereby grant the licensee the sole and exclusive right of representing or performing the play in the United Kingdom of Great Britain and Ireland, America, and the British Colonies and Dominions. 2. The copyright in the music of the play shall remain the property of the said André Messager, and he shall be at liberty to use the English lyrics for sale with

A the music. 3. The play shall be adapted for the English stage at the expense
of the licensee. 4. The licensee shall in consideration of the rights hereby
granted pay to the licensors the following royalties or fees: Four per cent. of
the gross receipts up to £800 and six per cent. of the gross receipts over that
B amount for London and New York, and half of these amounts for all other
towns, with the exception of No. 3, or fit-up towns, the fees of which are to
be one-fourth of London, and New York, such fees in the case of the United
Kingdom of Great Britain and Ireland to be paid weekly, and in respect of
America and the British Colonies and Dominions monthly. 5. If the play be
not produced in London by the said George Edwardes within three months
from this date all rights of representation as aforesaid shall revert to and
become again the absolute property of the licensors.

C 6. The licensee agrees not to interpolate into the score any piece or number
not composed by the said André Messager without the said André Messager's
permission, but the said André Messager agrees to furnish and compose such
alterations and additional numbers required for the English version as the said
George Edwardes may reasonably require. 7. The said André Messager shall
assist at such rehearsals as may be agreed, and shall conduct the orchestra
D on the occasion of the first production of the play at Daly's Theatre aforesaid.
8. Proper books showing the gross receipts of the theatre or theatres at which
the said play shall be presented shall be kept by the licensee, and the licensors
or their agent duly authorised in writing shall be entitled at all reasonable
times to inspect the said books and all vouchers, accounts and other docu-
E ments relating to the said receipts so as to enable the licensors to verify the
amount of percentage payable to them as aforesaid."

Mr. Edwardes died in 1915, leaving a will. In May, 1920, his executors assigned
in writing to a limited company called George Edwardes (Daly's Theatre), Ltd.,
"so far as they lawfully could" the benefit of the contracts referred to in the
schedules to the deed, and the benefit of "all other copyrights, rights of represen-
tation, licences, and the rights (if any) to which the vendors were entitled in
F connection with the business of the deceased." In the schedule appeared the
following: "No. 13, 'The Little Michus'" and other details. In October, 1926,
the defendants, the British Broadcasting Co., Ltd., negotiated with George Edwardes
(Daly's Theatre), Ltd., for the right to give a broadcast performance of "The Little
Michus," and, by letters passing between that company and the defendants, the
company agreed to permit a wireless performance by the defendants for £60.
G The defendants paid the £60 to the company. No step was taken to inform the
plaintiff of the intended performance, and his assent was never obtained. Pursuant
to the permission of the company the defendants gave a broadcast performance of
substantially the whole opera on Nov. 10, 1926. The plaintiff alleged that the
defendants, by so doing, had infringed his musical copyright, and claimed an
injunction and damages. The defendants admitted having broadcast the play, but
H denied that the plaintiff was the owner of any exclusive rights, and, alternatively,
they said that they had acquired the right to broadcast by licence from the
assignees of the copyright. The Court of Appeal, reversing the decision of
McCARDIE, J., held that the agreement of Mar. 23, 1905, amounted to an assignment
of the sole and exclusive performing rights in the opera to George Edwardes in the
territory named, and that George Edwardes could pass on such rights to his assigns.
I The defendants were, therefore, protected by the licence from the company. The
plaintiff appealed.

Sir Herbert Cunliffe, K.C., S. O. Henn Collins, and K. E. Shelley for the
appellant.

Sir Duncan Kerly, K.C., and Trevor Watson, for the respondents, were not
called upon.

LORD HAILSHAM, L.C.—This is an appeal from a decision of the Court of
Appeal reversing a judgment given by McCARDIE, J., in favour of the appellant,

to whom the learned judge awarded £150 damages for breach of copyright. In the view that I take of the case it turns within a very narrow compass, and it is only necessary to state quite shortly one or two dates and facts in order to indicate the point which arises.

It appears that the appellant, M. Messenger, was the composer of a play known as "Les Petites Michus." By an agreement of Mar. 23, 1905, arrangements were made between M. Messenger, the composer, and M. Vanloo and M. Duval, the authors, of the play, and Mr. George Edwardes, of Daly's Theatre, London, whereby Mr. Edwardes had certain rights conferred upon him with regard to the production of the play in the British Dominions and in the United States of America. In 1915 Mr. Edwardes died, and on May 6, 1920, his executors assigned to a company known as George Edwardes (Daly's Theatre), Ltd., as far as they lawfully could, all the rights passing to them under the agreement of 1905. On Oct. 19, 1926, George Edwardes (Daly's Theatre), Ltd., licensed the respondents, in consideration of a sum of £60, to perform the play at their broadcasting studio and thereby to allow all their subscribers and all those who used wireless receivers to hear the performance. On Nov. 10, 1926, that performance took place. Thereupon M. Messenger complained that the respondents were acting without his licence, and were, therefore, infringing his copyright, and, upon the respondents rejecting that position, this litigation ensued.

From that recital of the facts I think it follows that the whole question turns upon the effect of the agreement of Mar. 23, 1905. That document is made between M. Messenger, M. Vanloo, and M. Duval, who are collectively described as "the licensors," of the one part, and Mr. George Edwardes, who is in the agreement called "the licensee," of the other part. It recites that "the licensors have delivered the play to the licensee together with the full score of the music thereof with a view to its being produced by the licensee at Daly's Theatre and elsewhere on the terms hereinafter mentioned." By cl. 1 the agreement provides:

"The licensors hereby grant the licensee the sole and exclusive right of representing or performing the play in the United Kingdom of Great Britain and Ireland, America and the British Colonies and Dominions."

I think counsel for the appellant conceded that the language of that clause taken by itself would be wide enough to confer upon Mr. George Edwardes the absolute performing rights of the play within the area mentioned in the clause, but it was contended that that clause, when read with the recital and with the subsequent clauses in the agreement, must be construed as merely operating either as a licence or, at the most, as the assignment of a right to perform in theatres, or else in towns. I have looked at the subsequent clauses of the agreement, but I am quite unable to accept that view. Clause 2 provides:

"The copyright in the music of the play shall remain the property of the said André Messenger and he shall be at liberty to use the English lyrics for sale with the music."

Clause 3 provides: "The play shall be adapted for the English stage at the expense of the licensee." Then, by cl. 4, it is provided—and this is the clause particularly relied on by the appellant—

"The licensee shall in consideration of the rights hereby granted pay to the licensors the following royalties or fees: Four per cent. of the gross receipts up to £800 per week and six per cent. of the gross receipts over that amount for London and New York, and half of these amounts for all other towns with the exception of No. 3 or fit-up towns, the fees of which are to be one-fourth of London and New York, such fees in the case of the United Kingdom of Great Britain and Ireland to be paid weekly and in respect of America and the British Colonies and Dominions monthly."

By cl. 5 it is stipulated:

A "If the play be not produced in London by the said George Edwardes within three months from this date all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors."

Clauses 6 and 7 are not relied on as material. Clause 8 stipulates that :

B "Proper books showing the gross receipts of the theatre or theatres at which the said play shall be presented shall be kept by the licensee and the licensors or their agent duly authorised in writing shall be entitled at all reasonable times to inspect the said books and all vouchers accounts and other documents relating to the said receipts so as to enable the licensors to verify the amount of percentage payable to them as aforesaid."

C Counsel for the appellant contended that the recital showed that the play had been delivered "with a view to its being produced by the licensee at Daly's Theatre and elsewhere on the terms hereinafter mentioned," that those terms were shown by cl. 4 to be a percentage of the gross receipts, and cl. 8 showed that the gross receipts were limited to gross receipts at theatres within the named area.

D I am unable to accept that construction of the agreement. In my view, cl. 8 is a stipulation that the books, in case of presentation at a theatre, shall be kept and be open for inspection, but it cannot be read as limiting the right of the licensors to receive 4 per cent. of the gross receipts within the meaning of cl. 4. But, even if I were wrong on this construction and if the payments to the licensors were limited to 4 per cent. of the gross receipts of the performances at theatres, I should still be unable to treat that expression as limiting or cutting down the plain grant which is contained in cl. 1. That, in my view, plainly operates as an assignment to Mr. George Edwardes of the sole and exclusive right of representation within the area named in the clause, and I think that that view of the clause is strengthened, not only by the expression in cl. 2, which stipulates that the copyright in the music shall remain the property of M. Messenger, but also by the language of cl. 5, which provides that in the event of non-production within three months "all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors." That seems to me inept language in which to describe the mere cessation of a licence and is much more apt to describe the reversion to the licensors of rights which had been assigned by cl. 1.

F If I am right upon that question of construction, then I think the other points raised by the appellant do not really arise. It was suggested that the licence or grant was one which was personal to Mr. George Edwardes and therefore not assignable by him, but if this be an assignment out and out to Mr. George Edwardes, I do not think it was contended that Mr. George Edwardes in turn could not assign those rights to whomsoever he chose. At any rate, if such a contention is put forward, I find nothing to warrant it in the clauses of the agreement. A subsidiary point was mentioned, but not argued at any length at your Lordships' Bar, to the effect that since the Broadcasting Corporation, when they performed the play, became audible to people in other parts of the world outside those named in cl. 1, therefore, there was an infringement of M. Messenger's copyright in those other districts. With regard to that contention it is sufficient to say, as was said in the Court of Appeal, that no such case is made on the pleadings, and, therefore, it is not necessary to consider it in your Lordships' House. For these reasons, which I think are the same as those which are set out in the judgment of the Court of Appeal, in my view, this appeal should be dismissed, and I move your Lordships accordingly.

I **VISCOUNT SUMNER.**—I agree and for the same reasons.

It appears to me that the words of cl. 1, which contain an explicit grant, complemented by cl. 2, which states what is not included in the grant, and followed in cl. 5 by provisions as to defeasance and reversion of the rights of representation to the composer and his colleagues, so as to become again their absolute property, are too clear and too express to be compatible with anything but an assignment of

that exclusive right. The words in the preamble, and the fact that in various clauses the parties are described as "licensors" and "licensee," are not strong enough, in my opinion, to override the clauses in question, or to warrant us in giving them an unnatural construction. It may be in the result that there are some uses to which this right can be put from which M. Messenger will not be entitled under the agreement to derive any advantage. If so, it is unfortunate, though I think it probable that, especially at the time when the agreement was made, some of them were not and could not be foreseen, and others had little or no importance as a matter of practice. Be that as it may, he, and those who are responsible for drafting this lamentable document, may well regret it, but their regret is not sufficient to induce your Lordships to read the agreement in any other sense than that which it properly bears.

LORD BUCKMASTER.—I agree.

LORD CARSON.—I also agree.

LORD WARRINGTON.—I also agree.

Appeal dismissed.

Solicitors : *Gery & Brooks; Steadman, Van Praagh & Gaylor.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

Re KEYSTONE KNITTING MILLS TRADE MARK

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), June 15, 18, 19, July 9, 1928]

[Reported [1929] 1 Ch. 92; 97 L.J.Ch. 816; 140 L.T. 9;
45 R.P.C. 421]

Trade Mark—Removal from register—Validity of registration presumed after seven years—Termination of period—Commencement of proceedings for rectification—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 41.

On Dec. 16, 1920, the respondents registered a trade mark. On July 15, 1927, the applicants gave notice of motion to rectify the register by removing the trade mark on the grounds therein stated. The motion was not heard until March, 1928, when CLAUSON, J., made an order for the removal of the trade mark. By s. 41 of the Trade Marks Act, 1905 [now s. 13 (1) of the Trade Marks Act, 1938] : "In all legal proceedings relating to a registered trade mark (including applications [for rectification of the register]) the original registration of such trade mark shall after the expiration of seven years from the date of the original registration . . . be taken to be valid in all respects . . ."

Held: the date at which the rights of the parties was to be determined was the commencement of the proceeding to rectify the register, namely, the date at which the notice of motion to rectify was given; that date was within seven years from the date of registration; and, therefore, in March, 1928, CLAUSON, J., was not precluded by the provisions of s. 41 from making the order which he did.

Doubted whether, if the relevant date had been that of the hearing of the motion in March, 1928, and not that of the notice of motion, CLAUSON, J., would have had power, by ante-dating his judgment under R.S.C., Ord. 41, r. 3, nevertheless to give himself jurisdiction to make an order for rectification.

A Notes. The Trade Marks Act, 1905, was finally repealed by the Trade Marks Act, 1938, for which see 25 HALSBURY'S STATUTES (2nd Edn.) 1180.

Considered: *Re La Marquise Footwear's Application*, [1946] 2 All E.R. 497.

As to the rectification of the register of trade marks, see 32 HALSBURY'S LAWS (2nd Edn.) 595 et seq.; and for cases see 43 DIGEST 191 et seq.

Cases referred to:

- (1) *Pryor v. City Offices Co.* (1888), 10 Q.B.D. 504; 52 L.J.Q.B. 362; 48 L.T. 698; 31 W.R. 777, C.A.; 1 Digest 10, 74.
- (2) *Re Briton Medical and General Life Assurance Association* (1886), 32 Ch.D. 503; 55 L.J.Ch. 416; 54 L.T. 152; 34 W.R. 390; 2 T.L.R. 344; 1 Digest 10, 71.
- (3) *Cropper v. Smith (No. 2)* (1884), 28 Ch.D. 148; 54 L.J.Ch. 287; 52 L.T. 94; 33 W.R. 338; Griffin's Patent Cases (1884-1886), p. 72; 1 R.P.C. 254; 36 Digest (Repl.) 787, 1373.
- (4) *Diment v. Roberts*, [1925] 1 K.B. 9; 93 L.J.K.B. 1038; 132 L.T. 235; 40 T.L.R. 861; 68 Sol. Jo. 842; 22 L.G.R. 742, C.A.; 31 Digest (Repl.) 691, 7821.
- (5) *Re Cheesebrough's Trade Mark "Vaseline,"* [1902] 2 Ch. 1; sub nom. *Re Pearson's Application, Re Cheesebrough Manufacturing Co.'s Trade Mark "Vaseline,"* 71 L.J.Ch. 427; sub nom. *Re Cheesebrough Manufacturing Co.'s Trade Mark "Vaseline," Re Pearson's Application*, 86 L.T. 665; sub nom. *Re "Vaseline" Trade Mark*, 18 T.L.R. 468, C.A.; 43 Digest 178, 315.
- (6) *Freeman v. Tranah* (1852), 12 C.B. 406; sub nom. *Freeman v. Tranch*, 21 L.J.C.P. 214.

Appeal by respondents from a decision of CLAUSON, J., that the trade mark "Charm" was invalid and ordering it to be removed from the register.

R. Moritz, K.C., and *H. Fletcher Moulton* for the respondents to the application, for removal, Keystone Knitting Mills, Ltd.

Sir Duncan Kerly, K.C., and *F. E. Bray* for the applicants for rectification of the register, Israel and Oppenheimer, Ltd.

Cur. adv. vult.

July 9. The following judgments were read.

LORD HANWORTH, M.R.—The Keystone Knitting Mills, Ltd., were the proprietors of a trade mark consisting of the word "Charm," registered on Dec. 16, 1920, in class 38, in respect of hosiery, being wearing apparel. On July 15, 1927, Israel and Oppenheimer, Ltd., gave notice of motion to rectify the register of trade marks by expunging the said trade mark. CLAUSON, J., heard the motion on Mar. 1 and 2, 1928, and made an order rectifying the register by the removal therefrom of the trade mark, No. 410686, on the ground that the word "Charm" was and is descriptive, having a direct reference to the character or quality of the goods, and so failed to comply with the essential particulars contained in s. 9 (4) of the Trade Marks Act, 1905. We have affirmed the decision of CLAUSON, J., on this point. The respondents to the motion, however, raised another point on which we have reserved our judgment.

It is this. The mark was registered on Dec. 16, 1920. By s. 41 of the Act it is provided:

"In all legal proceedings relating to a registered trade mark (including applications [for rectification of the register] under s. 35 of this Act) the original registration of such trade mark shall after the expiration of seven years from the date of such original registration (or seven years from the passing of this Act, whichever shall last happen) be taken to be valid in all respects unless such original registration was obtained by fraud, or unless the trade mark offends against the provisions of section eleven of this Act . . ."

It was contended at the hearing of the motion, that the period of seven years had expired, and that the mark had thus become indefeasible, and must "be taken to be valid in all respects," for no suggestion was raised that the exceptions contained in the section as to the mark having been obtained by fraud or offending against the provisions of s. 11 of the Act applied. CLAUSON, J., overcame this difficulty by ante-dating his judgment to Dec. 15, 1927—the day before the seven years had elapsed—under the provisions of Ord. 41, r. 3. I have grave doubts whether the power contained in that rule can be used to defeat the right of a party if it has been acquired at the time when the judgment is given. It is, however, unnecessary to express a final opinion upon that point because in this judgment I have, for other reasons, come to the conclusion that the seven years had not elapsed at the time relevant for consideration, and thus that the trade mark ought not "to be taken to be valid in all respects."

By s. 39 the right given to a registered proprietor of a trade mark is defined. By s. 40 registration is to be *prima facie* evidence of validity, and then s. 41 makes registration conclusive after the lapse of seven years from the date of the original registration of the mark. Although the *terminus a quo* is stated, the *terminus ad quem* is not defined. Counsel for the respondents argued that by the phrase contained in the section, "in all legal proceedings," the *terminus ad quem* was left open so that the seven years could be said to have expired, with effective results, if at any point of time in the legal proceedings when the matter came up for decision, the seven years had elapsed—whether that point of time was found in the proceedings before the judge of first instance, or later, in the course of the hearing of the appeal or appeals from the decision of the judge who heard the motion. Such an indecisive and variable *terminus* involves obvious difficulties and inconveniences. The court of first instance might have decided that a mark ought not to be removed from the register. This decision when taken to the Court of Appeal may prove to be erroneous. Yet when the case was heard by the Court of Appeal, the seven years had elapsed, the court would be powerless to reverse the decision, although wrong, because the mark had acquired indefeasible validity.

It is, however, necessary to construe s. 41 and to determine its meaning. "Proceeding" is an inclusive term and may be used to include any kind of action, as it was held to do in *Pryor v. City Offices Co.* (1). Under s. 85 of the Companies Act, 1862, which gave the court power after the presentation of a petition for winding-up a company under the Act "... to restrain further proceedings in any action suit or proceeding against the company" [see now Companies Act, 1948, s. 226], it was held that an order might be made to stay proceedings to recover penalties for alleged offences under the Act and the Life Assurance Companies Act, 1870: *Re The Briton Medical and General Life Assurance Association* (2). The words "other legal proceeding" in s. 18 (10) of the Patents Act, 1883, were held to include a proceeding for the revocation of a patent: see *Cropper v. Smith* (3), and s. 41, which is under consideration, expressly includes applications under s. 35 of the Trade Marks Act, 1905, within the term "legal proceedings." By the Supreme Court of Judicature Act, 1873, s. 100, now replaced by s. 255 of the Supreme Court of Judicature (Consolidation) Act, 1925, "action" is defined to mean "a civil proceeding commenced by suit" or in "such other manner as may be prescribed by rules of court." The phrase, therefore, in s. 41, "in all legal proceedings relating to a registered trade mark" is designed to embrace all processes by which matters relating to a trade mark are brought to the attention of the court whether in an action commenced by a writ or by motion or originating summons. The words, however, are "in all legal proceedings" and not in any step in any proceeding. In *Pryor v. City Offices Co.* (1) an argument was presented that the words "in any proceeding" in s. 89 of the Supreme Court of Judicature Act, 1873, ought so to be construed, but it was rejected. The court held that, as in s. 90 of the same Act, so in the earlier section, the words must be read as "in any action." "They do not mean in any step in an action but in the action itself": see per

A BRETT, M.R. (10 Q.B.D. at p. 508). The above sections are now replaced by ss. 202 and 203 of the Consolidation Act, 1925.

B An action is one of the ways in which a litigant seeks redress from the courts, but whether the approach is made to the court by that or by other means the cause of action in respect of which a litigant approaches the court of justice must be complete at the time when he issues his process. A recent illustration that the date at which the rights of the parties are to be determined is the commencement of the action or proceeding is found in *Diment v. Roberts* (4), where a time limit for a sum recoverable within six months was held satisfied if some kind of legal proceeding to recover it was taken within that period. If the court were not otherwise occupied the cause might be determined with a minimum of delay. There is no opportunity allowed for the cause of action to ripen in its course before C hearing. In the case of an application to remove a trade mark from the register the onus lies upon the applicant to establish his case: *Re Cheesebrough Manufacturing Co.'s Trade Mark "Vaseline"* (5), and he must be prepared to discharge that onus at the moment when he makes his application. If matters subsequent to the date of the commencement of the action or proceeding are to be taken into account, it must be by virtue of some special provision or rule, such as Ord. 36, D r. 58, under which damages in respect of a continuing cause of action are to be assessed down to the time of assessment.

E Applying these rules and considerations to the present s. 41, it appears to me not to be possible to construe the words in the section as altering the principles which apply to all legal proceedings and the usual practice relating to them, and that the phrase "in all legal proceedings" must be interpreted as meaning all legal proceedings commenced after the seven years' period has elapsed. The purpose of s. 41 is to consummate a possessory title obtained by registration into an absolute title. It cannot intend that the rights of the parties, inter se, are to be altered as one step in the proceeding follows another. The analogy suggested as to a document proving itself if thirty years old when tendered—taking that to be the correct limit—is not a true one. Such a document carries with it on its face F a presumption of due execution and relieves the party from calling other evidence or witnesses at the trial. It facilitates proof—it does not, per se, alter the rights of the parties, although it may be a factor in reaching the determination of the issue between them. For these reasons it appears to me that the appeal must be dismissed with costs.

G LAWRENCE, L.J.—I agree. In my judgment, s. 41 of the Act of 1905, when taken in conjunction with s. 39 of the same Act, operates to confer a right upon the registered proprietor of a trade mark and does not merely lay down a rule of evidence or procedure. The expression "all legal proceedings" used in the section is intended to denote every kind of legal proceeding (including expressly an application for the rectification of the register under s. 35) whether commenced by writ H or by any other process. In my opinion, the expression is not used to denote the steps in a legal proceeding, but the legal proceedings themselves. It is an almost universal rule that the court sits to determine the rights of parties as existing at the time of the institution of the legal proceedings, whatever form such proceedings may take. This rule is, in my opinion, applicable to the right conferred on the proprietor of a registered trade mark by s. 41, with the result that the question I whether in any particular legal proceeding relating to a registered trade mark, such trade mark is or is not to be taken as valid in all respects depends upon whether at the time of the institution of such proceeding the period of seven years from the date of the original registration has or has not expired. If that be the right view, it follows that the crucial date which determines whether a particular legal proceeding is a proceeding in which according to s. 41 the trade mark is to be taken to be valid is the commencement of such proceeding, and that the section does not apply to any legal proceeding commenced before the expiration of the seven years' period.

If, as was at first contended by counsel for the respondents, the hearing of the action or matter in the court of first instance were the crucial date, the strange result would follow that the rights of the litigants might depend entirely upon whether the party having the conduct of the proceeding were able and willing to prepare for the hearing with promptitude and upon whether (even if such party were expeditious in this respect) the business of the court would permit of the case being heard before the expiration of the seven years' period. Thus an aggrieved person might be deprived of his right to have the register rectified through no fault of his own. Counsel for the respondents endeavoured to get over such a strange result by relying upon the maxim *actus curiæ neminem gravabit*, and, in the alternative, by shifting the crucial date from the date of the hearing to the date when the original registration was first put in evidence in the legal proceeding. Neither of these suggestions, however, really meets the difficulty. As to the first, the delay in the hearing might be attributable, not to the act of the court, but to an act of one or other of the parties (e.g., wilful obstruction by a party other than the aggrieved person) or to some unforeseen or unavoidable event (e.g., the absence abroad or illness of a material witness), in neither of which cases the maxim would apply: see *Freeman v. Tranch* (6). As to the second, it is plain that in many cases neither the aggrieved person nor the registered proprietor might have an opportunity of putting the original registration in evidence before the actual hearing. Moreover, the section does not appear to contemplate that any particular stage in a legal proceeding should be the crucial date.

Logically it seems to me that the crucial date must either be the date of the commencement of the particular legal proceeding or else it must be left open notwithstanding the institution of the proceeding, in which latter case it would be the duty of every court, from the moment of the effluxion of the seven years' period, to treat the mark as a valid mark whatever stage the proceeding might then have reached and in whatever court it might then be pending, which, as pointed out by the Master of the Rolls, might lead to an extraordinary result. In my opinion, the language of the section is more consonant with an intention that a mark should or should not be taken to be valid throughout the whole course of the same legal proceeding than with an intention that in one and the same legal proceeding there might be a period of time during which the mark is not to be taken to be valid and another period during which it is to be so taken. Assuming, however, that the language of the section were equally consistent with both intentions it is a sound rule of construction that if, without doing violence to the language employed, a statute can be construed so as to lead to a reasonable, rather than to an unreasonable, result it ought to be so construed. Applying this rule to the present case and bearing in mind that the section confers a right and is not merely a rule of evidence or procedure, I am of opinion that the true construction of the section is that indicated by me in the earlier part of this judgment. For the reasons stated, I am of opinion that s. 41 does not apply to the present proceedings and that the appeal fails.

I will only add that, in my opinion, there was no need for the direction given by the learned judge to ante-date his order. Either the learned judge at the time when the case came before him had jurisdiction to make an order striking the mark off the register or had no such jurisdiction. The existence or non-existence of the jurisdiction does not, in my opinion, depend upon whether or not the judge who hears the case is minded to exercise any discretion he may have to ante-date his order or is not so minded.

RUSSELL, L.J.—I agree that this appeal fails. In my opinion, s. 41 was not intended, and does not operate, to confer validity upon a trade mark, which is otherwise improperly on the register and in respect of which an application is (before the relevant seven years have run out) pending to remove it from the register. The section is one which confers rights; it does not merely deal with a question of procedure or evidence. The general rule is, I think, clear, viz., that

A rights are not altered as between parties after the commencement of litigation between them. In my opinion (whether the section confers rights or only relates to a question of procedure or evidence), the section should, if it be possible, be construed so as to make it consistent with that general rule. It is, in my opinion, possible so to construe s. 41 by confining the words "all legal proceedings" to legal proceedings commenced after the relevant period of seven years has expired. I agree also with the view that there was no necessity for the learned judge to ante-date his order. If he had jurisdiction when he made the order to remove the mark no ante-dating was necessary. If he had not, I do not, as at present advised, see how by ante-dating his order he could confer upon himself a jurisdiction which he did not otherwise possess.

Appeal dismissed.

C Solicitors: *Emmanuel & Simmonds; McKenna & Co.*
[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

D

R. v. WATFORD LICENSING JUSTICES. Ex parte TRUST HOUSES, LTD.

E [KING'S BENCH DIVISION (Lord Hewart, C.J., Swift and Acton, JJ.), November 6, 7, 1928]

[Reported [1929] 1 K.B. 313; 98 L.J.K.B. 198; 140 L.T. 350;
93 J.P. 41; 45 T.L.R. 89; 72 Sol. Jo. 825; 27 L.G.R. 8]

Licensing—Licensed premises—Alterations—Consent of justices—Matters to be taken into consideration—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 71 (1).

F On an application under s. 71 (1) of the Licensing (Consolidation) Act, 1910, for the consent of licensing justices to certain structural alterations, the justices imposed, as a condition of their consent, that the applicants should give an undertaking to close a gateway leading from a yard at the back of their premises into a place which was then under construction as a public market. G The applicants refused to give the undertaking and obtained a rule nisi for a mandamus calling on the justices to hear and determine their application according to law. In support of the rule they contended that the justices had no power to impose on them a condition other than one in respect of the matters mentioned in s. 71 (1), namely, one calculated to prevent an increase of facilities for drinking or concealment from observation of any part of the premises used for drinking or one which concerned any proposed alteration affecting communication between the part of the premises where intoxicating liquor was sold and any other part of the premises or any street or other public way.

H **Held:** the justices were entitled—and, indeed, it was their duty—to take into account whatever might be relevant to the whole matter; the proposed alterations had for part of their object, and, if approved, would have as part of their effect, increased facilities for drinking, and a means of access to the premises by the gateway was of account; and, therefore, the justices were entitled to impose the condition and the rule must be discharged.

I **Notes.** Section 71 (1) of the Licensing (Consolidation) Act, 1910, has been replaced by s. 134 of the Licensing Act, 1953, for which see 33 HALSBURY'S STATUTES (2nd Edn.) 264.

Applied: *R. v. Pontypridd Licensing Justices, Ex parte Ely Brewery Co.*, [1948] 2 All E.R. 581.

As to alteration of licensed premises, see 22 HALSBURY'S LAWS (3rd Edn.) A 547-549; and for cases see 30 DIGEST (Repl.) 47, 48.

Case referred to:

- (1) *Bushell v. Hammond*, [1904] 2 K.B. 563; 73 L.J.K.B. 1005; 91 L.T. 1; 68 J.P. 370; 52 W.R. 453; 20 T.L.R. 413, C.A.; 30 Digest (Repl.) 48, 363.

Rule Nisi for Mandamus obtained by Trust Houses, Ltd., owners of the Essex Arms public-house, High Street, Watford, calling on the licensing justices of Watford to show cause why they should not hear and determine according to law an application under s. 71 of the Licensing (Consolidation) Act, 1910, for the approval of plans relating to proposed alterations of the said public-house. The grounds for the rule were (i) that in withholding their consent to the proposed alterations, the justices had acted capriciously and not according to law; (ii) that the justices had sought to impose upon the applicants a condition which was irrelevant and illegal, and had refused to grant their consent except subject to such condition; (iii) that the justices had no power to impose upon the applicant a condition other than one calculated either to prevent an increase of facilities for drinking or to prevent concealment from observation any part of the premises used for drinking or which concerned any proposed alteration affecting the communication between the part of the premises where intoxicating liquor was sold and any other part of the premises or any street or other public way; (iv) that the justices came to the hearing of the application with their minds made up and did not hear and determine the application according to law.

The Essex Arms was a fully licensed public-house, and the alterations to the premises desired by the applicants were such as required the consent of the licensing justices under s. 71. By sub-s. (1) of that section:

"An alteration in any licensed premises in respect of which a justices' on-licence is in force which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking or which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises or any street or other public way, shall not be made without the consent of the licensing justices given either at the general annual licensing meeting or at transfer sessions."

The plans were lodged with the licensing justices on Feb. 9, 1928. Broadly speaking it was proposed (a) to remodel the bars upon the ground floor and give a separate entrance to the restaurant and hotel premises; (b) to turn an existing masonic hall on the first floor into a new coffee room; and (c) to add new bedrooms at the back of the premises. On Feb. 17, 1928, the justices viewed the premises. At an adjourned general annual licensing meeting on Feb. 28, 1928, application was made for sanction for the alterations and additions to the premises. This application was adjourned for amended plans to be submitted to the justices. On April 4, 1928, the premises were again viewed by justices who then for the first time noticed that a certain gateway into a yard at the back of the premises was open and not blocked up as it was said to have been ten years earlier when the justices had visited the premises in 1918. On May 29, 1928, at a transfer sessions, the application again came before the justices with revised plans, and the justices then intimated that, unless the applicants were prepared to give an undertaking to close up the gateway, it was not in the public interest that the application should be granted. The undertaking not being given, the justices refused the application. It appeared that the Essex Arms faced into High Street, Watford. At the rear of the house was a yard. The land at the rear of the yard had been bought by the Watford Borough Council in 1927 and they were now constructing a public market thereon. The gateway in question led from the yard into the land where the public market was under construction.

In the affidavit of the chairman of the justices it was stated that they refused the application being of opinion that it was undesirable that (a) there should be

A direct communication from the licensed premises into a public market, and that (b) there should be a way through licensed premises from High Street to the public market, which could and probably would be used by the public. They expressed the opinion that, having regard to the proposed alterations and additions to the premises, the difficulties of supervision both by the licensee and the police would be greatly increased. The applicants by their affidavit stated that the gateway had no connection with any of the proposed alterations and did not increase facilities for drinking or for access between the licensed and unlicensed parts of the premises or for access to any public street. The gateway had been in use since 1918 when the applicants acquired these licensed premises. The applicants contended that the licensing justices, on an application under s. 71, were not entitled to impose the terms as to the closing of the gateway as a condition of sanctioning the plans, since they had no power to impose a condition other than one of those specified in the third ground upon which the applicants had obtained the rule.

Montgomery, K.C., and *Sydney Lamb* showed cause.

Roland Oliver, K.C., and *Maurice Healy* in support of the rule.

D **LORD HEWART, C.J.**—This is a rule nisi for a writ of mandamus directed to the licensing justices of Watford, calling on them to hear and determine according to law and pursuant to the statutes in that behalf an application by Trust Houses, Ltd., for the approval by the licensing justices of plans relating to proposed alterations in certain licensed premises in High Street, Watford. Four grounds are set out in the rule, but the question involved in all is one and the same throughout and is the one short point whether, in considering an application under s. 71 of the Licensing (Consolidation) Act, 1910, the licensing justices are entitled to seek to impose a condition compelling the closing up of a certain means of access to the premises. Here the justices undoubtedly sought to make it a condition or term of their consent to the proposed alterations that a gateway at the back of the premises should be closed. It is said that in entering upon that matter and in seeking to impose that condition the justices travelled beyond the question that was before them into something extraneous and irrelevant, and, therefore, it is argued, their hearing and determination, whatever merits it may otherwise have had, was not a hearing and determination according to law.

The argument which the learned counsel in support of the rule has addressed to the court depends upon a particular interpretation of s. 71 of the Licensing (Consolidation) Act, 1910. The argument is that the field, the arena, the scope within which the minds of the licensing justices are permitted to work upon such an occasion are limited, and bound by the words in s. 71 (1) which describe the nature of the alterations giving rise to the inquiry. The licensing justices, it is said, may ask themselves: "Does the proposed alteration in the property give increased facilities for drinking?" "Does it in a prejudicial fashion conceal or tend to conceal from observation any part of the premises used for drinking?" "Does it, as we think, prejudicially affect the communication between the part of the premises where liquor is sold and some other part or some street or some public way?" It is said that once the minds of the justices go beyond those particular and limited inquiries they are dealing with extraneous and irrelevant matter and are failing and refusing to hear and determine the matter before them according to law.

I With all respect to that argument, in my opinion, that is a mis-reading of s. 71. Those words at the beginning of sub-s. (1) are words describing the nature of the alterations referred to. If the alteration applied for is of such a nature that it falls within any one of the three named categories, then it cannot be carried out without the consent of the licensing justices. Those words are describing the classes of alteration covered by the subsection. If, therefore, a proposed alteration comes within one of these named classes, and if, therefore, it comes before the justices for their consent, it does not appear to me that the investigation which

they may make is limited at all by those descriptive words. I think they are entitled, and, indeed, it is their duty, to take into account whatever may be relevant to the whole matter. It may be, in particular circumstances, that something is relevant that goes beyond the limited topics which the mere nature of the alteration seems to involve. Here, what is being dealt with, is, to put it shortly, a back door. It is quite true that the back door has been in existence there for some time. It is quite true that the back door is physically at no little distance from the part of these premises where, in fact, intoxicating liquor is sold. But it seems to me a little incorrect to say that, because the back door has been there for some time, the proposed alterations are not related to it. Ex concessis the proposed alterations had for part of their object, and if they were approved would have as part of their effect, the increase of facilities for drinking, and a means of access to the premises, as they were, becomes, it may be, an even more important matter in view of the condition to which it is proposed to alter these premises. The means of access was of account. The means of access to comparatively small premises may be of less moment than the means of access to comparatively large premises. But we are not troubled here with questions of degree: what is said is that the nature of the topic is irrelevant.

Reference has been made in the course of the argument to *Bushell v. Hammond* (1). There, what was being considered was not an application under s. 71 (1) or its predecessor, but an application for the renewal of a licence at the general annual licensing meeting. But, none the less, I cannot but think the remarks of COLLINS, M.R., are pertinent to this discussion. He said ([1904] 2 K.B. at p. 568):

"I think that under sub-s. (4) [of s. 11 of the Licensing Act, 1902] the licensing justices, when determining the nature of the structural alterations which they shall require upon the renewal of a particular licence, are quite justified in taking into consideration the means of access to the part where intoxicating liquor is sold, and in deciding what alteration in the means of access is reasonably necessary to the proper conduct of the business."

That subsection of s. 11 of the Act of 1902 has not a word to say about the means of access. In the subsection we find words empowering the justices, on renewing a licence, to direct "such alterations as they think reasonably necessary to secure the proper conduct of the business." It followed that in the opinion of the Court of Appeal, the means of access in such a case were so closely related to the part of licensed premises where intoxicating liquor was sold, that questions concerning the means of access might properly be dealt with on an application of the kind which was then being considered—for renewal of a licence where alterations were ordered. If the means of access were relevant and appropriate for that purpose in that case, why are they not relevant and appropriate on the question here, which the licensing justices have to consider under s. 71? Speaking for myself, I cannot see what could be more relevant and appropriate here than the means of access to the premises. It is not necessary to go into the merits of the matter, but one fact leaps to the eye upon these affidavits. It is the fact, namely, that now and for the future this gateway, while it opens on one side into the yard of the licensed premises, opens on the other into a public market that was then being constructed. In my opinion, there is no ground for contending that in this case the licensing justices have considered extraneous or irrelevant material, and have not determined the application before them according to law. The rule, I think, must be discharged.

SWIFT, J.—I agree.

ACTON, J.—I agree.

Rule discharged.

Solicitors: *Sharpe, Pritchard & Co.*, for *Sedgwick, Turner, Swoorder & Wilson*, Watford; *Stanley Robinson & Commin*.

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

LLOYDS BANK, LTD. v. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA

[COURT OF APPEAL (Scrutton and Sankey, L.JJ., and Tomlin, J.), March 22, 23, 26, 27, 28, 29, May 2, 1928]

[Reported [1929] 1 K.B. 40; 97 L.J.K.B. 609; 139 L.T. 126; 44 T.L.R. 534; 33 Com. Cas. 306]

Bank—Negligence—Conversion—Receipt from customer of cheque for payment into customer's account—Cheque drawn without authority in fraud of customer's employer—Liability of bank to employer—Bank's right to be credited with sums paid by customer to his employer.

L., who was accountant at a branch of the plaintiff bank, had authority to sign cheques on their behalf. Purporting to act on that authority he fraudulently signed, and procured the signature of other officials of the bank to, certain cheques for substantial sums which, it was clear from the amounts, were not in respect of salary due to him, and which he made payable to the defendant bank with instructions to that bank to place the proceeds of the cheques to the joint account of himself and his wife at the defendant bank. The defendant bank collected the cheques and placed them to the credit of the joint account. L. thereupon drew on the joint account cheques in favour of persons some of whom the defendant bank knew to be stockbrokers. From time to time L. drew cheques on the joint account and paid the proceeds into an account which he had with the plaintiff bank. No inquiry was made by the defendant bank as to the regularity of these transactions. In an action by the plaintiff bank for damages for the conversion of the cheques,

Held: each cheque was "issued" by the plaintiff bank, it having been signed and dealt with by persons with ostensible authority, but the accompanying instruction given by L. to the defendant bank gave notice to the defendant bank of irregularity which rendered them not holders in due course; the plaintiff bank were the "true owners" of the cheques within s. 131 of the Indian Negotiable Instruments Act, 1881 (which was in substantially the same terms as s. 82 of the Bills of Exchange Act, 1882), and the defendant bank were not entitled to the protection of that section since they had not established that in receiving the cheques and crediting them to the joint account they had acted without negligence; in dealing with the cheques as he had L. was guilty of their conversion, and in carrying out his instructions to pay them into the joint account the defendant bank were also guilty; damages for conversion might be reduced by the return of the chattel converted, but the mere proof of receipt of moneys from the wrongdoer, which, if the owner of the property converted had known of the conversion, he might have appropriated against his loss, did not, in the absence of knowledge of the conversion, justify the deduction from damages for the conversion of the amount of the moneys paid, and in any case, in the present case the sums paid by L. to the plaintiff bank were made as out of his own money to reduce an overdraft on or increase the credit of his account with the plaintiff bank; and, therefore, the plaintiff bank were entitled to damages for the conversion without any deduction.

Agent—Misrepresentation—Breach of authority given by principal—Liability to principal of third party—Notice to third party of irregularity.

A third party, dealing in good faith with an agent who is acting within his ostensible authority, is not prejudiced by the fact that, as between the principal and his agent, the agent is using his authority for his own benefit and not for that of his principal, but it is otherwise where the third party has notice of irregularity putting him on inquiry whether the ostensible authority is being exceeded.

Notes. Considered: *Slingsby v. District Bank, Ltd.*, [1931] All E.R.Rep. 143. **A**
 Referred to: *Fenton Textile Association v. Thomas* (1929), 45 T.L.R. 264; *Slingsby v. Westminster Bank, Ltd.*, [1930] All E.R.Rep. 184; *Lloyds Bank, Ltd. v. Savory & Co.*, [1932] All E.R.Rep. 106; *Marquess of Bute v. Barclays Bank, Ltd.*, [1954] 3 All E.R. 365.

As to relations between principals and third persons, see 1 HALSBURY'S LAWS (3rd Edn.) 208 et seq.; as to a bank's duties and liabilities in connection with the collection of cheques, see *ibid.*, vol. 2, 176 et seq.; as to the measure of damages for conversion, see 33 HALSBURY'S LAWS (2nd Edn.) 69 et seq. For cases see 1 DIGEST 562 et seq.; 3 DIGEST 237 et seq.; 43 DIGEST 519 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505. **B**

Cases referred to:

- (1) *Morison v. London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 30 T.L.R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C.A.; 3 Digest 242, 690. **C**
- (2) *A. L. Underwood, Ltd. v. Bank of Liverpool and Martins, Same v. Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 40 T.L.R. 302; 68 Sol. Jo. 716; 29 Com. Cas. 182, C.A.; Digest Supp. **D**
- (3) *Reckitt v. Barnett, Pembroke and Slater, Ltd.*, [1928] 2 K.B. 244; 97 L.J.K.B. 407; 139 L.T. 100; 44 T.L.R. 428, C.A.; reversed, ante, p. 1; [1929] A.C. 176; 98 L.J.K.B. 136; 140 L.T. 208; 45 T.L.R. 36; 34 Com. Cas. 126, H.L.; Digest Supp. **E**
- (4) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 1 Digest 595, 2284. **F**
- (5) *Hambro v. Burnand*, [1904] 2 K.B. 10; 73 L.J.K.B. 669; 90 L.T. 803; 52 W.R. 583; 20 T.L.R. 398; 48 Sol. Jo. 369; 9 Com. Cas. 251, C.A.; Digest Supp. **G**
- (6) *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.*, [1926] A.C. 670; 95 L.J.K.B. 913; 135 L.T. 548; 42 T.L.R. 644; 70 Sol. Jo. 756; 32 Com. Cas. 8, H.L.; Digest Supp. **H**
- (7) *Corporation Agencies v. Home Bank of Canada*, [1927] A.C. 318; 96 L.J.P.C. 63, P.C.; Digest Supp. **I**
- (8) *John v. Dodwell & Co., Ltd.*, [1918] A.C. 563; 87 L.J.P.C. 92; 118 L.T. 661; 34 T.L.R. 261, P.C.; 43 Digest 535, 705.
- (9) *Matthiessen v. London and County Bank* (1879), 5 C.P.D. 7; 48 L.J.Q.B. 529; 41 L.T. 35; 43 J.P. 560; 27 W.R. 838; 3 Digest 240, 680.
- (10) *Taxation Comrs. v. English, Scottish and Australian Bank, Ltd.*, [1920] A.C. 683; 89 L.J.P.C. 181; 123 L.T. 34; 36 T.L.R. 305, P.C.; Digest Supp.
- (11) *Bank of Ireland (Governor & Co.) v. Evans' Charities Trustees* (1885), 5 H.L.Cas. 389; 3 C.L.R. 1066; 25 L.T.O.S. 272; 3 W.R. 573; 10 E.R. 950, H.L.; 21 Digest 400, 1605.
- (12) *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; 2 New Rep. 521; 32 L.J.Ex. 273; 10 Jur.N.S. 102; 11 W.R. 862; 159 E.R. 73, Ex. Ch.; 21 Digest 291, 1036.
- (13) *Blackburn and District Benefit Building Society v. Cunliffe, Brooks & Co.* (1885), 29 Ch.D. 902; 54 L.J.Ch. 1091; 53 L.T. 741; 1 T.L.R. 504, C.A.; 3 Digest 263, 805.
- (14) *B. Liggett (Liverpool), Ltd. v. Barclays Bank, Ltd.*, [1928] 1 K.B. 48; 97 L.J.K.B. 1; 137 L.T. 443; 43 T.L.R. 449; Digest Supp. **I**
- (15) *Bannatyne v. MacIver*, [1906] 1 K.B. 103; 75 L.J.K.B. 120; 94 L.T. 150; 54 W.R. 293, C.A.; 1 Digest 318, 387.
- (16) *Reid v. Rigby & Co.*, [1894] 2 Q.B. 40; 63 L.J.Q.B. 451; 10 T.L.R. 418; 10 R. 280; 1 Digest 318, 386.
- (17) *Tate v. Wilts and Dorset Bank* (1899), Journal of Institute of Bankers, Vol. XX, p. 376; 3 Digest 240, 679.

- A (18) *M'Combie v. Davies* (1805), 6 East, 538; 2 Smith, K.B. 557; 102 E.R. 1393; 43 Digest 494, 332.
- (19) *Ladbroke & Co. v. Todd* (1914), 111 L.T. 43; 30 T.L.R. 433; 19 Com. Cas. 256; 3 Digest 239, 674.
- (20) *Ross v. London County Westminster and Parr's Bank*, [1919] 1 K.B. 678; 88 L.J.K.B. 927; 120 L.T. 636; 35 T.L.R. 315; 63 Sol. Jo. 411; Digest Supp.
- B (21) *Bissell & Co. v. Fox Bros. & Co.* (1885), 53 L.T. 193; 1 T.L.R. 452, C.A.; 3 Digest 241, 684.
- (22) *Hannan's Lake View Central, Ltd. v. Armstrong & Co.* (1900), 16 T.L.R. 236; 5 Com. Cas. 188; 3 Digest 242, 687.
- (23) *Edmondson v. Nuttall* (1864), 17 C.B.N.S. 280; 4 New Rep. 366; 34 L.J.C.P. 102; 13 W.R. 53; 144 E.R. 113; 43 Digest 521, 586.
- C (24) *Hiort v. London and North-Western Rail. Co.* (1879), 4 Ex.D. 188; 48 L.J.Q.B. 545; 40 L.T. 674; 27 W.R. 778, C.A.; 3 Digest 78, 168.
- (25) *Reversion Fund and Insurance Co. v. Maison Cosway, Ltd.*, [1913] 1 K.B. 364; 82 L.J.K.B. 512; 108 L.T. 87; 57 Sol. Jo. 144; 20 Mans. 194, C.A.; 1 Digest 318, 388.

D **Appeal from an order of MACKINNON, J.**

The plaintiffs claimed to recover from the defendants damages for the conversion of certain cheques drawn by one Lawson, who was chief accountant at the Bombay branch of the plaintiff bank, and had authority to sign cheques on their behalf. The plaintiffs banked with the Imperial Bank of India, and cheques had to be signed by two of their officials. From March, 1922, to January, 1924, Lawson carried on a complicated system of fraud. He signed, and, by fraud, procured the signature by another authorised official of the plaintiff bank to, nineteen cheques purporting to be drawn on behalf of the plaintiff bank on the Imperial Bank of India and made payable to the defendant bank. He then sent the cheques to the defendant bank for collection, requesting the defendant bank to place the accompanying cheque to the credit of a joint account which Lawson and his wife kept at the defendant bank. The defendant bank collected the cheques, which were duly honoured, and placed them to Lawson's joint account. By their defence the defendants pleaded, *inter alia*, that each cheque was issued on behalf of the plaintiff bank by two agents who had ostensible authority to issue it to the defendant bank. They relied on s. 131 of the Indian Negotiable Instruments Act, 1881, which was in substantially the same terms as s. 82 of the Bills of Exchange Act, 1882. By s. 131:

"A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specifically to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment."

MACKINNON, J., held that the cheques were never issued, and, therefore, the defendants had no rights. As regards s. 131, he held that, although they had received payment from Lawson as their customer in good faith, they had failed to prove absence of negligence, and he rested his judgment on the payment by Lawson of large cheques drawn by him on the plaintiff bank into his private account and failure to make inquiries of the manager of the plaintiff bank as to the regularity of the transaction. The learned judge further held that as Lawson had paid a certain amount of the money obtained by him by fraud to the plaintiff bank, their claim for conversion should be reduced *pro tanto*. The defendants appealed, and there was a cross-appeal by the plaintiffs against the reduction of the damages because of the sums paid to them by Lawson.

W. A. Jowitt, K.C., and *James Wylie* for the defendants.

Stuart Bevan, K.C., and *C. T. Le Quesne, K.C.*, for the plaintiffs.

Cur. adv. vult.

May 2. The following judgments were read.

SCRUTTON, L.J.—This appeal in a case where one bank sues another for conversion of cheques drawn by an employee of the plaintiff bank in fraud of his employer on the bank of the plaintiffs, and collected by the defendant bank raises a number of difficult questions.

The plaintiff bank, Lloyds Bank, Ltd., are the successors of Messrs. Cox, whose business they took over. No point was taken as to the change of parties, and I deal with the case as if Lloyds Bank were interested throughout the whole relevant period. They banked with the Imperial Bank of India, and their cheques must be signed by two of their officials. One of those officials was one Lawson, their accountant, who had over him in the bank three superior officials, a manager and two sub-managers. Lawson had an account in the joint names of himself and wife at the Chartered Bank of India, Australia, and China, the defendant bank. From March, 1922, to January, 1924, Lawson carried on a complicated system of fraud involving some nineteen fraudulent cheques. He signed, and by fraud procured another authorised official to sign, nineteen cheques on the Imperial Bank of India made payable to the defendant bank. He sent them to the defendant bank for collection on his behalf, the instructions to collect in that way being contained in a paying-in slip, or more generally in an accompanying letter, requesting the defendant bank to place the accompanying cheque to the credit of his joint account, and signed by Lawson only. The letter was on the bank's letter paper with a printed heading, "From Cox and Co.," the word "From" being sometimes struck out. The defendant bank collected the cheque, which was duly honoured by the Bank of India, and placed it to Lawson's account. As appears from the account itself, it was generally in small credit till the arrival of each fraudulent cheque, the funds collected from which were promptly drawn out, frequently in favour of stockbrokers. These fraudulent cheques were not discovered for a long time by reason of a complicated series of fraudulent entries, which it is unnecessary to trace in detail, and partly also by the neglect by the plaintiff bank of a series of elementary precautions. Lawson was the only person who checked the plaintiff bank's pass-book when returned daily, and the auditor only troubled himself with totals and not with items. When the first fraudulent cheque was discovered the other eighteen were traced in a day or so.

In these circumstances the plaintiff bank sued the defendant bank for conversion of the cheques. Conversion primarily is conversion of chattels, and the relation of bank to customer is that of debtor and creditor. There might be thought to be some difficulty, as there are no specific coins in a bank which are the property of any specific customer, in treating the payment by a bank of part of its debt to the customer to a person not authorised to receive it as conversion of chattels, but a series of decisions binding on this court, culminating in *Morison v. London County and Westminster Bank, Ltd.* (1) and *A. L. Underwood, Ltd. v. Bank of Liverpool and Martin's, Same v. Barclays Bank* (2), have surmounted the difficulty by treating the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it: see the explanation of PHILLIMORE, L.J., in *Morison's Case* (1). The plaintiffs' case as to conversion was rested on these authorities and the trial judge adopted it. The defendant bank attempted to answer this case in various ways. Their counsel said, as I understood his argument, that each cheque was issued on behalf of the plaintiff bank, by two agents who had ostensible authority to issue it, to the defendant bank, which was entitled to rely on the ostensible authority, and, while it was perfectly true that one of those agents, as between the bank and himself, had no authority to issue such a cheque for his own benefit, to outsiders he was acting within his ostensible authority, and unless they had notice of his fraud, or until the principal, learning of his fraud, avoided the transaction, they were protected in their dealings with the apparently regular

A cheque. This position was said to be justified by the authorities referred to in the recent judgments in *Reckitt v. Barnett, Pembroke and Slater, Ltd.* (3) ([1928] 2 K.B. 244) and in *Lloyd v. Grace, Smith & Co.* (4) and *Hambro v. Burnand* (5).

In my view, it is established that a third party, dealing in good faith with an agent acting within his ostensible authority, is not prejudiced by the fact that, as between the principal and his agent, the agent is using his authority in such a way that the principal can rightly complain that the agent is using his authority for his own benefit and not for that of his principal. Probably the plaintiff bank could not successfully sue the Bank of India for honouring these cheques signed by persons who had ostensible authority to sign, because in fact one of them was using his ostensible authority for his own benefit. But it is otherwise where the third party has notice of irregularity putting him on inquiry whether the ostensible authority is being exceeded. In the present case a subordinate official of a bank is steadily paying cheques of a bank by which he is employed, made payable to the collecting bank, into his own account at that collecting bank. They are not cheques which on their face have any relation to Lawson except that he is one of the officers signing; and their amounts are such that they cannot be payments of salary. The only authority to use cheques for Lawson's benefit which on their face have no connection with Lawson is a signature by Lawson himself. It appears to me that as in *Underwood's Case* (2) these facts put the defendant bank on inquiry. It is very important, in my view, to maintain safeguards against employees dealing with their master's property without authority. If the cheque had come forward without the accompanying authority of Lawson I do not think the defendant bank would have committed conversion by collecting the proceeds and asking for further instructions.

The learned judge below has taken the view that the cheque was never issued, and, therefore, the payee had no rights. By s. 2 of the Bills of Exchange Act, 1882, "issue" is defined as "the first delivery of a bill or note, complete in form, to a person who takes it as a holder"; and "holder" means "the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof." But the House of Lords has decided in *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.* (6) that the original payee of a cheque is not a holder in due course. The Indian Negotiable Instruments Act, 1881, however, to which the judge was not referred on this point, includes by s. 9 in the definition of "holder in due course" the payee of a cheque. It does not define "issue," but does in s. 14 define "negotiation," so as to make the payee under a cheque transferred to him a holder by negotiation. It seems to me that each cheque taken by itself was "issued," being signed and dealt with by persons having ostensible authority to sign and issue it, but the accompanying memorandum, signed by Lawson alone, and its directions gave notice of irregularity, which destroyed the "holding in due course." I prefer this view to that of the learned judge as to "no issue." It seems to me that the position is rather that of an issue with notice of irregularity than an issue under a voidable title—good till avoided. In *Corporation Agencies v. Home Bank of Canada* (7) the cheques drawn in fraud were treated by the Privy Council as drawn with ostensible authority, and the distinction between that case and *John v. Dodwell & Co., Ltd.* (8) was made to turn on no notice or notice. I think in this case there was notice, as in *Underwood's Case* (2). There being conversion not waived but relied upon, the plaintiffs could not sue for money had and received, and they so stated to us and to the defendants, by letter, after judgment was reserved. The fact of the notice also prevents the defendants from treating themselves as holders in due course of the second cheque, which they credited to their customer's account before collection. This fact also prevents the defendants from claiming the protection of the Indian Act, s. 131, as they did not collect for a customer, having already credited him with the amount.

The defendants next relied on s. 131 of the Indian Negotiable Instruments Act, which takes the place of s. 82 of the English Bills of Exchange Act, 1882, and gives protection to a banker who, in good faith, and without negligence, collects

for a customer a crossed cheque. The Indian Act uses the language "in case the title to the cheque proves defective," which is the language of the English Act of 1876. The English Act of 1882 expands this to "the customer has no title or a defective title." It was argued that the Indian Act only applied to cases of an ostensible but defeasible title, and not to cases of no title. I do not know why the language was altered. I notice that in *Matthiessen v. London and County Bank* (9) LINDLEY, J., uses the language "has a bad title." But as it seems to me in the present case the bank had a title as holder under the Indian Act, defective through notice, I do not think the difference in the Acts is material. It was also said that the Acts could not protect the bank, as they were the true owners, being payees, and could not owe a duty to themselves. As they were payees with notice of irregularity in the accompanying memorandum I do not think they were "true owners."

There remains the question which gave the learned judge a great deal of trouble, whether the defendant bank showed that they collected without negligence. Negligence involves duty, and as the collecting bank, apart from statute, owed no duty to the owner of the cheque, the duty must be one created by the statute itself. I accept the measure of duty stated by LORD DUNEDIN in *Taxation Comrs. v. English, Scottish and Australian Bank, Ltd.* (10) ([1920] A.C. at p. 688), where he says:

"ISAACS, J., says:

'Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison v. London County and Westminster Bank, Ltd.* (1), and relevant to the present, are (1), that the question should in strictness be determined separately with regard to each cheque; (2), that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the banker's mind, and caused them to make inquiry.'

If there be inserted after the words 'given cheque' the words 'coupled with the circumstances antecedent and present,' their Lordships think this is an accurate statement of the law."

LORD DUNEDIN adds to it the qualification, which I entirely accept, that to require a thorough inquiry into the history of each cheque would render banking business impracticable, and that, therefore, there must be something markedly irregular in the transaction. The learned judge finds, after careful consideration, that the defendant bank failed to prove absence of negligence. He rests his judgment on the payment by Lawson of large cheques of his bank into his private account, and the failure of the defendants to make inquiries of the manager of the plaintiff bank as to the regularity of the transactions. I agree in this finding, and would add that I think examination of Lawson's account (and I am sure that general examination of the accounts of every customer takes place from time to time in all well-managed banks) should, I think, have put the defendant bank on inquiry as to the source from which these heavy payments to stockbrokers were being made, in the case of an account generally in low water, except for these payments in, immediately reduced by payments out.

The only remaining defence was that the defendant bank was "lulled to sleep" by the failure of the plaintiff bank to detect these frauds. The learned judge has dismissed this on the ground that no one from the defendant bank came to say he was "lulled to sleep"; their attitude was that they remembered nothing about the matter. This is enough to dispose of the matter, but though a similar defence succeeded in *Morison's Case* (1), I am not at all satisfied as to the grounds of such a decision. It does not seem consistent with the decisions in *Bank of Ireland v. Evans' Charities Trustees* (11) and *Swan v. North British Australasian Co.* (12) that negligence, to act as estoppel, must be the proximate cause of the loss. If my butler for a year has been selling my vintage wines cheap to a small wine

A merchant, I do not understand how my negligence in not periodically checking my wine book will be an answer to my action against the wine merchant for conversion. However, the ground of the learned judge's decision is enough to dispose of this point. This, I think, substantially exhausts the points taken on the appeal, which must be dismissed with costs.

The plaintiffs had a cross-appeal which originally raised four matters. Of these

B a claim in respect to salvage from Lawson's property has been argued; a claim for interest on the amount recovered was abandoned; a claim to treat the sum as awarded on a claim for moneys had and received (in which case consideration of exchange would make the amount larger) was abandoned, if the plaintiffs succeeded in conversion, by letter after the hearing before us, on the ground that if the plaintiffs did not waive the tort, but succeeded on conversion, they could not claim

C in assumpsit. There remained a contention that the judge was wrong in allowing the defendants to reduce the sum awarded against them by the items set out in the amended claim, being sums which Lawson was said to have paid back to the plaintiffs out of the amount converted by him, so that the plaintiffs had not, in fact, suffered the damage alleged. It seems to me clear that damages in conversion may be reduced by the return of the chattel converted; and that where there has

D been a series of conversions of the same chattel, the return of the chattel by one of the wrongdoers may be used to reduce the damages against each wrongdoer. But when one comes to the conversion of a cheque, it is not at all clear how the fact that one of the persons converting has after conversion paid to the plaintiffs, not the cheque converted, but some currency, not necessarily the currency derived from the cheques converted can be treated without more as a reduction of the

E damages for the original conversion. The servant of a tradesman converts a cheque of his employer through a bank, and at a later period comes into his employer's shop and buys for £10 a chattel sold by the employer. Can the bank claim to reduce damages for conversion by £10, because the employer has received £10 from the original wrongdoer? Will proof that the £10 came out of the proceeds of the cheque converted make any difference? There are authorities beginning

F with *Blackburn and District Benefit Building Society v. Cunliffe, Brooks & Co.* (13), the latest application of which is by WRIGHT, J., in *B. Liggett (Liverpool), Ltd. v. Barclays Bank, Ltd.* (14), which support the view that, if the person converting without authority can show that he used the proceeds in discharging debts of the plaintiff, that fact may reduce to that extent the sum claimed from the wrongdoer. But whether any particular payment to the plaintiff by one of the wrongdoers

G reduces the damages for conversion must depend on the facts of each case, and cannot be settled by mere proof of receipt without more. In *Underwood's Case* (2) the Court of Appeal, therefore, ordered an inquiry as to the circumstances of each payment; the parties, however, settled the matter. WRIGHT, J., ordered a similar inquiry in *Liggett's Case* (14). I take, as a sample, in the present case, the first

H five payments alleged in the claim, which are closely connected with the first fraudulent cheque in this case. This cheque was one for 15,000 rupees, dated Mar. 31, 1922. Against it five cheques were drawn, which all, in various ways, came to the plaintiffs. They amounted to 15,617 rupees, and changed Lawson's account with the defendants from a credit of 232 rupees to a debit of 385 rupees. Obviously, therefore, to allow the defendants to deduct 15,617 rupees, as has been

I done, is to give them the advantage to the extent of 617 rupees of payments which were not derived from the first cheque converted. It seems also to assume that any chance which the owner of the property converted had of appropriating property of the wrongdoer, to meet his claim, though the owner did not know of the conversion, may be used to reduce the damages payable by any wrongdoer. Next, these five cheques, which the defendants claim to be allowed to deduct from the damages, were the following (i) A cheque for 2,250 rupees paid by Lawson into his account at the plaintiff bank, turning his account, which was then 2,075 rupees in debit, into 175 rupees in credit. I do not see how Lawson could claim this as reducing his damages, as he promptly proceeded to draw against it till his account

was again 900 rupees overdrawn. If he could not so use it, I do not see how the defendants could so use it, unless they showed some duty to them, on the part of the plaintiff bank, to discover Lawson's frauds, and I do not see any justification for inferring such a duty. (ii) Two cheques for 7,917 and 4,750 rupees respectively, paid by Lawson to the plaintiff bank, to purchase two telegraphic transfers to London. Lawson was buying these apparently to meet two drafts on London which he had obtained from Cox & Co., for 7,649 rupees on Feb. 20, and 4,663 rupees on Mar. 13, 1922. Our attention was not called to the details of these transactions, but it looks as if the plaintiff bank gave value for these cheques, and if so, to allow the defendant bank to take credit for the whole sum would be to inflict a double penalty on the plaintiff bank. Lastly, there were two cheques for 350 rupees paid to the plaintiff bank, not into Lawson's account. Our attention was not called to any explanation of these amounts, and I do not see any justification for the defendant bank, without more, claiming to debit the plaintiff bank with them. No evidence was given that any of the sums in the claim went to pay debts of the plaintiff bank, which might bring the matter within such authorities as *Bannatyne v. MacIver* (15) and *Reid v. Rigby & Co.* (16). In my opinion, the mere proof of receipt of moneys from the wrongdoer, which, if the owner of the property converted had known of the conversion, he might have appropriated against his loss by conversion, does not, in the absence of knowledge of the conversion, justify the deduction claimed. The cross-appeal, therefore, succeeds on this point, and the judgment for the plaintiffs should be increased to £17,044 15s. 2d. The appeal must be dismissed with costs, and the plaintiffs must have the costs of the cross-appeal.

SANKEY, L.J.—In February, 1923, the plaintiffs took over the business carried on by Messrs. Cox & Co. as bankers in England, India, and elsewhere, and in the remainder of this judgment I propose to refer to Messrs. Cox & Co. and Lloyds Bank, Ltd., as the plaintiffs. The plaintiffs alleged that on various dates between Mar. 30, 1922, and Jan. 21, 1924, one Lawson, chief accountant of their Bombay branch, with another official, drew cheques to the number of nineteen on the Imperial Bank of India, with which the plaintiffs had an account. Lawson drew the cheques in favour of the defendants, and delivered them to the defendants, the first cheque with a paying-in slip and each of the others with a memorandum containing instructions by Lawson to the defendants to put the said cheques or the proceeds thereof to the credit of Lawson's joint account in the Bombay branch of the defendants. They further alleged, as indeed was the fact, that Lawson acted in fraud, and without the authority, of the plaintiffs, and that the defendants wrongfully converted the said cheques by collecting the same from the Imperial Bank of India and putting the proceeds to the credit of the said joint account, whereby the plaintiffs suffered damage. The plaintiffs claimed a sum of £17,044 15s. 2d., and, alternatively, a rather larger sum on account for money had and received. The defendants contended: (i) That they were not guilty of conversion; (ii) that they are protected by the Negotiable Instruments Act, 1881, as modified up to Sept. 1, 1909, of the Indian Code of Law, which reads as follows:

"A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment."

They further contended that they acted in good faith, which is not disputed, and without negligence in the circumstances, and upon that issue is joined. The learned judge accepted the plaintiffs' contention, but said that they were liable to give credit in respect of certain amounts, being part of the proceeds of the above-mentioned cheques which had found their way back into Lawson's account with the plaintiffs, and in the result he gave judgment for £12,470. From that judgment the defendants appeal, and the plaintiffs have a cross-appeal in respect of the credits allowed.

A The plaintiffs had in their employment at all material times the said Lawson, who had for ten years been in the position of chief accountant. He had, besides his duties of looking after the accounts, full powers under a power of attorney to sign cheques, and to commit the plaintiffs by his signature. His salary was at the rate of 1,200 rupees a month, which was credited to him in a current account which he had with the plaintiff bank. He had also a banking account with the

B plaintiffs in London, and, thirdly, he had a current account with the defendant bank, originally in his own name, but later on as a joint account in the name of himself and his wife. The plaintiffs had an account with the Imperial Bank of India. Lawson was a rogue who has since been convicted and sentenced to a long term of imprisonment, and the nineteen cheques mentioned were fraudulently obtained and used by him, the first fraud being in respect of a cheque of Mar. 31,

C 1922, and the last fraud in respect of a cheque of Jan. 22, 1924. Before he began the frauds he had a considerable number of honest dealings, by means of which money was transferred from the plaintiff bank to his own account with the defendants by means of pay slips. These sums ranged from the small amount of 687 rupees to the large one of 7,649 rupees. It is necessary to mention this fact because one of the considerations urged by the defendants is that, before the

D fraudulent transactions, Lawson had with them considerable transactions which were admittedly honest.

The nineteen cheques drawn upon the Imperial Bank of India which are the subject of this action required to be signed by two signatories in order to make them valid cheques drawn by the plaintiffs. Lawson was entitled to sign a cheque, and various other persons were entitled to be one of the two joint signatories

E required. These cheques are in the form: "Pay the Chartered Bank of India, Australia and China [the defendants] or order," and they are crossed. They are drawn upon the plaintiffs' account with the Imperial Bank of India. Every one is signed by Lawson, and also signed by some second signatory. The fact is that they were fraudulently prepared by Lawson, who fraudulently got the other officials to sign them because he intended to use them, not for the proper purposes of the

F plaintiff's business, but for his own fraudulent purposes, and for his own improper enrichment. Every one of these cheques was, in fact, paid in by Lawson to his joint account with the defendants; it was collected by the defendants from the Imperial Bank of India, and was credited by them to Lawson's joint account. The first cheque was apparently handed in over the counter; but all the others were sent by Lawson with a covering letter, addressed to the defendants, the effect of

G which was as follows:

"Dear Sirs,—Please place the amount of the enclosed cheque for 1,100 rupees to the credit of my joint account and oblige. Yours truly, T. D. Lawson."

These personal letters from Lawson to the defendants were in each case written upon the office paper of the plaintiffs. No particular ingenuity appears to have

H been exercised in the perpetration of the fraud. When Lawson was in need of money, presumably to meet his losses in speculation, he issued a cheque duly signed on behalf of the plaintiffs, drawn on the Imperial Bank of India, but passed no entries until the last day of the month, when to reconcile the Imperial Bank account he debited the plaintiff's Bombay account with their Calcutta Agency account in the books at Bombay on account of a payment to a local firm. A cheque

I on the Imperial Bank was made out in favour of the firm for the said payment, but the cheque was subsequently destroyed. It was Lawson's duty as accountant to check the books each day and to reconcile the Imperial Bank account, and to send to the head office a reconciliation at the end of each month. The day following the above entries they were reversed until the end of the month, when the operation was completed. There was no examination of vouchers by a senior officer, but each member of the staff went through the vouchers daily to verify his own signature. It was not the custom to exchange continuation of both inward and outward accounts with the Calcutta branch or the fraud might have been discovered

sooner. The plaintiff bank were undoubtedly negligent. Mr. Buckler, their district manager, who investigated the fraud, writes on Mar. 27, 1924: "I cannot think that had Bombay had an adequate staff, or trained men, Lawson would have been able to defraud the bank over a period of twenty-three months without detection." The same officer says in his report on April 2: "The methods employed by Lawson disclosed very grave defects in the system at the Bombay office, or, to put it bluntly, an entire lack of system, and a complete reliance on one man who was allowed not only to make out vouchers, draw cheques, and obtain a second signature to the cheques without the slightest query, but also to check up and reconcile the accounts on which he was operating. The position of an accountant in a big office must carry a considerable amount of weight, particularly with the junior staff, but it is almost incredible that so many members of the staff should have gone on so long without querying a system by which they signed cheques blindly, or raising some protest on their own responsibility in doing so. To all intents and purposes Bombay has been a one-signature branch, for the second signature is added merely on the strength of the first, and in order to conform to the rule of two signatures." A considerable body of evidence was given to explain the system by which the frauds were committed, and by which the transactions were carried out by officials, both of the plaintiff bank and of the defendant bank, but only one expert banker was called, namely, Mr. Allen, who had a large experience of Indian banking, and he was called for the plaintiffs.

I come now to the points raised, and the questions which arise are: (i) Were the defendants guilty of conversion of the cheques in question? (ii) Are they protected by the Indian Act referred to, by reason that they have in good faith and without negligence received payment for a customer of the cheques in question? Several points emerge for decision here which are applicable to both questions.

As to (i), whether the defendants were guilty of conversion, the defendants put their argument as follows: (a) There was no conversion because we had a voidable title to the cheques in question which had not been avoided before we dealt with them by collecting the money and placing it to Lawson's account. (b) This also applies to the case made against us under the count for money had and received. The plaintiffs informed the court that if they were successful in their case for conversion they did not desire to rely on the count for money had and received. The defendants refer to *Tate v. Wilts and Dorset Bank* (17), which, they say, is conclusive in their favour, and urge that, in the circumstances, they have no need to rely upon their statutory defence. Their reasoning is that this is a case where a negotiable instrument was issued by the plaintiffs who were induced, it is true, to do so by the fraud of Lawson, but still they did not issue a negotiable instrument, and it carried with it all the rights of third parties to deal with it, and the plaintiffs cannot claim to impair these third parties' rights by reason of the fact that they were induced to do what they did by the fraud of their servant. Even if *Tate's Case* (17) can be held to be good law since the decision in *Morison's Case* (1), the facts there were entirely different, and it is not applicable to the present circumstances. The cheque there was issued, and meant to be issued, by Tate himself, and was made payable to the order of Dixon, who had a voidable title. The court held that the banker who has collected an uncrossed cheque for a customer is protected where that customer holds under a voidable title. The learned judge decided against this point upon the ground that the plaintiffs did not issue the document, but that the document was issued by Lawson, a fraudulent servant, as part of his fraud. There is some ground for taking this view to be found in *Morison's Case* (1). The fraudulent person there was a man of the name of Abbott, who issued the cheques, purporting to do so under authority he had given him by the plaintiff Morison. LORD READING, C.J., said ([1914] 3 K.B. at p. 364):

"The cheques were at all times, until issued, i.e., by Abbott, the property of the plaintiff. They were never the property of Abbott, who had no title to them."

A BUCKLEY, L.J., said ([1914] 3 K.B. at p. 375) that the plaintiff was then true owner of the cheques in question; and PHILLIMORE, L.J., said ([1914] 3 K.B. at p. 378) that the cheques were the plaintiff's instruments until he chose, or until Abbott on his behalf chose, to issue them to some outside person. There is, however, this distinction to be drawn between the present case and *Morison's Case* (1). In *Morison's Case* (1) Abbott had no authority to draw the cheques, and so the defendants' title to such cheques was defective, as Abbott issued them to the defendant in fraud of the plaintiff. In the present case Lawson had actual authority to draw cheques. I should prefer to state the point whether the defendants were guilty of conversion in the following way. It must be admitted that, upon a proper construction of the power of attorney, Lawson had actual authority to be one of the signatories of the cheques in question, as, indeed, in each case the other signatory had. Mr. Curling, the manager of the defendants' Bombay branch, admitted that Lawson had this authority jointly with another person. But he had no authority to send the cheque, with the private memorandum above referred to, requesting the defendants to put it to his joint account, and in doing so he was guilty of conversion, and so were the defendants who carried out his instructions. As LORD ELLENBOROUGH said in *M'Combie v. Davies* (18) (6 East D at p. 540):

"A man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?"

E Both upon this ground and upon the ground taken by the learned judge in the court below, I am clearly of opinion that the defendants were guilty of conversion of the plaintiff's cheques. Indeed, *Morison's Case* (1) is a direct authority for this proposition.

F As to point (ii), which is probably the most important one, are the defendants protected by the section of the Indian Act referred to? That depends upon whether they were guilty of negligence in these transactions. Both this section and the corresponding s. 82 of the Bills of Exchange Act, 1882, have given great trouble to the court. What is negligence in the circumstances? The difficulty is that the statute does not speak of any corresponding duty, but leaves that to be inferred. I think the duty of the defendants to the true owner of the cheques was (a) to exercise the same care and forethought with regard to the cheque paid in by the customer as a reasonable man would bring to bear on similar business of his own: G see SIR JOHN PAGET ON BANKING (4th Edn.), p. 274; and (b) to provide a reasonable and competent staff to carry out this duty. There are numerous tests which have been applied in the courts from time to time suggesting what may or may not be negligence. For example, a bank may be negligent in not making inquiries as to a customer on opening an account: *Ladbroke & Co. v. Todd* (19); *Taxation Comrs. v. English, Scottish and Australian Bank, Ltd.* (10); and there may be negligence H in not noticing the account of the customer from time to time and considering whether it is a proper or a suspicious one: see *Morison's Case* (1). In this case the plaintiffs formulate their charges of negligence in the following way. They say: (i) Lawson, an employee of the plaintiffs, was transferring large sums of money from the plaintiff bank to the defendant bank. Why? If he had an account at the plaintiff bank only, the money would be accessible there. (ii) Heavy payments I were made directly afterwards to persons some of whom the defendants knew to be stockbrokers. (iii) The methods by which the transfers were made were uncommon transactions; they were not made by a cheque drawn by Lawson on his own account with the plaintiffs, but by cheque purported to be drawn by the plaintiffs, on the Imperial Bank in favour of the defendants. (iv) They were accompanied by a memorandum signed by Lawson in person instructing the defendants to put the cheque in question to the credit of his joint account. (v) One signatory to the cheque was always Lawson himself, and the cheque was, as stated above, accompanied by the personal memorandum from Lawson himself, which was

on the plaintiffs' printed form, but was not signed by two, as the cheque was. A
 The defendants seek to avoid this by referring to the pay slips above mentioned,
 which were admittedly honest transactions, and to this the plaintiffs reply: True,
 they were honest transactions, but the pay slips are equivalent to cheques drawn
 by Lawson on his own account with the plaintiffs. They are quite different from
 the fraudulent cheques, which have nothing to do with Lawson's own account. It
 would be difficult for a lawyer to come to a conclusion merely upon the argument B
 of counsel, but here in this case there is evidence upon which the court can act.
 For example, Mr. Curling, the defendants' manager at Bombay, said: "I feel that
 the Chartered Bank should have queried receiving cheques in their own favour, and
 not in favour of Lawson, when drawn by Cox & Co. and/or Lloyds Bank on their
 account at the Imperial Bank; I also feel that their attention should have been
 more closely drawn to that, owing to the fact that one of the signatories on every C
 cheque was Lawson; I feel, further, that the Chartered Bank must have known
 that Lawson was an employee of Cox & Co. and Lloyds Bank in turn owing to the
 fact that the memoranda which Lawson sent covering the cheques for his credit
 were all on paper bearing the title of Cox & Co. or Lloyds Bank." Mr. Lane, the
 deputy manager of the Bombay branch, said as follows: "I consider that the
 defendants were negligent not once but many times in accepting instructions from D
 a private individual regarding the disposal of a cheque made payable to themselves
 which was not signed by the individual giving instructions." He further says:
 "I have said in my evidence that if I was giving a confidential opinion I should
 see that the account was never overdrawn and describe the account as a satisfactory
 account, and seeing that there were considerable sums of money passing through,
 I would describe it as 'means fair,' but if I had any reason for suspicion I should E
 have examined the items in the account, and if I did that I should find that
 constant differences were being paid to share brokers in Bombay, which would
 give any bank man the feeling that this man was speculating." Mr. Lenney, of
 the defendants, excused the bank by referring to the honest transactions already
 mentioned, but the independent witness already referred to, Mr. Allen, said in
 answer to the question: "Ought it to have gone through? (A.) Oh no. If I like F
 to put a young man in a position where he should exercise discretion and he is
 not capable of doing it I cannot shield behind him, I am afraid. (Q.) If that young
 man with such knowledge of his business as he should have had had stopped and
 looked at the cheque, and looked at the paying-in slip, and examined both
 documents, ought he to have let it go through? (A.) Oh no. He should have
 queried it to his manager." With reference to the last answer of Mr. Allen, G
 the admission is made in the correspondence by Mr. Buckler on Mar. 27, where he
 says: "I cannot think that had Bombay had an adequate staff of trained men that
 Lawson would have been able to defraud the bank over a period of twenty-three
 months without detection." BAILHACHE, J., in *Ross v. London County West-*
minster and Parr's Bank, Ltd. (20) ([1919] 1 K.B. at p. 685), says:

"I must, however, attribute to the cashiers and clerks of the defendants the
 degree of intelligence and care ordinarily required of persons in their position
 to fit them for the discharge of their duties. It is, therefore, necessary to
 consider whether a bank cashier of ordinary intelligence and care on having
 these cheques presented to him by a private customer of the bank would be
 informed by the terms of the cheques themselves that it was open to doubt H
 whether the customer had a good title to them."

LORD DUNEDIN says, in *Taxation Comrs. v. English, Scottish and Australian Bank, Ltd.* (10), approving the words of ISAACS, J., in the High Court of Australia ([1920] A.C. at p. 688):

"'Apart from the well-established rule that whether or not the evidence
 establishes that a person acts without negligence is a question of fact, the
 legal principles found in *Morison v. London County and Westminster Bank, Ltd.* (1), and relevant to the present, are: (1) That the question should in I

A strictness be determined separately with regard to each cheque; (2) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry.' If there be inserted after the words 'given cheque' the words 'coupled with the circumstances antecedent and present' their Lordships think this is an accurate statement of the law."

B The items of negligence to which I am disposed to attach the greatest importance are: (i) The fact that the defendants knew that Lawson was an employee of the plaintiffs and was transferring these large sums of money from the plaintiff bank to the defendant bank, and (ii) the methods by which the transfer was made. In my view, a bank cannot be held to be liable for negligence merely because they have not subjected an account to a microscopic examination. It is not to be expected that the officials of banks should also be amateur detectives. It is not easy, nor is it desirable, to define the degree of negligence which would render them liable. Many factors have to be taken into consideration, the customer, the account, and the surrounding circumstances. But, while it is difficult to draw the line, the problem upon which side of the line a particular case falls does not present such difficulties. Having regard to the uncommon nature of the cheques in question, having regard to the fact that Lawson was an employee of the plaintiffs, as was well known by the defendants, and having regard to the heavy payments made at crucial times to persons known to be brokers, I cannot come to any other conclusion but that the defendants were negligent in this case.

E In *Bissell & Co. v. Fox Bros. & Co.* (21) DENMAN, J., said, in reference to s. 82 of the Bills of Exchange Act, 1882, which is similar to the words in the Indian Code:

F "It is clear, I think, that the negligence contemplated in s. 82 must mean the neglect of such reasonable precautions as ought to be taken with reference to the interests, not of the customer who purports to have the authority, but of the principal whose authority he purports to have, the section being framed wholly with reference to the liability of the banker to the "true owner" of the cheque and not with reference to his liability to his customer."

G That statement was approved on appeal, and is, I think, followed by KENNEDY, J., in *Hannan's Lake View Central, Ltd. v. Armstrong & Co.* (22), although in *Ladbroke v. Todd* (19) BAILHACHE, J., puts it rather differently. Who, then, is the true owner of the cheque to whom the bank owes the duty? The defendants' contention was that they were the true owners, and the duty in such circumstances was one which they owed to themselves only, and, therefore, they could not be guilty of negligence towards the plaintiffs. In my view, this is wholly inapplicable. The plaintiffs were the true owners of the cheques in question: see the judgment of BUCKLEY, L.J., in *Morison's Case* (1).

H It is not necessary, in my view, to discuss all the points raised, having regard to the conclusion to which I have come on the main points. It is only necessary to refer to the second cheque of July 10, 1922, which was credited to Lawson before it was cleared. In my view, the defendants have no defence to that, as they did not receive payment for the customer within the meaning of the section and they were not collecting it for their customer. I think under the Indian Code, I the original payee of a cheque can be a holder in due course, the Indian Act differing from the English Act in this respect, under which LORD CAVE, L.C., in *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.* (6) ([1926] A.C. at p. 680), held that the original payee of a cheque was not a holder in due course, and I do not think the principles laid down by the majority of the court in *Reckitt's Case* (3) assist the defendants. There was ample material which should have aroused the defendants' suspicions and put them on inquiry with regard to this cheque. The defendants contended that, even if they were negligent, they were entitled to say that after a time they were, as it is put in *Morison's Case* (1), "lulled to sleep":

see per BUCKLEY, L.J.; by the plaintiffs' failure to take proper precautions, and, therefore, they ought not to be held liable in this case where the plaintiffs were themselves so negligent. This doctrine of lulling to sleep, as it was called during the course of the argument, must depend either upon estoppel or upon ratification, and, having regard to the facts of the present case, I do not think that the doctrine is applicable or that it can be said that anything which the plaintiffs did ratified the defendants' actions or created an estoppel preventing the plaintiffs from succeeding in this action. Giving the best consideration I can to this matter, I have reached the conclusion that the charges of negligence set up by the plaintiffs have been made out and the defendants cannot rely on the Indian Act as a defence.

In the result, I think the appeal of the defendants must be dismissed, and there remains to be considered the cross-appeal of the plaintiffs. The facts here may be stated shortly. It is said that some of the proceeds of the fraudulent cheques found their way back into Lawson's account at the plaintiff bank., and that, therefore, credit must be given in this action for the amount of those cheques. The number of the cheques is twenty-four, amounting to £4,574 0s. 10d., and the particulars will be found in the defence. It is clear on the authorities that the damages for conversion of a cheque are the face value of it. The law has always regarded very jealously the conversion of a man's property by another (*Edmondson v. Nuttall* (23)). But where the defendant in an action for conversion is able to prove that the plaintiff has got back part of the proceeds of the property wrongfully converted, he is pro tanto excused: see *Hiort v. London and North-Western Rail. Co.* (24). *Bannatyne v. MacIver* (15), where the defendant was entitled to take credit for the sums which he had used for paying the legal debts of the plaintiffs, and *Reversion Fund and Insurance Co., Ltd. v. Maison Cosway, Ltd.* (25), where *Bannatyne v. MacIver* (15) was commented upon, are distinguishable. The defendants have not satisfied me that the plaintiffs did get back any of the proceeds of the cheques. Part of the proceeds were paid for or into Lawson's account when it was in debit, and, therefore, went to pay the debt of Lawson. Part of them went into Lawson's account when it was in credit and were used by him for his own purposes. It is impossible to say that any part of the proceeds of the fraudulent cheques was received by the plaintiffs. In my view, therefore, credit cannot be given for them and the cross-appeal should be allowed with costs.

TOMLIN, J.—Upon the facts of this case I think that, though each of the fraudulent cheques was on its face signed in accordance with the apparent authority, no one of them passed from Lloyds Bank (in which expression I include Cox's Bank and their successors in title) into the possession of the Chartered Bank under any authority from Lloyds Bank either actual or apparent. Each cheque was signed, by Lawson in furtherance of his fraudulent purpose, and by the other signatory for some other purpose in respect of which he was deceived by Lawson. Having been signed the cheque was never passed officially out of the custody of Lloyds Bank to the Chartered Bank. Lawson acting in his private capacity was the sole channel of communication between the two banks, and the only instruction to the Chartered Bank was, in one case, a pay-in slip, and, in the other cases, a written memo, signed by Lawson in his personal capacity and purporting to direct that the proceeds of the relative cheque should be placed to the credit of the joint account of Lawson and his wife with the Chartered Bank. It is not admissible, in my opinion, in these circumstances to separate the signing of the cheque from the acts whereby the cheque and the instructions for dealing with it passed into the hands of the Chartered Bank. The transaction must, I think, in each case be regarded as a whole for the purpose of determining where the property in the cheque lay, and, upon the facts which I have mentioned, it remained, in my judgment, with Lloyds Bank. If this be the true view, I think that the Chartered Bank are liable for conversion in respect of the nineteen cheques unless they can escape by bringing themselves within the protection of s. 131 of the Indian statute, the Negotiable Instruments Act, 1881, and I may add here, in regard to the second

A cheque, that I agree with the learned judge below that the Chartered Bank are in no better position because they advanced money to Lawson against this cheque before it was cleared.

I cannot doubt that the protection, which s. 131 affords to a banker, by necessary implication imposes upon the banker, as a condition of the benefit conferred, a duty of care towards some one or more of the persons who may be affected by his action. It may be difficult to define in general terms applicable to every case the person to whom the duty is owed or the ambit of the duty itself, but, if the section applies here, I think there was upon the Chartered Bank a *prima facie* duty towards Lloyds Bank as the apparent drawers of the cheque, and that the Chartered Bank might have expressed to themselves that duty in some such terms as these: "Here is a cheque of Lloyds Bank drawn on their account at the Imperial Bank to our order although we have no claim against Lloyds Bank requiring to be satisfied out of it. It has come to our hands, not from Lloyds Bank acting through any of its authorised officials, but from a person who, though an official of the bank, is acting in his personal capacity only, and who, though one of the signatories of the cheque, is claiming the money for his own benefit. In this state of affairs we must treat the cheque as still belonging to Lloyds Bank until an official direction is obtained."

The first question is: Does the section apply at all? It is said it does not because (i) Lawson had no title to the cheque, and (ii) because the Chartered Bank, being the payees, did not collect the cheque for a customer. Upon the construction of the section I do not think that its operation is confined to cases where there is some title though a defective one, but extends to cases where there is no title at all. Further, having regard to the decision in *Morison v. London County and Westminster Bank, Ltd.* (1), where one of the cheques was drawn to the order of the collecting bank, I do not think that it would be possible to hold that in the present case the Chartered Bank did not collect for a customer. To do so would be to put upon the Indian section, which is substantially identical with s. 82 of the English Act, a meaning different from that attributed to the latter section by this court. The section, therefore, in my opinion, applies and the next question is whether the Chartered Bank have established that they acted in good faith and, having regard to the duty resting on them, without negligence. In view of what the bank actually did, I do not think that they can establish that they acted without negligence, though admittedly acting in good faith, unless they can justify their conduct either (i) by reference to some recognised banking practice, or (ii) by reason of some special circumstances in the case. The learned judge below has not found, nor do I think the evidence established, the existence of any special banking practice to justify the course taken by the Chartered Bank. The Chartered Bank, however, rely upon certain special circumstances which, they say, relieve them of the charge of negligence. The point may be put shortly in this way. Before the first fraudulent cheque was presented, that is, before Mar. 31, 1922, Lloyds Bank had been from time to time paying considerable sums of money to Lawson by means of pay slips signed by Lawson on behalf of Lloyds Bank. These pay slips Lawson passed to the Chartered Bank for collection for the credit of his joint account, and in two instances the pay slips had been drawn in favour of the Chartered Bank and had come to the Chartered Bank from Lawson in his personal capacity with a private memorandum of Lawson instructing the Chartered Bank to credit the proceeds to the joint account. These were all legitimate payments, and it is said that, having regard to them, any suspicion which the first fraudulent cheque ought otherwise to have aroused might reasonably have been allayed, and that there was still less ground for suspicion in the case of the second fraudulent cheque which was received some four months after the first, with a pay-slip transaction intervening between them, and that when it was found that no question arose on the pay-slip transactions or on the first two cheques a fortiori there was no reason to treat as suspicious the subsequent cheques. I do not think that this

contention can be supported. The pay-slip transactions differed in at least two material respects from the cheque transactions. They were for substantially smaller amounts, and the money receivable in respect of them was payable directly by Lloyds Bank. When the first fraudulent cheque was received it was a transaction of a novel and, in my opinion, of a suspicious character, and I do not think that the prior pay-slip transactions justified the omission of any precaution which ought otherwise to have been taken. If the first cheque transaction was suspicious, I think that each repetition of the transaction was calculated to aggravate rather than to allay suspicion. There can be no presumption that every fraud must be discovered or that discovery must be made within any given time, and, except upon the basis of some such presumption, I am unable to see why the Chartered Bank should have been entitled to assume that the absence of complaint in respect of any one transaction established the regularity of that or any subsequent transaction. In my judgment, nothing short of estoppel or ratification would assist the Chartered Bank, and upon the facts I do not think that either estoppel or ratification is made out. I think, therefore, that the appeal fails and should be dismissed with costs.

There remains the question on the cross-appeal, whether the money paid by Lawson to Lloyds Bank ought to be treated as having diminished the damages for conversion. When Lawson was credited in his account with the Chartered Bank with the proceeds of the fraudulent cheques, he from time to time drew upon the credit balances thus created cheques either in favour of Lloyds Bank or in his own favour and used these cheques either (i) to discharge his indebtedness to Lloyds Bank in respect of overdrafts on his account with them or other liabilities of his own to Lloyds Bank, or (ii) to supplement the balances to the credit of his account with Lloyds Bank and thus enable him to continue his drawings upon them. These sums the learned judge has allowed as a deduction from the damages for conversion. I do not think that they ought to have been so allowed. The principle of such cases as *Bannatyne v. MacIver* (15) has, in my opinion, no application to the facts of the present case. No part of the money wrongfully obtained from Lloyds Bank was ever paid to them or applied for their benefit as their money. The payments made by Lawson were made as out of his own money to discharge his own debts to Lloyds Bank, or to create as between them and him the relation of banker and customer, and to enable him to draw, as he did in fact draw, for further sums upon them. The damage to Lloyds Bank was not diminished by these payments. The only effect of deducting them would be either to increase the claim of Lloyds Bank against Lawson, or to leave Lloyds Bank without any right to recover the amount of them from anyone at all. I think, therefore, that the judgment below was wrong in this respect, and that the cross-appeal on this head should succeed with costs.

Appeal dismissed; cross-appeal allowed.

Solicitors: *Barlow, Lyde & Yates; Linklaters & Paines.*

[*Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.*]

Re NORTON. PINNEY v. BEAUCHAMP

[CHANCERY DIVISION (Romer, J.), June 13, 14, 1928]

[Reported [1929] 1 Ch. 84; 98 L.J.Ch. 219; 140 L.T. 348]

Settled Land—Statutory owner—Person having powers of tenant for life—Trustees of compound settlement—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 23 (1).

On Jan. 1, 1926, the date of the coming into force of the Settled Land Act, 1925, certain land stood limited under a compound settlement to the use of N. for life and after his death, subject to certain charges, to the use of trustees upon trust for sale. A vesting deed was subsequently executed in favour of N., who died on Dec. 4, 1926. Probate limited to the settled land was granted to the trustees of the compound settlement as N.'s special representatives. The compound settlement included two deeds of 1911 and 1913 respectively, the trustees of the deed of 1911 being given, by cl. 11 of the deed, all the powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890.

Held: the whole estate the subject of the compound settlement was not held upon trust for sale, but the trustees of the two deeds of 1911 and 1913 were the statutory owners of the land as persons having the powers of a tenant for life under s. 23 (1) of the Settled Land Act, 1925, and when they sold the land they would sell as statutory owners and not as trustees for sale, and must pay over the proceeds of sale to the trustees of the compound settlement.

Notes. Considered: *Re Sharpe's Deed of Release*, *Sharpe v. Fox*, [1938] 3 All E.R. 449. Referred to: *Bacon v. Bacon*, [1947] 2 All E.R. 327.

As to statutory powers in relation to land, see 29 HALSBURY'S LAWS (2nd Edn.) 668 et seq.; and for cases see 40 DIGEST (Repl.) 790 et seq. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Case referred to:

(1) *Re Parker's Settled Estates*, *Parker v. Parker*, [1928] 1 Ch. 247; 97 L.J.Ch. 161; 138 L.T. 360; 71 Sol. Jo. 981; 40 Digest (Repl.) 847, 3236.

Adjourned Summons.

On Dec. 31, 1925, land stood limited under a compound settlement to the use of Lord Norton for life, and after his death, subject to certain jointure rentcharges and to certain portions secured by a legal term of years, to the use of trustees upon trust for sale. The compound settlement began with a deed of Jan. 26, 1894, the trustees of which, on the coming into force of the Settled Land Act, 1925, on Jan. 1, 1926, became the trustees for the purposes of that Act, and on the same date the legal estate in the land became vested in Lord Norton, and the rentcharges took effect in equity. A vesting deed was subsequently executed in favour of Lord Norton, and thereafter the legal term of years for securing the portions took effect in equity. Lord Norton died on Dec. 4, 1926, and probate, limited to the settled land, was granted to the trustees of the compound settlement as his special representatives, on the footing that the settlement did not come to an end on his death. The present application was made under s. 2 (2) of the Law of Property Act, 1925, and s. 93 of the Settled Land Act, 1925, by the trustees of two deeds of Sept. 2, 1911, and July 31, 1913, by persons claiming to be interested under the deeds. The deed of 1911 gave the trustees of that deed all the powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890. The application asked (i) whether the settled estates were, in the events which had happened, subject to a trust for sale within s. 2 (2) of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, Sched., and whether the respective equitable interests subsisting under the various instruments or otherwise, and having priority to the trust for sale, created by the deeds of 1911 and 1913 were capable of being overreached by the trustees for sale under those deeds, if approved under the provisions of sub-s. (2); (ii) if the answer to (i) were in the affirmative,

that the applicant trustees, as the present trustees of the deeds of 1911 and 1913, might be approved or appointed by the court as trustees for sale within and for the purposes of s. 2 (2) of the Law of Property Act, 1925, as amended, and that the trustees of the compound settlement, as the special personal representatives of Lord Norton in regard to the settled estates, might be directed to convey or otherwise vest such estates to or in the applicant trustees as trustees for sale; (iii) alternatively, if the settled estates remained settled land under a compound settlement constituted by all or some one or more of the various instruments, whether the trustees for the time being of the deeds of 1911 and 1913 were, by virtue of s. 23 (1) (a) of the Settled Land Act, 1925, the statutory owners within the meaning of that Act and were entitled to require the settled estates to be conveyed or otherwise vested in them as such statutory owners.

Topham, K.C., and *J. Bradley Dyne* for the applicants.

Manning, K.C., and *Greenland* for the trustees of the compound settlement.

M. Adams, W. Copping, Fawell and *E. Beaumont* for parties interested.

ROMER, J.—The first question that arises upon this summons is whether the compound settlement came to an end on the death of the second Lord Norton. The solution of that question depends upon the answer to be given to the further question whether, on the death of Lord Norton, the land, which previously had been the subject-matter of the settlement, was held upon trust for sale within the meaning of s. 3 of the Settled Land Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, Sched. That section, as amended, says:

"Land not held upon trust for sale which has been subject to a settlement shall be deemed for the purpose of this Act to remain and be settled land, and the settlement shall be deemed to be a subsisting settlement for the purposes of this Act so long as—(a) any limitation, charge, or power of charging under the settlement subsists, or is capable of being exercised . . ."

It is quite clear from that, that this land remains settled land after the death of the second Lord Norton, unless upon the happening of that event the land became held upon trust for sale.

I had occasion recently in *Re Parker's Settled Estates* (1) to consider the meaning of the phrase "trust for sale" as used in sub-s. (7) of s. 1 of the Settled Land Act, as amended by the Act of 1926, and for reasons that I then gave, I came to the conclusion that land was not settled land where the whole legal estate, which would be otherwise subject to a settlement, was held upon trust for sale. But I also came to the conclusion that the land in question there was settled land, because there was outstanding in certain trustees a legal estate in a term of years for securing portions. The whole legal estate subject to the settlement was not, therefore, held upon trust for sale. That being so, what I have to consider here is whether, on the death of Lord Norton, the legal estate in the whole subject-matter of the settlement, which, undoubtedly, had existed up to that date, was held upon trust for sale. Up to his death he had had the legal estate in fee simple, and that was the legal estate which was the subject of the settlement. On his death it vested in his personal representatives, his special representatives to whom probate has been granted, and was not vested in the trustees for sale. I must, accordingly, turn to s. 7 of the Settled Land Act, which provides what is to be done with the legal estate which becomes vested in his personal representatives on the death of a tenant for life. For the purposes of the present case I need only refer to sub-s. (5), which is in these terms:

"If any person of full age becomes absolutely entitled to the settled land (whether beneficially, or as personal representative, or as trustee for sale, or otherwise) free from all limitations, powers and charges taking effect under the settlement, he shall be entitled to require the trustees of the settlement, personal representatives, or other persons in whom the settled land is vested, to convey the land to him . . ."

A But the trustees for sale in this case have not become absolutely entitled to the settled land free from all charges taking effect under the settlement. There are certain equitable rentcharges which take effect in priority to the trust for sale. That being so, it appears to me that not only was the whole legal estate the subject-matter of the settlement not held upon trust for sale upon the death of the second Lord Norton, but that the trustees for sale as such had not, and have not now, a right to call for the legal estate. So far, I must, as it seems to me, come to the conclusion that on the death of the second Lord Norton the land did not cease to be settled land, but continued to be settled land and is still settled land.

But I must now deal with another matter. Under the document which constituted the trust for sale and declared the trusts of the proceeds of sale it was provided by cl. 11 as follows :

C "Subject to any order to be obtained under s. 7 of the Settled Land Act, 1884, the trustees after the death of Lord Norton and Lady Norton shall have and may exercise in reference to any hereditaments for the time being subject to the trusts of these presents all the powers which are by the Settled Land Acts, 1882 to 1890, or any Act amending the same or by the said settlement conferred on a tenant for life in possession or a person deemed tenant for life in possession of land and may raise and pay out of capital or income any money required for the purpose of the powers hereby conferred and in the opinion of the trustees properly payable out of capital or income and so that the provisions of s. 63 of the Settled Land Act, 1882, respecting capital moneys shall apply to all capital arising under the said powers."

E It is said by counsel on behalf of the present trustees of that deed, that, having regard to that clause, they are the statutory owners under this settlement after the death of the second Lord Norton. That is because by s. 23 (1) of the Settled Land Act, 1925, it is provided as follows :

F "Where under a settlement there is no tenant for life nor, independently of this section, a person having by virtue of this Act the powers of a tenant for life then—(a) any person of full age on whom such powers are by the settlement expressed to be conferred; and (b) in any other case the trustees of the settlement, shall have the powers of a tenant for life under this Act."

It is said that, having regard to that clause, the present trustees of that deed are persons on whom that section confers the powers of a tenant for life. It is said, however, on behalf of the trustees for the purpose of the Settled Land Act of the compound settlement, that that is not so, because cl. 11 begins as follows : "Subject to any order to be obtained under s. 7 of the Settled Land Act, 1884," and that that in some way qualifies or renders conditional the rest of the clause. I do not think it renders the rest of the clause conditional in any way. If one looks at the trusts declared of the proceeds of sale, it will be found that certain persons were entitled to the income of these proceeds for life, and that pending a sale the rents and profits were to be applied as if they were income arising from the proceeds of sale. There were, therefore, certain persons who could be deemed to be tenants for life of the settlement thereby created by reason of the provisions contained in s. 63 of the Settled Land Act, 1882. But a person deemed to be a tenant for life under that section could not exercise the powers of the 1882 Act unless he obtained an order from the court made under s. 7 of the Settled Land Act, 1884, and, in my opinion, these words "subject to any order to be obtained under s. 7 of the Settled Land Act, 1884," mean "without prejudice to the rights of any person deemed to be tenant for life under s. 63 of the Settled Land Act, 1882, who may obtain an order under the Settled Land Act, 1884." That being so, the powers conferred upon the trustees of this deed are in the circumstances unconditional. I, therefore, come to the conclusion that these trustees are right in their contention, and that they are the statutory owners under this compound settlement.

Counsel on behalf of these trustees then says, and says truly, that he is now entitled to call for a conveyance of the legal estate from the trustees for the

purposes of the Settled Land Acts under the compound settlement under the earlier subsections of s. 7, that is to say, one or other of the subsections preceding sub-s. (5). That must be conceded. "But then," says counsel for the applicants, "I shall have got the legal estate and I have a trust for sale, and, therefore, the land is the subject-matter no longer of a settlement but of a trust for sale." That is an ingenious proposition, but on reflection I do not think it is one to which I ought to accede. He will get the legal estate no doubt, but he will get it, not as a trustee for sale, but as statutory owner, and I do not think that merely by getting it as statutory owner it is possible then to say that the legal estate in the land is subject to a trust for sale. In connection with this point my attention was called to s. 17 of the Settled Land Act, 1925. If counsel for the applicants were right in his contention, and the settlement, although not coming to an end on the death of the second Lord Norton, came to an end the moment his clients, as statutory owners, got the legal estate, the trustees of the compound settlement would probably be entitled to be discharged. When, however, I turn to s. 17, I find a strong indication that the intention of the legislature was that trustees for the purposes of the Act are not to be discharged so long as there is any equitable interest remaining outstanding which it is their duty to protect. I do not think it would be right, although they now have to transfer the legal estate to the statutory owners, to regard them as vesting the legal estate in the trustees for sale, and not in the persons who are statutory owners. If I were to assent to the contention of the applicants the effect would be that I would be putting the trustees of the compound settlement in the same position as though they had conveyed the legal estate to the applicants under s. 7 (5)—a thing they cannot be compelled to do. On the whole I think I ought not to accede to the applicants' contention, although, no doubt, in practice a certain amount of expense, and, it may be, inconvenience, would be obviated had I been able to do so. As it is, if and when the applicants sell the land they will sell as statutory owners and not as trustees for sale, and the proceeds of sale will, of course, have to be paid to the trustees of the compound settlement and not retained by the applicants, as would have been the case if I had been able to come to the conclusion that the land became subject to a trust for sale the moment the legal estate became vested in them.

Solicitors: *Linklaters & Paines; Hasties; Marsh, Field & Co., for Docker, Hosgood & Co., Birmingham; Shirley Woolmer & Co.; Clinton & Co., for Harrisons, Worcester; Peacock & Goddard.*

[Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

A

Re VISSER. QUEEN OF HOLLAND v. DRUKKER

[CHANCERY DIVISION (Tomlin, J.), June 29, 1928]

[Reported [1928] Ch. 877; 97 L.J.Ch. 488; 139 L.T. 658;
44 T.L.R. 692; 72 Sol. Jo. 518]

B

Conflict of Laws—Foreign law—Enforcement—Revenue law.

Liability under the law of a foreign State to pay taxes to the head of that State will not be enforced by the courts in England.

Sydney Municipal Council v. Bull (1), [1909] 1 K.B. 7, applied.

C

Notes. Approved: *Re Delhi Electric Supply and Traction Co.*, [1953] 2 All E.R. 1452. Considered: *Government of India v. Taylor*, [1955] 1 All E.R. 292. Referred to: *Regazzoni v. K. C. Sethia* (1944), Ltd., [1956] 2 All E.R. 487.

As to the enforcement of foreign law by English courts, see 7 HALSBURY'S LAWS (3rd Edn.) 8 et seq.; and for cases see 11 DIGEST (Repl.) 322–324.

Cases referred to:

D

(1) *Sydney Municipal Council v. Bull*, [1909] 1 K.B. 7; 78 L.J.K.B. 45; 99 L.T. 805; 25 T.L.R. 6; 11 Digest (Repl.) 322, 6.(2) *Huntington v. Attrill*, [1893] A.C. 150; 62 L.J.P.C. 44; 68 L.T. 326; 57 J.P. 404; 41 W.R. 574; 8 T.L.R. 341, P.C.; 11 Digest (Repl.) 515, 1293.(3) *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K.B. 539; 89 L.J.K.B. 252; 122 L.T. 547; 36 T.L.R. 125; 64 Sol. Jo. 225; 11 Digest (Repl.) 421, 717.

E

(4) *A.-G. for Canada v. Schulze* (1901), 9 S.L.T. 4.(5) *Spiller v. Turner*, [1897] 1 Ch. 911; 66 L.J.Ch. 435; 76 L.T. 622; 45 W.R. 549; 41 Sol. Jo. 452; 9 Digest (Repl.) 639, 4256.(6) *Cotton v. Regem*, [1914] A.C. 176; 83 L.J.P.C. 105; 110 L.T. 276; 30 T.L.R. 71, P.C.; 8 Digest (Repl.) 726, 220.

F

(7) *Emperor of Austria v. Day and Kossuth* (1861), 3 De G.F. & J. 217; 30 L.J.Ch. 690; 4 L.T. 494; 7 Jur.N.S. 639; 9 W.R. 712; 45 E.R. 861, C.A.; 1 Digest 46, 362.(8) *Holman v. Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 11 Digest (Repl.) 325, 16.(9) *Planché v. Fletcher* (1779), 1 Doug.K.B. 251; 99 E.R. 165; 11 Digest (Repl.) 325, 17.

G

(10) *Henry v. Sargeant* (1843), 13 New Hampshire Reports (U.S.A.) 321.(11) *Alves v. Hodgson* (1797), 7 Term Rep. 241; 2 Esp. 527; 101 E.R. 953; 11 Digest (Repl.) 429, 755.(12) *Clegg v. Levy* (1812), 3 Camp. 166, N.P.; 11 Digest (Repl.) 429, 756.(13) *Bristow v. Sequeville* (1850), 5 Exch. 275; 19 L.J.Ex. 289; 14 Jur. 674; 155 E.R. 118; 11 Digest (Repl.) 430, 757.

H

(14) *Ralli Bros. v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 15 Asp.M.L.C. 33; 25 Com. Cas. 227; sub nom. *Sota and Aznar v. Ralli Bros.*, 36 T.L.R. 456; 64 Sol. Jo. 462, C.A.; 11 Digest (Repl.) 435, 791.(15) *The Eva*, [1921] P. 454; 91 L.J.P. 17; 126 L.T. 223; 37 T.L.R. 920; 15 Asp.M.L.C. 424; Digest Supp.

I

(16) *Boucher v. Lawson* (1736), Cunn. 144; Lee temp. Hard. 85, 194; 94 E.R. 1116; 11 Digest (Repl.) 440, 823.(17) *James v. Catherwood* (1823), 3 Dow. & Ry.K.B. 190; 11 Digest (Repl.) 325, 18.**Motion** by Israel Zeegen, one of the defendants in an action in which the Queen of Holland, as plaintiff, sought to recover in England moneys alleged due under Dutch fiscal laws, to strike out the statement of claim as disclosing no reasonable ground of action and to dismiss the action.

The plaintiff alleged that the three defendants, Moritz Drukker, the said Israel Zeegen, and Willem Roosegaard Bisschop, were the personal representatives in England of one David Visser, who was alleged to have been Dutch by both nationality and domicile. The action, which was brought by the plaintiff claiming to be a creditor of the estate of David Visser, was for the recovery of moneys alleged to be due to the plaintiff by virtue of the Dutch fiscal laws under which duties were payable on the estates of deceased persons of Dutch nationality and domicile. The contention of the applicant was that no notice was taken by English courts of the revenue laws of a foreign State, and that English courts would not hear claims of foreign sovereigns to recover taxes alleged to be due under their revenue laws.

Latter, K.C., and *Henry Johnston*, for the applicant, referred to *DICEY'S CONFLICT OF LAWS* (4th Edn.), r. 54, p. 224; *Huntington v. Attrill* (2); *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* (3); *A.-G. for Canada v. Schulze* (4); and *Sydney Municipal Council v. Bull* (1).

Bennett, K.C., and *Frank Gahan*, for the plaintiff as respondent, referred to *Spiller v. Turner* (5); *Cotton v. Regem* (6); *Emperor of Austria v. Day and Kossuth* (7); *Holman v. Johnson* (8); *Planché v. Fletcher* (9); *Henry v. Sargeant* (10); *Alves v. Hodgson* (11); *Clegg v. Levy* (12); *Bristow v. Sequeville* (13); *Ralli Bros. v. Compañía Naviera Sota y Aznar* (14); *The Eva* (15); and *Boucher v. Lawson* (16).

Wilfrid Hunt for the defendant, Bisschop.

James Wylie for the defendant, Drukker.

Latter, K.C., in reply, cited *James v. Catherwood* (17).

TOMLIN, J., stated the facts and continued: It seems to be plain that, at any rate for somewhere about 200 years, since the time of LORD HARDWICKE, the judges have had present to their minds the notion, and have repeatedly said, that the courts of this country do not take notice of the revenue laws of foreign States. In *DICEY'S CONFLICT OF LAWS* (4th Edn.) (1927), p. 224, the rule is stated in this way:

"The court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State."

It appears that that word "revenue" appeared in the rule for the first time in 1922, in the third edition at p. 230; in the prior editions it was expressed to be only for the enforcement of a "penal" law of a foreign country. "Revenue" was added in 1922 and "political" was added in 1927; and it now runs: "directly or indirectly, of a penal, revenue, or political law. . . ." I am asked by counsel for the respondent to say that that is an addition that is not justified, and that the statement in the fourth edition is not well founded. It is argued that there has never been an actual decision in this country—at any rate, except one decided comparatively recently in 1909—in support of that proposition, and that what has been said has been mere obiter, and, therefore, ought now, to-day, for the first time, to be disregarded. On the other hand, it is contended that, whatever may be said as to there being no authority, no actual decision, in support of the proposition, there is certainly no actual decision which definitely establishes the contrary. The absence of authority for what on the one side is called an elementary proposition may indicate that the proposition is not well founded in principle, but it also may merely indicate that it is so well recognised that it has never been put to the test. A number of cases have been cited, and I agree that it is very difficult to say of any of them that it is a direct decision, with the exception of one which I will mention. The same view of the matter seems to have been taken in America, although there again the case referred to does not appear to contain a direct assertion, but only a dictum, and there is no case which supports the view that the revenue laws of a foreign country will be enforced here. Such cases as *Alves v. Hodgson* (11) and *Clegg v. Levy* (12) seem to me to be explained in

A *Bristow v. Sequeville* (13). They really turn upon this, that, where one is suing on a foreign instrument or contract, one has to establish its validity according to foreign law, but if it is valid according to foreign law, it is none the less valid because of a provision of revenue law. If, on the other hand, the revenue law does not operate to invalidate the instrument, but only affects its admissibility as evidence, then it is plain, on *Bristow v. Sequeville* (13), that the instrument would be admissible in evidence in our law. That seems to me to be the explanation of those cases, and all that those cases do is to indicate that, however unwilling the courts may be to recognise foreign law, they are bound to recognise some of the consequences of that law, namely, those cases where, as one of the terms of the law, contracts are rendered invalid by the foreign law.

C There remains *Sydney Municipal Council v. Bull* (1), before GRANTHAM, J. I think it is plain that, if the plaintiff there had been a foreign State instead of a foreign municipality, it would be impossible to say that it was not a direct decision in point. I myself do not see that any valid distinction could be drawn between a foreign sovereign State and a foreign municipality, seeking in the one case to recover State taxes, and in the other local municipal taxes or rates. They seem to me to be in *pari materia*, and, being bound by the ordinary rule to follow decisions of co-ordinate jurisdiction, I should feel myself bound to treat *Sydney Municipal Council v. Bull* (1) as one which it was my duty to follow, so far as courts of first instance are concerned to regard this matter as disposed of by that case, and to leave it to higher jurisdictions to determine whether the rule ought to be maintained. That is apart from my own opinion. My own opinion is that there is a well-recognised rule, which has been enforced for 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States, and that this is one of those actions which these courts will not entertain. That being so, this application must succeed. The statement of claim must be struck out, and the action dismissed. As the sovereign State has submitted to jurisdiction by coming here, I am in a position to order that State to pay the cost of the action.

F Solicitors: *Waltons & Co.; Matthew J. Jarvis; Speechley, Mumford & Craig; Linklaters & Paines.*

[Reported by K. R. A. HART, Esq., Barrister-at-Law.]

HUE v. WHITELEY

[CHANCERY DIVISION (Tomlin, J.), October 18, 19, 1928]

[Reported [1929] 1 Ch. 440; 98 L.J.Ch. 227; 140 L.T. 531]

Easement—Right of way—User as of right—User for business or pleasure—Irrelevance of motive of person exercising user.

Where evidence is given of continuous user by the public of a way as of right (i.e., believing themselves to be exercising a public right), dedication to the public of the way may be inferred from such evidence, whether the use of the way has been for business or social purposes, or for walking to benefit health, or merely for a stroll through a beauty spot. If a person uses a way believing it to be a public way, his motive in doing so is irrelevant.

A.-G. v. Antrobus (1), [1905] 2 Ch. 188, distinguished.

Notes. Referred to: *Jones v. Bates*, [1938] 2 All E.R. 237; *A.-G. and Newton Abbott R.D.C. v. Dyer*, [1947] Ch. 67; *Lewis v. Thomas*, [1950] 1 All E.R. 116.

As to proof of dedication of a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 49 et seq.; and for cases see 26 DIGEST 282 et seq.

Cases referred to:

- (1) *A.-G. v. Antrobus*, [1905] 2 Ch. 188; 74 L.J.Ch. 599; 92 L.T. 790; 69 J.P. 141; 21 T.L.R. 471; 49 Sol. Jo. 459; 3 L.G.R. 1071; 26 Digest 297, 285.
- (2) *Harvey v. Truro Rural Council*, [1903] 2 Ch. 638; 72 L.J.Ch. 705; 89 L.T. 90; 68 J.P. 51; 52 W.R. 262; 19 T.L.R. 576; 1 L.G.R. 758; 26 Digest 313, 454.
- (3) *A.-G. v. Esher Linoleum Co., Ltd.*, [1901] 2 Ch. 647; 70 L.J.Ch. 808; 85 L.T. 414; 66 J.P. 71; 50 W.R. 22; 26 Digest 281, 178.
- (4) *Ramuz v. Southend Local Board* (1892), 67 L.T. 169; 8 T.L.R. 700; 26 Digest 333, 639.

Action for a declaration as to ownership of land.

The plaintiff, Arthur Corbet Hue, of Pinehurst, Mickleham, Surrey, and the defendant, William Whiteley, of Bencombe, Mickleham, were neighbours. Both residences, Pinehurst and Bencomb, occupied sites which at one time had formed part of Deepdene, the Hope estate. One Henry Peto Grissell had obtained a long lease of Pinehurst from the estate in 1878, and together therewith a right of way over a timber road, which gave access to Pinehurst from the London Road. The lease later became vested in the plaintiff, and he acquired the freehold in 1916, taking a conveyance of the roadway eight years later. The defendant constructed, in the boundary fence between Bencombe and Pinehurst, a gateway, and after a dispute, the plaintiff brought this action, claiming a declaration that he was owner both of the roadway and of the strip of land between it and the boundary fence, and an injunction to restrain the defendant from trespassing upon the same. The defendant resisted both claims by the contention that the roadway was not in the ownership of the plaintiff, but was a common and public highway. For the plaintiff it was contended, on the authority of *A.-G. v. Antrobus* (1), that the user in the present case was purely permissive. The onus of proof was upon the defendant.

Gavin Simonds, K.C., and *Gordon Alchin*, for the defendant, referred to *A.-G. v. Antrobus* (1); *Harvey v. Truro R.D.C.* (2); *A.-G. v. Esher Linoleum Co., Ltd.* (3); and *Ramuz v. Southend Local Board* (4).

F. K. Archer, K.C., and *H. G. Robertson* for the plaintiff.

TOMLIN, J., stated the facts and continued: The dispute has arisen because the defendant recently opened in his fence adjoining the track, the first part of which forms an approach road to the plaintiff's house Pinehurst from the public London Road, a small gate for pedestrians, without having asked the plaintiff's consent. The plaintiff says that he would have granted permission, but, as it was not asked, he objected, and this action is the result.

A The action involves somewhat difficult questions of fact and law, the short point being whether over the "approach" road and beyond there is a public footway, so that the defendant was justified in making an opening on to the way. It is admitted that, if the property does abut on a public footway, he is so entitled. Box Hill is a place to which the public have long resorted, either with or without a right. It is admitted that there is a public bridle road from Headley Road, B through Juniper Valley, to Box Hill, and the question is whether there is a public footway eastward to a point in the bridle road. The track, in the precise form in which it is alleged to exist to-day, does not appear in the earlier editions of the ordnance map, but I am quite satisfied that at all material times the Pinehurst drive was continued eastward by a track which ran into the bridle road from the Headley Road to Box Hill.*

C The next point to be considered is whether there has been such user of the track as to lead to the inference that there is a public right of way. The evidence goes back over sixty years, and it is evidence of people who have used the track to get to the highway and to the public bridle road as of right, on the footing that they were using a public way. On that evidence I should be bound to hold that there had been at some time a dedication to the public of this path as a public footpath.

D It appears that of recent years the Hope estate over which the track runs has been settled, but there is no evidence that there is no power to dedicate, nor has there been any evidence that the land was settled land sixty years ago. Upon the evidence I must conclude that the path, inasmuch as within living memory it was used as of right, was dedicated.

E *A.-G. v. Antrobus* (1) has been cited to show that the user here has been permissive. In that case FARWELL, J., held that, as the only user proved was that of the public crossing land in order to get to a place where they had no right to be and there to visit a monument over which there was no public right, the only proper inference was that the owner of the land and of the monument had allowed this user for the purpose of visiting the monument. It is hard to see how that principle has any application to the present case, which is concerned with user F to pass from one public place to another. Does it make any difference that it is desired to use the way for business or social purposes, or for walking to benefit health, or for a stroll through a beauty spot? I cannot see that it has anything to do with the matter. A man passes from one point to another, believing himself to be using a public road, and the state of his mind as to his motive in passing is irrelevant. If there is evidence, as there is here, of continuous user by persons G as of right (i.e., believing themselves to be exercising a public right to pass from one highway to another), there is no question such as that which arises in *A.-G. v. Antrobus* (1).

I must conclude that there is in fact a public footpath from the London Road past the target gate to the bridle road. The plaintiff does not dispute that the defendant would be justified in constructing a gate opening on to the public footpath, and there was no ground for complaint by the plaintiff as to the position of the gateway, or as to the passage of the defendant through the gateway on to the road. I desire to state in conclusion that although I have here decided that there is a public right of way, that decision binds no one save the parties to this action.

Solicitors: *Hopgood, Mills, Steele & Lonsdale; Roche, Son & Neale.*

I [Reported by K. R. A. HART, Esq., Barrister-at-Law.]

A

Re NORTHCLIFFE. ARNHOLZ v. HUDSON

[CHANCERY DIVISION (Maugham, J.), November 6, 7, 8, 1928]

[Reported [1929] 1 Ch. 327; 98 L.J.Ch. 65; 140 L.T. 300]

Estate Duty—Property passing on death—Share of income for life with accruer clause in will—Finance Act, 1894 (57 & 58 Vict., c. 80), s. 2 (1)(b), s. 9 (6).

B

By cl. 6 of his will and a codicil thereto the testator, after making specific gifts, left the residue of his estate on trust for sale and investment and directed the trustees to stand possessed of the resulting fund to pay the net income arising therefrom in each year to specified beneficiaries in certain shares. There was an accruer clause, and the last survivor became entitled to the whole of the income of the residue. Two of the beneficiaries having died, on a question of the amount of estate duty payable on their shares,

C

Held: (i) that the property which passed on the death of any such person must be taken to be a share of capital in the residuary trust fund, and that estate duty must be paid on the value thereof; (ii) that such duty was a first charge on that portion of the residue out of which the income was payable, and must be paid by the corpus of the estate.

D

Re Cassel, Public Trustee v. Mountbatten (1), [1927] 2 Ch. 275, distinguished.

Notes. Referred to: *Christie v. Lord Advocate*, [1936] 1 All E.R. 443; *Re Duke of Norfolk's Will Trusts, Public Trustee v. I.R.Comrs.*, [1950] 1 All E.R. 664.

E

As to property which passes on death for purposes of estate duty, see 15 HALSBURY'S LAWS (3rd Edn.) 10 et seq.; and for cases see 21 DIGEST 7 et seq. For Finance Act, 1894, see 9 HALSBURY'S STATUTES (2nd Edn.) 347.

Cases referred to:

(1) *Re Cassel, Public Trustee v. Mountbatten*, [1927] 2 Ch. 275; 96 L.J.Ch. 483; 137 L.T. 785; 43 T.L.R. 743; 71 Sol. Jo. 804; Digest Supp.

F

(2) *Re Palmer, Palmer v. Palmer*, [1916] 2 Ch. 391; 85 L.J.Ch. 577; 115 L.T. 57; 60 Sol. Jo. 565, C.A.; 21 Digest 35, 220.

(3) *Earl of Cowley v. I.R.Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest 7, 27.

(4) *Berry v. Gaukroger*, [1903] 2 Ch. 116; 72 L.J.Ch. 435; 88 L.T. 521; 51 W.R. 449; 19 T.L.R. 445; 47 Sol. Jo. 490, C.A.; 21 Digest 27, 155.

G

(5) *Re Wedgwood, Allen v. Public Trustee*, [1921] 1 Ch. 601; 90 L.J.Ch. 322; 125 L.T. 146, C.A.; 21 Digest 36, 226.

(6) *Re Sarson, Public Trustee v. Sarson*, [1925] 1 Ch. 31; 69 Sol. Jo. 105; 21 Digest 37, 239.

(7) *Re Jones, Lambert v. Colbourn*, [1928] W.N. 227; Digest Supp.

H

Adjourned Summons to determine the amount and basis of payment of estate duty payable on the death of persons entitled to a share of the income of a testator's residuary estate.

The late Lord Northcliffe made a will and three codicils, which were admitted to probate. By cl. 6 of the will, after making some specific devises and bequests and leaving a pecuniary legacy, he disposed of the residue on trust for sale and investment and directed that the trustees should stand possessed of his resulting residuary trust fund to pay the net income arising therefrom in each year in shares of one-hundredths as therein mentioned. Sub-clause 28 contained a proviso that upon failure of the trusts declared as to any of the shares of income

I

"the shares or share of income which are or is the subject of the trust which shall have failed (including all additions thereto under this present provision) shall be added to the income of such of the said trusts as shall not have failed

- A at that date, and to the last one of such trusts when all but one shall have failed and in every case except the last such addition to each trust shall be in the proportion which the income then subject to that trust (including income accrued under this present provision) shall at that date bear to the income then subject to others or other of the said trusts which shall not have failed (including income accrued under this present provision)."
- B He then directed, out of a fund to be created out of the accumulations of some one-hundredths, payment of a number of legacies (which had been paid) and some annuities. Subject thereto the residuary trust fund was to be held upon trust for charities. By orders made on July 28, 1924, it was directed that the shares should be treated as hundred and thirds, and—after providing for the legacy fund—the rest should be treated as representing the seventy-four and one-quarter shares of the residuary trust fund payable as directed by cl. 6. Two of the income beneficiaries having died, this summons was taken out.

Evershed (*Arnholz* with him) for the plaintiff.

Stamp for the Inland Revenue Commissioners.

- Greene, K.C., and A. L. Ellis*, for Sir George Sutton, an executor, referred to *Re Palmer, Palmer v. Palmer* (2); *Re Cassel, Public Trustee v. Mountbatten* (1); *HANSON ON DEATH DUTIES* (7th Edn.), p. 62.

Potts (*Sir T. Hughes, K.C.*, with him) for the charities.

Crossman (*The Attorney-General, Sir Thomas Inskip, K.C.*, with him) for the Attorney-General as representing charities.

Whittaker; Wilfrid Hunt; Bennett, K.C., and L. Cohen; Archer, K.C., and R. Peel for other parties.

- E **MAUGHAM, J.**—The question which now arises for decision is whether the estate duty payable by reason of the death of any person entitled to any share of the income of the residuary estate ought to be paid on the value of a share in the capital of the residuary estate of the testator equal to the share of the income of such residuary estate previously enjoyed by the deceased beneficiary or on some other basis. The question is one which is immediately ripe for decision by reason of the fact that two of the income beneficiaries have died, namely, Mrs. Ann Milner, who died on Jan. 18, 1923, and Mrs. Geraldine Mary Harmsworth, who died on Aug. 29, 1925. It is to be borne in mind that the interests of these two beneficiaries are derived under cl. 6 of the will of the testator, which is prefaced by the statement that the trustees, out of the proceeds of conversion of his real and personal estate and after making certain payments,

"shall stand possessed of such residuary moneys and the investments for the time being representing the same (hereinafter called 'the residuary trust fund') . . . upon trust to pay the net income arising therefrom in each year in the shares and manner following."

- H These interests were somewhat altered by the effect of the codicil and the order construing the codicil, which I need not deal with for the moment. The interest payable to Mrs. Milner is in sub-para. 9. It was originally a gift "as to one equal one-hundredth part of the said income to my wife's mother for her life." Under cl. 10 of the will there is the gift of the residue upon charitable trusts after the trusts of income theretofore declared shall have come to an end. The point arises by reason of the fact that in sub-cl. 28 of the will there is an accruer clause, which is in these terms. [His Lordship read it.] It is apparent that the trust relating to income will go on for a very long period. In the meantime the shares of the various persons who die having been entitled to proportions of the income of the residuary trust fund go to augment the shares of the survivors, so that the last survivor becomes entitled to the whole of the income of the residue, and upon his or her death the property goes to the charity. There is a slight complication introduced by the circumstances that certain shares are payable under sub-cl. 23, 24, and 25 to certain trustees of settlements therein mentioned, but for the present purpose I need not go into that matter at all.

Primâ facie it seems to me that these interests in various one-hundredths or some other proportions of the income of the residuary trust fund are in substance in precisely the same position from the point of view of estate duty as are the interests of persons who are entitled to aliquot shares of residue for life. I am unable to understand why, if a testator chooses to divide the income of his residue among, we will say, three children instead of giving it all to one person, any difference arises in relation to the question of the section under which the estate duty is leviable. If real or personal property is given to A. for life and then to B.—it matters not for this purpose whether the property is real or personal estate—upon the death of A. it is not disputed that s. 1 of the Finance Act, 1894, applies, and estate duty is leviable upon the principal value of that property. If it happens to be settled property which passes upon the death of the tenant for life, “passing” there obviously is used in the sense of passing in possession. If, instead of the simple case I have given, the property goes in aliquot shares between A., B., and C. for life, and then to D., I cannot see why the same result does not follow. It seems to me that in such a case, upon the death of one of the three life tenants the property which passes on his death is the proportion of the estate of the testator which passes in the sense of passing in possession to the person next entitled. If in such a case there were an accruer clause, still I think precisely the same result would follow, except that unfortunately for the ultimate beneficiaries in such a case the Crown would benefit because the property would pass more than once in the event of A. dying, leaving B. and C. the other life tenants surviving him, and then we will say B. dying and leaving C. in possession. In such a case one-third of the property would pass on the death of the first life tenant and then on the death of the second life tenant and then on the death of the third life tenant the whole would pass to the remainderman. Though in this case I have every inclination to see if I can escape from the claim of the Crown, I am unable to see how on any fair interpretation of the words of the will I can come to the conclusion that the testator has dealt with the income of the residuary trust fund in such a way as to make it, as has been said, a separate item of property, in such a way that the estate duty upon the death of the life tenant falls to be determined on a different basis from that which would be applied upon the death in such a case as I have mentioned of a tenant for life of an aliquot share of a residue. It is said that what is in effect done is to dispose of the income of his residuary estate for a period which has been called, not inappropriately, a tontine period; and, accordingly, having separated up that item of property and the rest of his estate, what we have to consider as passing from time to time on the death of any of these beneficiaries of one-hundredth parts is the property subject to the tontine period and coming to an end at the expiration of that period. I do not think that that is a legitimate conclusion to be drawn from the language of the testator. He has divided the income of the residuary trust fund into certain shares, and has given people aliquot portions of those shares.

Re Cassel (1) has been referred to as supporting the view of those who resist the claim of the Crown. It was, however, a very exceptional case where the testator bequeathed Brook House and contents and certain other property, which I need not mention at the moment, to trustees upon trust to allow a certain beneficiary to have the use and enjoyment thereof for her life and after her death upon similar life trusts for other persons. A number of points were argued before RUSSELL, J., who decided—after a doubt which was removed by a consideration of the decision of the House of Lords in *Earl of Cowley v. I.R.Comrs.* (3)—that the case was one where property passed under s. 1 of the Finance Act, 1894. He then had to consider the question what property passed on Mrs. Cassel's death, and he answered the question by saying that it was the benefit of the annual sum payable under the special clause. It is to be observed there that the sum payable from time to time by the trustees out of the income was a sum which could not possibly be ascertained at the death of the testator, and varied with the quantum of rates and taxes payable from time to time, and of the outgoings necessary for keeping the premises and

A contents, which were of very great value in a proper state of preservation, an
amount which was equally uncertain. It was, therefore, almost impossible to say
that the principal value of the property out of which that sum had to be paid
passed on the death of the first tenant for life. Accordingly, quite naturally as I
think, he came to the conclusion that the case was of a very special character, and,
there being no section of the Act of 1894 which exactly applied, it had to be met
B by holding that what passed was the benefit of the annual sum which was payable
under the special clause. It is said that I can apply the principle of that case here.
I have no power to do anything of the sort. I think the property which passed is
to be taken to be a share of capital in the residuary trust fund. Accordingly, estate
duty must be paid on the value of such a share. That is as between the estate
and the Crown.

C The second question was out of what fund was the duty payable.

Bennett, K.C., and L. Cohen for Lady Hudson.

Stamp referred to s. 9 of the Finance Act, 1894.

MAUGHAM, J., referred to *Berry v. Gaukroger* (4).

D *Potts referred to Re Cassel, Public Trustee v. Mountbatten* (1); *Re Wedgwood,*
Allen v. Public Trustee (5); *Re Sarson, Public Trustee v. Sarson* (6); and *Re Jones,*
Lambert v. Colbourn (7).

E **MAUGHAM, J.**—The question now arises out of what fund estate duty is
payable by reason of the death of Mrs. Ann Milner or Mrs. Harmsworth. I have
come to the conclusion that this is a case where the language of s. 9 of the Finance
Act, 1894, applies, and that that part of the duty on the interest of the deceased
which does not pass to the executors of either of these ladies—as these interests
do not, since they terminated with their lives—must be, in the language of s. 9 (1),
a first charge on the property in respect of which duty is payable. I have already
held that the property which passed within the meaning of the Finance Act, 1894,
by reason of the deaths of these ladies, was not an isolated property separated in
F some way from the rest of the estate of the testator, but a share or slice of residue
from which the income payable to each of these ladies was derived. I am, there-
fore, bound, I think, to hold that the estate duty payable on each of these deaths
is a first charge on that portion of the residue out of which the income was payable.
Section 9 (6) of the Act of 1894 shows quite clearly the intention of the legislature,
that the person who inherits a limited interest in property on which duty has to
be paid and pays the duty in respect of that property is to be entitled to a charge
G on the property as if the estate duty on that property had been raised by means of
a mortgage to him. It has been held in the House of Lords that this automatically
gives a charge to the tenant for life or person who pays the duty. Accordingly,
I think it is impossible to hold consistently with what I said on the first part of
the question that the duty we are now dealing with can be thrown, either by means
of a policy on which the new tenant for life would bear the premiums, or in any
H other way on the persons who acquire limited interests in the shares of the income
which accrue to them on the death of each legatee. The result is that the duty
in question must, I think, be borne out of the corpus of the estate.

I Solicitors: *Russell & Arnholz; Ellis, Peirs & Co.; Hurford & Taylor; Charles*
Russell & Co.; Nicholson, Graham & Jones; Taylor, Willcocks & Co.; Treasury
Solicitor.

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

MANCHESTER CORPORATION v. AUDENSHAW URBAN DISTRICT COUNCIL AND ANOTHER

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), June 7, 8, 11, 12, 1928]

[Reported [1928] Ch. 763; 97 L.J.Ch. 276; 139 L.T. 509; 92 J.P. 163; 44 T.L.R. 628; 72 Sol. Jo. 452; 26 L.G.R. 343]

Highway—Repair—Road to be “maintained by and at the expense of” a local authority—Increased cost of maintenance owing to heavier traffic—Liability of authority.

By s. 11 of a private Act passed in 1875 a local authority was given power to construct a road, and by s. 14 (2) of the Act it was provided that “the new road hereinbefore authorised . . . shall be at all times hereafter maintained by and at the expense of the [authority],” and that it should be made according to certain measurements and specifications. The construction of the road was completed by 1878. At the commencement of this action the road had fallen into serious disrepair due mainly to its being used by traffic which was unknown in 1878 and for many years afterwards. It was capable of being repaired in accordance with the specifications in the private Act, but, unless such repair was supplemented by expedients unknown in 1878, e.g., tar-spraying, it could not be maintained in a condition adequate for increased and heavier traffic without work, and, consequently, expenditure, which was not contemplated when it was made.

Held: the liability of the authority to repair the road was to be determined, not by reference to the amount and character of the traffic when it was made as compared with those at the date when the action was begun, but by whether the authority had complied with the requirements imposed on it by s. 14 of the private Act, even though the expense of so doing might, by reason of the nature of the traffic passing along the road, be heavier than it was when the road was constructed.

Order of EVE, J., [1928] 1 Ch. 127, varied.

Notes. As to repair of highways, see 19 HALSBURY'S LAWS (3rd Edn.) 108 et seq.; and for cases see 26 DIGEST 352 et seq.

Cases referred to:

- (1) *A.-G. v. Sharpness New Docks and Gloucester and Birmingham Navigation Co.*, [1913] 1 K.B. 422; 82 L.J.K.B. 187; 108 L.T. 517; 77 J.P. 121; 29 T.L.R. 142; 11 L.G.R. 157; reversed, [1914] 3 K.B. 1; 83 L.J.K.B. 1762; 110 L.T. 634; 78 J.P. 201; 30 T.L.R. 273; 58 Sol. Jo. 285; 12 L.G.R. 449, C.A.; reversed sub nom. *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.*, [1915] A.C. 654; 84 L.J.K.B. 907; 112 L.T. 826; 79 J.P. 305; 31 T.L.R. 254; 59 Sol. Jo. 381; 13 L.G.R. 563, H.L.; 26 Digest 581, 2716.
- (2) *R. v. Inhabitants of Isle of Ely, Old Bedford Bridge and New Bedford Bridge Cases* (1850), 15 Q.B. 827; 4 New Mag. Cas. 222; 19 L.J.M.C. 223; 15 L.T.O.S. 412; 14 J.P. 512; 14 Jur. 956; 4 Cox, C.C. 281; 117 E.R. 671; 26 Digest 580, 2705.
- (3) *R. v. Kerrison* (1815), 3 M. & S. 526; 105 E.R. 708; 26 Digest 581, 2712.
- (4) *A.-G. for Ireland v. Lagan Navigation Co.*, [1924] A.C. 877; 93 L.J.P.C. 241; 131 L.T. 771; 88 J.P. 162; 22 L.G.R. 569, H.L.; 26 Digest 582, 2717.
- (5) *A.-G. v. Great Northern Rail. Co.*, [1916] 2 A.C. 356; 85 L.J.Ch. 717; 115 L.T. 235; 80 J.P. 337; 32 T.L.R. 674; 60 Sol. Jo. 665; 14 L.G.R. 997, H.L.; 26 Digest 582, 2719.
- (6) *Sandgate U.D.C. v. Kent County Council* (1898), 79 L.T. 425; 15 T.L.R. 59, H.L.; 26 Digest 265, 65.

- A (7) *Scott v. Brown* (1904), 69 J.P. 89; 4 L.G.R. 103, C.A.; 31 Digest (Repl.) 361, 4928.
- (8) *Sevenoaks, Maidstone and Tunbridge Rail. Co. v. London Chatham and Dover Rail. Co.* (1879), 11 Ch.D. 625; 48 L.J.Ch. 513; 40 L.T. 545; 27 W.R. 672; 38 Digest 297, 265.

Appeal from an order of EVE, J., reported [1928] 1 Ch. 127.

- B The plaintiff corporation instituted this action to determine their liability in respect of the maintenance of a road known as Corporation Road situated in the districts of the defendant councils. By the Manchester Corporation Waterworks and Improvement Act, 1875, the plaintiffs were authorised to construct reservoirs in the districts of the defendants, and by s. 11 of the Act they were authorised to make a road in lieu of a road known as Taylor Lane, which was to be submerged
- C by the reservoirs. Section 14 provided that the new road should at all times thereafter be maintained by and at the expense of the corporation, should be of the width of fourteen yards, inclusive of a stone boundary wall on each side, fencing it from the adjoining lands, and should have a footway of not less than 7½ ft. wide on each side, to be made with a rubble or cinder foundation and gravel cover of not less than 12 in. in depth altogether, with curbstones. It was further
- D provided that the carriageway of the road should be macadamised, the foundation to be rubble 6 in. in depth, covered with hard macadam to the depth of at least 12 in. This new road was maintained as specified until recent years when, owing to the very heavy traffic, the corporation allowed it to fall into disrepair, and now claimed a declaration that it was only liable under s. 14 of the Act to maintain the road in the condition it was in when it was completed in April, 1878.
- E EVE, J., held that the contention of the plaintiffs was right and that the principle laid down in *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.* (1) applied, but he added that the defendants would be at liberty to apply for an inquiry as to any contribution which they might allege ought to be made by the plaintiffs to the costs of re-conditioning the corporation road. The defendants appealed.

- F *Joshua Scholefield, K.C.*, and *H. A. Hill* for the defendants.
Sir Herbert Cunliffe, K.C., and *John Bennett* for the corporation.

- LORD HANWORTH, M.R.**—This is an appeal from a decision of EVE, J., who gave his judgment on Nov. 16, 1927. Manchester Corporation were the plaintiffs there, and the defendants were the Audenshaw and Denton Urban District Councils
- G which are councils in the neighbourhood of Manchester. The corporation are the waterworks undertakers for the city of Manchester and several surrounding areas. The two defendant councils are the highway authorities for their respective districts, and as stated in the statement of claim, are successors of the Audenshaw and Denton Local Boards referred to in the Act of Parliament which has to be construed. Many years ago Manchester Corporation obtained powers under the
- H Manchester Corporation Waterworks and Improvement Act, 1875, for the purpose of constructing reservoirs in the Audenshaw and Denton districts. At that time in the district in which they were minded to complete these reservoirs there was a road known as Taylor Lane, partly within the district of Audenshaw and partly within the district of Denton. The corporation wanted to submerge that road because the land on which it stood was intended to form part of the reservoir.
- I Taylor Lane was repairable by the frontagers abutting upon it *ratione tenuræ*.

The Act of 1875 is a private Act to enable the mayor, aldermen, and citizens of Manchester to extend their waterworks, and for other purposes. By s. 11 of that Act it is provided that:

“Subject to the provisions of this Act, the corporation may make, construct, lay down, and maintain, in the situation and lines and according to the levels shown on the deposited plans and sections relating thereto, and in and upon the lands described upon such plans, the several works hereinafter described, . . .”

Item No. 22 in that section is this :

"A road commencing in the road called Taylor Lane, at a point measured two hundred and twenty-six yards or thereabouts in a south-easterly direction along the said lane from the centre of the bridge carrying the said lane over the Stalybridge and Stockport branch of the London and North-Western Railway, and terminating in Cock Lane at the bridge carrying the said lane over the said branch railway."

That was a right to construct a road in lieu of Taylor Lane. They got the power to submerge Taylor Lane, and to build this new road in the place of it. Those powers were subject to the provisions of the Act, s. 14 (2) of which provided :

"The new road hereinbefore authorised and described on the deposited plans as 'intended diversion of road No. 22,' shall be at all times hereafter maintained by and at the expense of the corporation, and shall be made of the width of fourteen yards, inclusive of a stone boundary wall to be erected by the corporation on each side fencing such road off from the adjoining lands, and shall have a footway of not less than $7\frac{1}{2}$ ft. wide on each side, to be made with a rubble or cinder foundation and gravel cover of not less than 12 in. in depth altogether, and with curbstones. The carriageway of the said road shall be macadamised, the foundation thereof to be rubble 6 in. in depth, covered with hard macadam to the depth of at least 12 in."

In one part of the argument attention was called to the fact that in s. 14 (2) there is a duty imposed upon the corporation "at all times hereafter" to "maintain by and at the expense of the corporation" this new road, and there are no words which might possibly be construed as words of some limitation of that provision as there are in sub-s. (1) of s. 14, where it is provided, with regard to the maintenance of the intended diversion of road No. 21, that is to be "used for the same purposes and subject to the same rights of way, passage or otherwise as the portion of Debdale Lane," for which such diversion was substituted. I only refer to that argument because it is one which has not been fully developed before us, but it is noticeable with regard to road No. 22 that there is a liability on the corporation to make it of certain dimensions and in a particular way, and to maintain it. There are no words which could be construed as in any way cutting down that plain duty of maintenance which is imposed by s. 14 (2). Under sub-s. (4) of s. 14 :

"The last-mentioned new road shall not be deemed to be completed until it shall have been made and sewered in accordance with the foregoing provisions, and to the reasonable satisfaction of the Audenshaw and Denton Local Boards respectively, and the corporation and the said local boards, or either of them, may from time to time enter into agreements with respect to the adoption of so much of the said road and sewer, or any part or parts thereof respectively, as shall be within the respective district of such boards as a highway and sewer, repairable by the inhabitants of the said district, and in the meantime until such adoption the corporation may from time to time contract with the said local boards, or either of them, for the maintenance of such road or any part thereof as a highway not repairable by the inhabitants. . . ."

The road was constructed, but it has never been taken over by the Audenshaw and Denton Local Boards or their successors, the urban district councils. It remains a road which was made and is to be maintained by Manchester Corporation. The powers under sub-s. (4) of s. 14 have not been put in force and the duty of the Manchester Corporation remains.

It is important to remember that inasmuch as the road which this new road replaced, Taylor Lane, was one the cost of the repairs of which could be extracted from the frontagers, there was to be the same right on the part of the local authorities to extract from the frontagers the cost of the maintenance of the new road if and when the urban district authorities took it over and had the right and duty of maintaining it. These two councils are representative bodies who must

A bear in mind that they must not impose upon the ratepayers at large an expense which ought to be borne by a particular body of ratepayers, namely, the frontagers of the new road, if that liability has been properly put upon the frontagers. I am pointing out this and dwelling upon it because I want at the outset to make it quite plain that as the matter stands, upon the facts before us at the present time, the corporation of Manchester, having made the road, are the persons who are to maintain it, and that at the present time, there having been no adoption by the Audenshaw or Denton authorities, those authorities have no duty or right or power in respect of the road.

B Before the action was brought there was a controversy between the parties as to what were the respective duties of these three authorities, the Manchester Corporation and the two urban district councils, in respect of this road, and correspondence C passed, in which undoubtedly the defendants, the two urban district councils, contended that the full liability in respect of the maintenance of the road fell upon the corporation. The corporation took the point that what had happened to the road was in the main due to the increased traffic which had fallen upon it. The urban district councils, in spite of that, said that whatever repairs were necessary D to the road ought to be undertaken and paid for by the corporation. On the other hand, the corporation said: "Our liability is only a liability of the nature as it existed at the time when the road was made, which was in 1878, and no greater, and inasmuch as the road has been brought to its present condition by traffic which was not contemplated in the year 1878, you cannot impose upon us the liability E for the present condition of the road, which is due to and caused by this unforeseen heavy mechanical traffic." I ought to add that when the new road was built it passed through an area on which there were no frontagers to the road, but since that time there has been a foundry which fronts to the road. That foundry, as I understand, has got either belonging to it or connected with it two other foundries which now abut upon the road, and quite recently there has been a housing scheme adopted by the urban district councils, which has brought a number of houses in F proximity to the road. But, broadly speaking, except for the foundries, there is a large front of the area abutting on the road which is not occupied by houses.

It is said that what has broken the road down is the heavy traffic which has passed along the road in transit to the foundries. That may be so, and I dare say it is so in fact. Counsel for the corporation was quite unable to suggest any date at which it could be said that the Manchester Corporation had ceased to be under the liability which is imposed upon them directly by s. 14 (2) of the Act of 1875. G The corporation have contended that their liability in respect of the road is limited by the terms of s. 14 (2) and that they are only liable to maintain the road in the condition it was in when it was completed in or about April, 1878. Further, or in the alternative, the Manchester Corporation contend that they are only liable to maintain the road in a state of repair sufficient for the traffic at the date when the said Act was passed, or, in the further alternative, at the date when the road H was completed. By an amendment made at the trial, they claimed a declaration "that under and by virtue of s. 14 (2) of the [Act of 1875] they are only liable to maintain the said corporation road in the condition in which it was completed in or about April, 1878, and are not under any obligation to maintain the carriageway of the said road in a fit state to bear the ordinary traffic of the present day." I The defendants, on the other hand, claimed that there was a liability on the corporation which was not limited by the conditions which prevailed in 1878, but was an unlimited liability upon the corporation to maintain the road whatever should be the traffic upon it, and by way of counter-claim they asked that there should be a declaration made "that the plaintiffs are under an obligation to maintain the carriageway of the road in a fit state to bear the ordinary traffic thereon at the present day," or in the alternative, "(a) a declaration that the plaintiffs are under an obligation at all times to maintain a macadamised carriageway, the foundation thereof to be rubble 6 in. in depth, covered with hard macadam with a depth of at least 12 in.; (b) a declaration that the last-mentioned obligation

exists whatsoever may be the nature of the ordinary traffic on the road at the present day." Lastly, they claimed a declaration A

"that the carriageway of the road is not now being maintained in accordance with either of the obligations sought to be established as aforesaid."

The case was tried before EVE, J., and, as one always finds in his judgments, he has taken care to show expressly what he has found and what he decides. He B says this:

"The conclusions to be drawn from the evidence adduced at the trial can, I think, be summarised thus: '(i) By a macadamised road in 1875, and for a quarter of a century afterwards, was meant a road of water-bound macadam. Tar-spraying and the use of tar machines did not exist prior to the commencement of the present century. (ii) Such a road was adequate for the traffic over this road in 1878, and the next forty years. (iii) During such last-mentioned period the road was maintained by the plaintiffs in accordance with their statutory obligations. (iv) The road at the commencement of this action was, and it still remains, in a condition of serious disrepair. This condition is in the main due to traffic of a character unknown in 1878 and for many years afterwards. (v) The road is not incapable of being repaired as a water-bound macadamised road, but unless such repair is supplemented by the introduction of some binding material and by tar-spraying or some other expedient unknown before 1900, the already existing traffic over it will inevitably bring about rapid destruction. (vi) The result is that from the economic standpoint the road constructed in accordance with the statutory requirements of 1875 cannot be maintained in a condition adequate for present-day traffic without expenditure of a nature unknown and of work never contemplated until the road had been completed and in use for a quarter of a century and more. (vii) The traffic over the road when repaired is more likely to increase than remain stationary.' "

It is important to observe in those findings that it is possible to repair the road as a water-bound macadamised road such as was built and was maintained from and after 1878. It also appears that in the main, though not in totality, traffic of a character which was not known in 1878 has led to the condition of serious disrepair in which the road is found. I give full weight to those observations. In (vi) EVE, J., says that from the economic standpoint the road cannot be maintained without expenditure of a nature unknown and of work never contemplated until the road had been completed and in use for a quarter of a century. It appears to me that those findings, especially that finding from the economic standpoint—and I think counsel for the corporation suggested from the practical standpoint—have led to a misunderstanding. We have not got to approach it from the point of view of what should be done in an area if we, as arbitrators, had to determine what would be the wise thing to do in relation to this road, sweeping away all the duties, all the powers, and all the restrictions imposed by Acts of Parliament on the three bodies that are before us. We are not asked to give, and we have no power to give, judgment from the economic standpoint or from the practical point of view. We have to determine in relation to these bodies, which are all three of them bound by certain statutes, what are the liabilities inter se, and, therefore, the economic point of view, although it may be very wise that the parties should come to some agreement from that point of view, is not one which we have to consider or on which we can rest our judgment. F G H I

Those are the findings, but it is to be observed that those findings do not form any basis upon which it could be said that the Manchester Corporation have ceased to be liable in respect of the maintenance of this road under s. 14 (2). It is possible for them to repair this road. That being so, I can find no reason for saying that that liability which primarily rests upon the corporation does not continue at the present time. EVE, J., at the close of his judgment, said:

A "I am satisfied that some reconstruction work to surface and foundations alike would be called for. But, on the other hand, the fact that the road has been, and is still being, so used and that present-day conditions are such as to render an obligation to maintain it as in 1878 of no practical use, does not, in my opinion, operate to free the plaintiffs from all liability to contribute to the cost of repair, and if in fact it can be established that any default on the part of the plaintiffs in the years during which they have suspended work on the road has increased the expenditure which will now have to be incurred in restoring the road the plaintiffs are, in my opinion, liable to contribute to the extent of such increase. I propose to make a declaration in the terms of para. 1 of the prayer and to dismiss the counter-claim. I will give leave to the defendants to apply for an inquiry as to any contribution which they may allege ought to be made by the plaintiffs to the cost of reconditioning the road and generally."

He carried out, therefore, to its conclusion the view which he held based on the economic point of view and the practical point of view and determined that he would grant a declaration of the liability of the plaintiffs, but side by side with that declaration of liability, which is of no practical use, he, by the inquiry which he orders, shows that the only liability of the plaintiffs which he intended to impose upon them was such a liability as might be found after inquiry to call for a sum by way of contribution to the maintenance of this road. Perhaps I ought to have called attention to the sums which have been expended by the plaintiffs in the maintenance of this road. I will not trouble about the earlier years or the years immediately after the war, but in 1919 they spent a sum of £1 12s. 10d. and no more, and after that time from 1920 to 1925 they spent a sum which, I think, averages about £60 to £70 and no more. The photographs which are before us show that EVE, J.'s statement as to the condition of the road is, as one would expect it to be, well founded. Having regard to those findings, can it be said that this judgment which has been drawn up on these pleadings is right? The judgment is that the court does declare that by virtue of s. 14 (2) the Manchester Corporation are only liable to maintain the road in the condition in which it was completed in or about the year 1878, and then it is adjudged that the defendants' counter-claim, which contained alternative suggestions as to what the liability of the corporation might be, is dismissed—I have already read them—and the defendants are to be at liberty to apply for an inquiry as to any contribution which they may allege ought to be made by the corporation to the cost of the reconditioning of the road, and generally as they may be advised. That is an inquiry which indicates that the corporation are the owners of the road, and yet somehow or another the defendants are to repair the road, to re-make the road, and the corporation are only to make a contribution to the expenditure necessary for that purpose to the extent to which it can be held or found by a body that the suspension of the work by the Manchester Corporation during the past few years has led to an increased expenditure at the present time. It appears to me that that judgment and the inquiry are based upon a confusion of thought and does not allow for the continuance of the liability of the corporation in respect of what EVE, J., calls "this corporation road," which they are to maintain and are to maintain under the statute at all times, for those times have not been brought to an end as they might have been brought to an end under s. 14 (4).

I come, therefore, to consider whether or not any modification can be made or ought to be made by virtue of the authorities which have been cited to us. *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.* (1) is of the greatest importance. That was a case in which the House of Lords determined that there was not a liability upon the undertakers to maintain their bridges so as to be suitable for the future traffic which had arisen subsequent to the time when the bridges had been constructed to the satisfaction of the commissioners whose satisfaction had to be expressed, I think it was, under s. 61 of the

local Act. The question that was propounded then was one which is stated at [1915] A.C. 656, the Attorney-General claiming "a declaration that the appellants were liable to support, maintain and keep in repair certain bridges in the claim specified, which carried common highways over the appellants' canal within the city of Worcester, sufficient to bear the ordinary traffic of the district and the traffic which might reasonably be expected to pass along the said highways having regard to the present character and needs of the district." That is what was sought to be enforced. The smaller question whether or not they were bound to keep the bridges in the condition in which they had been approved by the commissioners was not a point which was raised. I think, *sub silentio*, it is treated in nearly all the speeches that that liability, of course, remained. I say that because LORD HALDANE says this ([1915] A.C. at p. 662):

"The Court of Appeal seem to have thought that the obligation under these words to maintain and repair might have imposed an obligation to make new works, by analogy to the general obligation of the county authority to keep a highway in such a condition that it could carry not only the traffic of the period at which it was made, but heavier traffic coming into existence subsequently."

That is the common-law liability of the highway authority who are bound to maintain the highways, but then he passes on:

"But s. 61 of the Act which we have to construe in the present case does not appear to me to admit of resort to any presumption of intention based on the analogy of the common law."

So that what ultimately was determined in the *Sharpness Case* (1) was what duty was imposed by the statute which by imposing a statutory duty excluded the presumption of the common law. LORD DUNEDIN says ([1915] A.C. at p. 664):

"I am not doubting the authority of these two cases [*R. v. Inhabitants of Ely* (2); *R. v. Kerrison* (3)], but it seems to me a perfectly different thing to come to the conclusion that when, without special statutory authority, there has been made an obstruction to a public road, which obstruction has been obviated by means of a bridge, then the right of the undertaker to continue the obstruction is conditional upon his maintaining the bridge, and to raise up a so-called common-law doctrine of repair where the work in question is specifically allowed by statute; and when the statute itself in a clause or clauses expressed the conditions under which the work may be done."

The decision as a whole is that by virtue of the terms of the statute there was a liability to repair and repair only in accordance with and up to the standard accepted by the commissioners when the bridges had been built, with the result that the House negatived the claim for a declaration that the appellants were bound to maintain and keep in repair the bridges, so that they might be able to bear the traffic expected to pass along the highways, having regard to the present character and needs of the district.

The next case, *A.-G. for Ireland v. Lagan Navigation Co.* (4), is just as plain. There were certain facts which were admitted at the trial before WILSON, J. One of them was: "The said bridge, and also the retaining and other walls connected therewith, have been, since their construction, maintained in a good and sufficient state of repair adequate to carry the traffic of the said district as existing at the date of the passing of the said Act [1843]; and then the question was, (a) Are the respondents bound to keep the bridge fit for present-day ordinary traffic, or (b) are they only bound to keep the bridge in an efficient state for such ordinary traffic at the date of the passing of the Act in 1843?" Again, the decision is that, by virtue of the terms of the statute, the liability was only one to maintain the bridge in the condition which was imposed upon them by the statute. The passage which has been referred to in the speech of LORD ATKINSON says that the statute, virtually

A if not expressly, excluded any other liability than that which was laid down by the statute.

The last case, *A.-G. v. Great Northern Rail. Co.* (5), is to the same effect. There the decision was that the railway were not liable to improve and strengthen the bridge to make it sufficient to bear the ordinary traffic of the district which might be reasonably expected to pass over it, according to the standard of the present day. The *Sharpness Case* (1) is applied for the purpose of saying that the measure of liability is that which is imposed by the statute. But, again in that case, I cannot find any suggestion that there is a ceasing of the responsibility for maintenance by reason of the fact that there has been an increase of the traffic. The liability to maintain, or to keep up the standard originally imposed upon the authority by statute is taken to be in existence, and the only question in those cases is as to the increased liability since the statute was passed.

Applying those cases to the present case, there is a liability, recognised by Eve, J., possible of fulfilment by those who alone have a duty in respect of the road—the Manchester Corporation. They have a duty to maintain the road at a standard which was fit for the traffic in 1878. There is no finding that they have done so. There is no finding to say that at the present time after the expenditure of this £60 or £70 in the last eight years there has been a maintenance of that standard. All that has been said, and, indeed, claimed, is that by reason of this increase of traffic they ought not to be bound, or it would be unwise, economically or practically, to hold them liable to a duty which still remains upon them by statute. It appears to me that having regard closely to the *Sharpness Case* (1), the *Lagan Case* (4), and the *Great Northern Case* (5), it is plain that the liability of the Manchester Corporation continues, and that they have a duty, and they alone have a duty, in respect of the maintenance of this road. We are told that the evidence by some of the witnesses was that if the road is repaired to such a standard as would have been suitable for the traffic in 1878, the road would last, some of the witnesses say, five years, and some of them say ten years. But if it is to last, and does last, for five years, it may be that the Manchester Corporation will, at the end of that time, have to repair it again, and it may be that it would be wiser on their part to undertake repairs which will last longer. They have the opportunity of doing so, if they are so minded to do it. They cannot be prevented because *Sandgate U.D.C. v. Kent County Council* (6) shows that where there is a responsibility on the part of an authority to maintain a footpath, they have the power to undertake works which are not immediately connected with the footpath itself but are for the purpose of the maintenance of the footpath, and that if they do undertake that liability, they are entitled to make a charge upon their ratepayers. LORD HALSBURY says (79 L.T. at p. 427):

“I have no hesitation in saying that, assuming a thing to be necessary for the preservation of the road, and assuming that the local authority is under obligation to keep up the road, the law of England is that you shall keep up that road by whatever means are appropriate and necessary to do it.”

It cannot, therefore, be said if the corporation like to take steps under which the road would not need serious repair for ten years, that they could not do it because they could not charge their ratepayers with the cost of it. They have also, as I have pointed out, powers to protect themselves in respect of extraordinary traffic.

I The point that we have got to determine is, Have they ceased to be liable under s. 14 (2) of the Act? and for the reasons which I have given it appears to me that that liability has not terminated. That is their primary duty in respect of it, and they have to make up the road to the standard suitable in 1878. Whether it lasts a longer or a shorter time, or whether that is the best and most economical way of dealing with this matter, if the whole subject were on a clean slate, I do not know. Whether that is the most practical way of dealing with it, I do not know, but that is the legal responsibility which is imposed upon them by the statute. Inasmuch as EVE, J.'s judgment does not meet that point and does not declare

that liability, it appears to me that his judgment must be varied so as to embody that liability, and with regard to the costs, inasmuch as the defendants claimed a great deal too much below, we think that it would be wise not to interfere with the costs. I think EVE, J., dealt with them at the trial, but the appellants will be entitled to the costs of this appeal. A

LAWRENCE, L.J.—I agree. I think it is plain that there has been some misunderstanding in this case, both on the part of the Manchester Corporation and on the part of the learned judge, and that it is this misunderstanding which has necessitated the present appeal. B

Manchester Corporation was, by their special Act of 1875, authorised to make and construct the road in question. By s. 14 the particular manner in which the road should be constructed was laid down, namely, it was to be made of a certain width, with stone boundary walls and footways on each side. Then the carriage-way of the road, which is the most important part of the purposes of this appeal, was to be macadamised and the foundation was to be of rubble 6 in. in depth and covered with hard macadam to a depth of at least 12 in. The section further provided that the corporation should at all times thereafter maintain that road at and by their own expense. The same section, by sub-s. (4), enacts that the road shall not be deemed to be completed until it has been made and sewered in accordance with the provisions, and to the reasonable satisfaction of the Audenshaw and Denton Local Boards. The road was so completed to the satisfaction of those boards in the year 1878, and was for a considerable period thereafter maintained by and at the expense of the Manchester Corporation. In or about the year 1922, however, the road had fallen into a state of disrepair and the defendants called upon the Manchester Corporation to put it into a proper state of repair, at the same time claiming that the corporation was liable, under the Act, not merely to maintain the road in the condition it was in when it was completed in 1878, but to recondition it in such a manner as to make it a more solid and substantial road, better fitted to bear the modern heavy traffic which was passing over it. The Manchester Corporation did not dispute their liability to maintain the road in the condition in which it was completed in 1878, but strenuously denied that they were under any obligation to make a better, or more substantial, road such as the defendants demanded. The defendants, however, insisted on their claim, and thereupon the Manchester Corporation commenced this action with a view to having it decided whether such claim was well, or ill, founded. The action claimed by the statement of claim two declarations—first, a declaration that under and by virtue of the section which I have already read, the Manchester Corporation were only liable to maintain the road in the condition in which it was completed in 1878, and, secondly, a declaration that the only obligation imposed upon them by that section was to maintain the road in a state of repair sufficient for the ordinary traffic at the date of the passing of the Act, or at the date when the road was made. The defendants, on the other hand, insisted upon their claim to saddle the Manchester Corporation with the liability of making a stronger and more substantial road and, by their defence, they set up that claim and counter-claimed for a declaration to give effect to such a claim. Therefore, the issue at the trial was, aye or no, whether the liability of the Manchester Corporation was such as the defendants had claimed it to be, or whether the Manchester Corporation was only liable to do that which it had never disputed. At the trial counsel for the corporation and the learned judge seem to have assumed that, if the case were decided in favour of the corporation and they were only under the lesser liability, the defendants would then themselves proceed to construct the road in a more substantial fashion and it was only a question of how much money the corporation should contribute towards the expense of so constructing the road, apparently assuming that the amount of such contribution should be ascertained by the expense which the corporation would have had to incur if they had fulfilled their statutory obligation, applying, by analogy, such a case as *Scott v. Brown* (7) to C D E F G H I

the road was so completed to the satisfaction of those boards in the year 1878, and was for a considerable period thereafter maintained by and at the expense of the Manchester Corporation. In or about the year 1922, however, the road had fallen into a state of disrepair and the defendants called upon the Manchester Corporation to put it into a proper state of repair, at the same time claiming that the corporation was liable, under the Act, not merely to maintain the road in the condition it was in when it was completed in 1878, but to recondition it in such a manner as to make it a more solid and substantial road, better fitted to bear the modern heavy traffic which was passing over it. The Manchester Corporation did not dispute their liability to maintain the road in the condition in which it was completed in 1878, but strenuously denied that they were under any obligation to make a better, or more substantial, road such as the defendants demanded. The defendants, however, insisted on their claim, and thereupon the Manchester Corporation commenced this action with a view to having it decided whether such claim was well, or ill, founded. The action claimed by the statement of claim two declarations—first, a declaration that under and by virtue of the section which I have already read, the Manchester Corporation were only liable to maintain the road in the condition in which it was completed in 1878, and, secondly, a declaration that the only obligation imposed upon them by that section was to maintain the road in a state of repair sufficient for the ordinary traffic at the date of the passing of the Act, or at the date when the road was made. The defendants, on the other hand, insisted upon their claim to saddle the Manchester Corporation with the liability of making a stronger and more substantial road and, by their defence, they set up that claim and counter-claimed for a declaration to give effect to such a claim. Therefore, the issue at the trial was, aye or no, whether the liability of the Manchester Corporation was such as the defendants had claimed it to be, or whether the Manchester Corporation was only liable to do that which it had never disputed. At the trial counsel for the corporation and the learned judge seem to have assumed that, if the case were decided in favour of the corporation and they were only under the lesser liability, the defendants would then themselves proceed to construct the road in a more substantial fashion and it was only a question of how much money the corporation should contribute towards the expense of so constructing the road, apparently assuming that the amount of such contribution should be ascertained by the expense which the corporation would have had to incur if they had fulfilled their statutory obligation, applying, by analogy, such a case as *Scott v. Brown* (7) to

A which our attention was called. It is, in my opinion, that assumption, which was a mistaken one, which led to the insertion in the order of the inquiry. It is quite true to say that the defendants, being anxious to make the corporation construct a better and stronger road, endeavoured to enforce that view in the court below. In that they were held to be wrong, and I think the learned judge was right in dismissing their counter-claim with costs. But, having said that, I cannot find B any justification for the assumption that, if they so failed, they would themselves undertake the construction of such a road and would convert the liability of the corporation under the statute into a monetary contribution towards the making of such a road. Nor do I find any trace, either in the pleadings or elsewhere in the case, of any statement by the defendants that, if they failed in their contention, as they did fail, they were not going to insist on the fulfilment by the corporation C of their statutory duty to maintain the road in the condition in which it was in 1878. Counsel for the defendant district councils has pointed out certain difficulties in the way of his clients undertaking the construction or repair of the road in question, but, be that as it may, it is quite sufficient for this case that the defendants should say that they have no intention, and never had any intention, of themselves undertaking the making up and the repairing of the road at the present time and that D they intend, so far as they lawfully can, to insist upon the corporation fulfilling their statutory duties which they had hoped were higher than they have actually been found by the court to be.

The learned judge founded his judgment upon *Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. A.-G.* (1). The defendant councils, although by their notice of appeal they have attacked that part of EVE, J.'s judgment, have not presented any argument to show that the learned judge was wrong E in the view he took. EVE, J., referred especially to the passage in the speech of LORD PARKER in the *Sharpness Case* (1), in which LORD PARKER stated that the standard by which the obligation has to be judged is neither the ordinary traffic when the canal was constructed, nor the ordinary traffic of to-day, but the bridge itself as determined by the commissioners under the Act. He applied that to the F facts of the present case, and held that the standard by which the obligation on the Manchester Corporation is to be judged is neither the ordinary traffic when the road was constructed nor the ordinary traffic of to-day, but the road itself as determined by the Act and as completed to the satisfaction of the local boards. So far as I can judge without hearing any arguments to the contrary, it seems to me that that judgment is perfectly right. But then the learned judge went on to G say that no court would enforce such an obligation, giving as his reasons, that if the obligations were enforced, it would lead to an extravagant and wasteful expenditure. It was proved before him that the road was not incapable of being repaired as a water-bound macadamised road in the condition in which it existed in 1878. There is a conflict of evidence as to how long such a road would last without having H again to be repaired. I have not read the evidence, but from what counsel have told this court there seems to be a question whether it would last four years at the lowest estimate, or as much as ten years at the highest; but this evidence only shows that the expense of complying with the statutory obligation may, by reason of the nature of the traffic passing over the road, be heavier at the present time than it was when the road was originally constructed. I cannot understand how, that being the case, it relieves the corporation from their statutory duty and I obligation as declared by the learned judge. If the corporation desired to minimise their obligation, the cases cited by counsel for the district councils such as *Seven-oaks, Maidstone and Tunbridge Rail. Co. v. London Chatham and Dover Rail. Co.* (8) and *Sandgate U.D.C. v. Kent County Council* (6) show that they have ample power to make a road which would last longer than they say a water-bound macadamised road would last, but that is not for this court to determine. That is for them to determine from their own point of view, as to what is the best way to carry out their obligation. It seems to me that the learned judge came to an erroneous conclusion in saying that the liability of the corporation was not one

which could be enforced. I can nowhere see how that liability can be commuted without the assent of the local authorities into a payment of money towards the expense of their making up the road. Of course, such an agreement might be come to and might commend itself to the court and to other people as a practical manner of solving the question between the parties, but the court cannot assume that such an agreement would be entered into and direct an inquiry which, I gathered from counsel, neither party asked it to direct, unless the plaintiffs did so when, at the suggestion of the learned judge, they amended their statement of claim asking for such an inquiry. In my view, such an inquiry is one which prejudices the defendants in enforcing the liability which the court has declared the corporation should be under. From the very wording of it it looks as if they had alleged and would allege that the corporation ought to contribute something towards the expense of their making up the road, and I can quite understand that if they had attempted in the High Court or any other court to enforce that declaration it would be said, in view of that inquiry, that it was never intended that that liability should be so enforced. For those reasons I agree with the Master of the Rolls that the judgment should be varied in the manner in which he has stated, and I further agree with the order which has been suggested by him as to the course of the costs below and the costs of this appeal. I think that the defendants were bound to come to the Court of Appeal in view of the form of the judgment and in view of the explanation of that judgment given by the learned judge.

RUSSELL, L.J.—I am of the same opinion. It appears to me that the important thing to ascertain at the outset of this appeal is: What exactly was the dispute between the parties which the court was asked to decide in the action? In order to show what the dispute was in a concrete form reference should be made to *Sharpness New Docks and Gloucester and Birmingham Navigation Co. Case* (1) and the three decisions which were given in that case. The first decision, namely, the decision of PHILLIMORE, J., was a declaration of liability measured by the traffic existing at the date when the structure was brought into being. The Court of Appeal reversed that and declared that the measure of the liability was the traffic at the present day. The House of Lords reversed that in substance, restoring the view taken by PHILLIMORE, J., but varying his order by declaring that the measure of liability was not traffic of the present day, nor the traffic of the past date, but the bridge as erected at the past date. Bearing those points in mind and turning now to the pleadings in the present case one can see exactly what it was that the parties were respectively contending to be the measure of the plaintiffs' liability. The corporation contended for and sought to obtain a declaration that under and by virtue of s. 14 of the private Act they were only liable to maintain the road in the condition in which it was completed in or about April, 1878, that is to say, they were contending for a declaration in accordance with the decision of the House of Lords in the *Sharpness Case* (1). Alternatively, they claimed a declaration that the only obligation imposed upon them by s. 14 of the Act was to maintain the road in a state of repair sufficient for the ordinary traffic at the date of the passing of the Act. Alternatively, therefore, they were contending for a declaration in the terms of PHILLIMORE, J.'s decision. The defendants, on the other hand, in their defence and counter-claim contended that the corporation were under an obligation to maintain the carriageway of the road in a fit state to bear the ordinary traffic thereon at the present day. In other words, they were seeking a decision that the measure of liability was to be such as the Court of Appeal had held to be the proper measure in the *Sharpness Case* (1). At the trial EVE, J., decided in favour of the plaintiffs, and correctly so in virtue of the decision of the House of Lords in the *Sharpness Case* (1); and he held that the liability was a liability defined by the Act of 1875, and limited by that definition—that is to say, the liability was a liability to maintain the corporation road as a road of the class and durability described in s. 14 of the private Act as it was there described and as it was in fact constructed and approved by the local boards

A in 1878. The passage in which one can find in his judgment the kernel of the learned judge's decision is where he applies the remarks of LORD PARKER in the *Sharpness Case* (1) to the facts of the case before him, and says :

B "Applying what LORD PARKER says in his speech in the *Sharpness Case* (1) to the facts of this case, I should say that what the plaintiffs have to maintain is the fabric of the particular road of which the size, character and formation were determined by the Act and that there is no principle of construction by which an obligation to maintain a particular structure can be enlarged into an obligation to reconstruct the fabric in such a way that it is materially different in size, character or formation from the particular fabric the subject of the obligation."

C He made a declaration to that effect which is contained in his order. So far, in my opinion, the decision of the learned judge was correct in every respect and could in no way be complained of, but unfortunately he did more than that. He added to the order this provision :

D "And it is further adjudged that the defendants be at liberty to apply for an inquiry as to any contribution which they may allege ought to be made by the [corporation] to the cost of reconditioning the said corporation road."

E It appears to me that so long as that provision remains in the order there exists, putting it at its lowest, a twofold suggestion—first of all, that the corporation are not under obligation to do the work, but that the obligation of reconditioning the road rests with the defendants; and, secondly, the suggestion that the liability and obligation of the corporation is not to do the work but to make a contribution to the expenses incurred by the defendants in doing the work. In both respects such a suggestion is, in my opinion, quite wrong, and it was essential from the point of view of the defendants that they should come to this court to get that matter put right. In other words, what the learned judge has done is this. Having decided in favour of the corporation—in my opinion, quite correctly—the point which the court was asked by the parties to decide in the action, he has run off into a statement of what he thinks the position ought to be upon the footing that the defendants are the persons upon whom the obligation rests to do the work of reconditioning the road. From such an order the defendants, as I say, were bound to appeal, but as I read the notice of appeal it asks the court to reverse the decision of the learned judge and to give them a declaration in the terms of the view of the Court of Appeal in the *Sharpness Case* (1), which would be wrong. However, that was not the attitude adopted by the defendants by their counsel before this court, and they stated they were perfectly willing to accept the order, and all they asked for was the deletion from it of the provision in regard to an inquiry. When that was stated the corporation assumed the attitude that they would have no objection to that offending provision coming out, but they contended that, in that event, their obligation had come to an end in toto. I confess I am wholly unable to appreciate how any such contention can be put forward. How the obligation came to an end was not in any way suggested, or when it came to an end, but the overwhelming objection to any such attitude being successfully assumed on the part of the corporation before us is that they obtained a declaration in their favour from the learned judge in the court below upon the footing of their being legally liable. They obtained that decision in their favour in accordance with their pleading, and there is no appeal by them from that decision of the learned judge. In those circumstances it would be perfectly impossible for this court, even if it thought fit so to do otherwise, to declare that there was no liability on the corporation, or that the corporation's liability under the statute had come to an end.

Accordingly the position now is that the learned judge's decision in the court below was correct in every respect except as regards the insertion of the provision as to an inquiry for contribution by the plaintiff corporation. That provision

should, in my opinion, be struck out of the order, and the result would be that the only order made upon this appeal would be to vary the order of the learned judge in the court below by omitting from it all the words beginning with the words "And it is further adjudged" down to and including the words "as they may be advised," leaving the rest of the order standing as to costs and otherwise, and inasmuch as my Lord took the view that the appellants should be given the costs of this appeal I am prepared to concur in that.

Order varied.

Solicitors: *Stibbard, Gibson & Co.*, for *Rupert Wood*, Ashton-under-Lyne; *William Richards*, Denton; *Sharpe, Pritchard & Co.*, for *P. M. Heath*, Town Clerk, Manchester.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

Re ACHILLOPOULOS. JOHNSON v. MAVROMICHALI

[CHANCERY DIVISION (Tomlin, J.) March 15, 22, 1927, January 16, 1928]

[Reported [1928] Ch. 433; 97 L.J.Ch. 246; 139 L.T. 62]

Administration of Estates—Foreign testator—Attorney administrator of executor—Obligation to pay English debts and foreign debts of which he has notice—Liberty to pay balance to principal without foreign advertisement.

The duty of an attorney administrator for a foreign principal, that principal being the executor or person in the position of executor under the law of the domicile, is to ascertain and pay the debts owing in England. Unless he has notice of some foreign debt he is then free to hand over the surplus to his principal without the necessity of foreign advertisement or taking any active steps abroad to ascertain the position with regard to foreign debts. The executor or person in that position is the person directly responsible for the payment of foreign debts.

Notes. As to administration *durante absentia*, see 16 HALSBURY'S LAWS (3rd Edn.) 240–243; and for cases see 23 DIGEST (Repl.) 202–206.

Cases referred to:

- (1) *De La Viesca v. Lubbock* (1840), 10 Sim. 629; 59 E.R. 760; 23 Digest (Repl.) 205, 2420.
- (2) *Eames v. Hacon* (1881), 18 Ch.D. 347; 50 L.J.Ch. 740; 45 L.T. 196; 29 W.R. 877, C.A.; 23 Digest (Repl.) 205, 2421.
- (3) *Re Rendell, Wood v. Rendell*, [1901] 1 Ch. 230; 70 L.J.Ch. 265; 83 L.T. 625; 49 W.R. 131; 45 Sol. Jo. 78; 23 Digest (Repl.) 205, 2422.
- (4) *Re Dewell, Edgar v. Reynolds* (1858), 4 Drew. 269; 27 L.J.Ch. 562; 31 L.T.O.S. 50; 4 Jur.N.S. 399; 6 W.R. 404; 62 E.R. 104; 23 Digest (Repl.) 159, 1729.

Originating Summons.

By his will dated Mar. 28, 1910, Sophocles Konstantin Achilopoulos (hereinafter called "the testator"), a Greek banker residing at Alexandria in Egypt, appointed as his "heirs" his wife Sofia S. K. Achilopoulos (who predeceased him) and his three daughters (defendants to the summons), Maria (wife of A. T. Mpasia), Helen (wife of N. G. Theotoki), and Aristis S. K. Achilopoulos. The testator gave to

A each of his three daughters one-third of one-third of his estate absolutely, and as to the remaining two-thirds he gave the income arising therefrom to his wife for life, and after her death, as to three-fourths of such two-thirds of his estate, to his three daughters, subject to certain conditions, and the remaining one-fourth to the Greek nation, subject to certain conditions. And after making certain legacies as in the will more particularly mentioned, the testator appointed as his executors his wife, his sons-in-law A. T. Mpsia and N. G. Theotoki (both since deceased), his chief clerk, K. D. Kaloglopoulon, and Sir Everard A. Hambro, K.C.V.O. By a codicil dated May 3, 1916, the testator revoked the appointment of Sir E. A. Hambro as an executor of his will, and in his place appointed Petros K. Mavromichali, the husband of his daughter Aristis (one of the defendants, and who had married since the will), as an executor thereof. The testator died at Alexandria on Mar. 12, 1924, at a very advanced age. At the date of his death—although he had resided for a considerable number of years in Alexandria, he still retained his Greek nationality—and, although there was a doubt as to his domicile, yet, as he was a Greek national, all matters relating to his personal status and property were, according to the evidence, subject to Greek law. On Mar. 13, 1924, the testator's will and codicil were, in accordance with Greek law, deposited with the Greek consular court at Alexandria, but no judicial act was performed by that court. At the time of his death the testator was possessed of very considerable property, approximating in value to the sum of £2,000,000, of which there were considerable English assets to the value of £80,000, or thereabouts. Such assets consisted of various registered stocks in English companies, standing in the names of certain English banks, and certain accumulations of money on deposit at such banks. It having become necessary that administration should be taken out in England in respect of the English portion of the estate, a power of attorney was given by the defendant Aristis Mavromichali (the daughter of the testator, and one of the "heirs" mentioned in the will) to the plaintiff Percy M. Johnson for that purpose, and, on Jan. 30, 1925, letters of administration with the will and codicil annexed were granted by the Principal Probate Registry to P. M. Johnson as the lawful attorney of Aristis Mavromichali for her use and benefit in respect of such English assets, and until further representation should be granted. The attorney administrator duly paid the estate duty and other duties on the testator's English assets, and all English liabilities of which he had notice, and issued the usual advertisements in "The Times" and "London Gazette" for claims of creditors to be sent in, but did not issue any advertisements in any foreign newspapers. The plaintiff was desirous of handing over the testator's English property and assets to the three defendants as being the persons designated as heirs in the will, but before doing so desired to obtain the directions of the court as to how he should proceed, as to what steps he should take to ascertain to whom he should pay such assets, and as to how he should procure a good discharge on payment over to the proper persons. The opinion of eminent Greek lawyers was obtained, which showed that, by Greek law, the property of a testator vested wholly and exclusively in his heirs, who alone could administer the property of the deceased, the executors of a will merely exercising supervisory functions, and that, therefore, the defendants, the three daughters of the testator, as "heirs," were able to give a valid receipt to the attorney administrator.

H An originating summons was taken out by the plaintiff, as the person to whom I letters of administration with the will and codicil annexed had been granted as the attorney of A. Mavromichali for directions as to what notices by advertisement he ought to issue for claims against the testator's estate, and that it might be determined whether the plaintiff was at liberty to hand over the assets of the testator come to his hands to the defendant A. Mavromichali or, alternatively, to the defendants jointly as such heirs of the testator, and generally that directions should be given as to how he should deal with the assets. After the matter had been adjourned into court and the case opened, a question arose whether each one of the "heirs," who were all defendants to the summons, was, by Greek law, able to deal

with the estate apart from, and independently of, the others, and it stood over for this point to be dealt with. As a result of inquiry a fresh power of attorney was obtained from all three defendants, appointing the plaintiff and a Mr. Ralph Wordsworth the attorneys of the defendants for the purpose of obtaining fresh letters of administration. The addition of Ralph Wordsworth was rendered necessary under the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 160. Accordingly, on Dec. 16, 1927, fresh letters of administration with the will annexed were granted by the Principal Probate Registry to the original plaintiff and R. Wordsworth as the defendants' attorneys, and the former grant dated Jan. 30, 1925, was revoked by order of the Probate Division of the High Court on July 7, 1927. The two survivors of the executors appointed by the testator's will were also ordered to be added as co-defendants to the summons, namely, Petros K. Mavromichali and Konstantinon D. Kaloglopoulon.

Wilfred Greene, K.C., and *Tillard*, for the plaintiffs, the attorney administrators, referred to *De La Viesca v. Lubbock* (1); *Eames v. Hacon* (2); *DICEY'S CONFLICT OF LAWS* (3rd Edn.), p. 714, note g; *Re Rendell* (3); and *Re Dewell* (4).

H. C. Bischoff for the defendants.

TOMLIN, J.—The testator was a Greek national. Early in life he settled in Egypt, and, having lived to a great age, died a Greek national, but probably domiciled in Egypt. On the evidence before me, it appears that, under Egyptian law, a Greek national domiciled in Egypt is subject to Greek law. It, therefore, is immaterial whether the domicile was Egyptian; in either alternative the Greek law governs. The testator made a will and codicil under which the three defendants who are named in the summons in its original form are nominated by his will as his "heirs." His widow in fact was also nominated, but she predeceased him, and the effect of the evidence of Professor Streit, one of the experts on Greek law, seems to me to be that the three defendants to whom I have referred are, under Greek law, to-day the heirs of the deceased, having regard to the form of the will. By the will and codicil there were also named executors, all of whom, except two, are now dead. The surviving executors were not in the first instance made defendants, but have been added by amendment.

The evidence with regard to Greek law is this. Under the law of that country, there is no system at all by which somebody is granted a formal position corresponding with executor or administrator in this country; on the contrary, those persons who are the heirs are fixed by law with rights and duties corresponding with the rights and duties of the executor or administrator under English law, including the duty of paying the debts. The heirs have now authorised an application in this country for a grant of administration with the will annexed to the plaintiffs as their attorneys. In the first instance, one only of the defendants was the principal, and Mr. P. M. Johnson, the original plaintiff, was the attorney. As the result of some difficulties which might arise from that position, when the matter first came before me last year, I ordered an adjournment, with the result that now there are two plaintiffs—Mr. Johnson and his partner Mr. Wordsworth—and there has been a fresh grant to the two plaintiffs as attorneys for all three defendants. So that the position to-day is this: there are in this country administrators with the will annexed, attorneys for principals who, under the law of domicile, are not executors or administrators in our sense of the term, because the law of the domicile does not recognise such, but persons who are, under that law, vested with the same rights and duties as an executor or administrator over here. I may add, it appears that, under the Greek law, the position of the executor so called is merely one of the supervision. It is not very clear what are his precise functions, but, having regard to the fact that the executors are parties here and assent to the order, it is immaterial for me to examine their position more closely. I think the only question which arises in this case is this: Whether the persons who are charged with the payment of debts under the law of the domicile, not by virtue of any formal act of probate or grant of administration, but by mere force of law,

A are in a worse position than the legal personal representative in a case where the law of the domicile recognises the formal creation of the office of executor. There is no question, I think, but that where a testator domiciled abroad has died, and the executors, under the law of the domicile, have procured a grant in this country by their attorneys for him, the court is free, in proper circumstances, to authorise the administrator to hand over the surplus of the assets in this country to the executors of the law of the domicile. The problem raised by the summons is whether there is any distinction between the case where the principal is, under the law of the domicile, an executor, and where the principal under the law of the domicile is not an executor but only the person who, by virtue of his interest, is charged by the law of the domicile with the duties which, under our law, are imposed on the executor. For my part, I can see no distinction at all. It seems to me that all that the court has to do is to satisfy itself that the principal is the person who, under the law of the domicile, is bound to perform the functions which are imposed by our law on an executor or administrator; in other words, that they are the persons who, under the law, are responsible for seeing that the debts are paid and that the ultimate surplus gets into the proper hands. In this case, I am satisfied by the evidence to which my attention has been called that the three persons who were made original defendants to the summons are the persons who, by the law of the domicile, under the Greek law, are charged with the duty of administering the estate, paying the debts, and seeing that the surplus gets into the proper hands. That being so, I am free, if I see fit, to give to the administrators over here liberty to hand over any surplus to those defendants.

E The only other matter is, what is the obligation of the administrators in respect of debts before handing over the surplus? It appears that the administrators have issued the usual statutory advertisements in this country, and have paid all the debts, except possibly some revenue claim which remains to be settled, and also it appears that they have had no notice of any foreign debts. There is some evidence that there are no foreign debts, but the question is whether, in those circumstances, I ought to give liberty to hand over without making any provision or giving any direction in regard to foreign debts. I think I am free to do so. I take the view that the duty of an attorney administrator for a foreign principal, who is the executor of the law of the domicile, is that he is to take the necessary steps for ascertaining and paying the English debts or the debts payable in the United Kingdom, but, having done that, he is free to hand over the surplus (unless he has notice of some foreign debt) without the necessity of foreign advertisements or taking any active steps abroad to ascertain the position in regard to the debts. He is free to hand over the surplus to his principal—being the executor or person in the position of executor under the law of the domicile—because that person is the person directly responsible for the payment of foreign debts. Therefore if, up to the date of handing over, he has no notice of any foreign debts, he is justified in handing over the surplus.

H Solicitors: *Wordsworth, Marr, Johnson & Shaw.*

[*Reported by L. MORGAN MAY, Esq., Barrister-at-Law.*]

MEDWAY OIL AND STORAGE CO., LTD. v. CONTINENTAL CONTRACTORS, LTD.

[HOUSE OF LORDS (Viscount Haldane, Viscount Dunedin, Lord Shaw, Lord Carson and Lord Blanesburgh), April 30, May 1, 3, October 30, 1928]

[Reported [1929] A.C. 88; 98 L.J.K.B. 148; 140 L.T. 98;
45 T.L.R. 20]

Costs—Counterclaim—Claim and counterclaim dismissed—Costs to which defendant is entitled.

Where a defendant has succeeded in his defence but failed in his counterclaim he is entitled to the costs which he has actually and properly incurred in defeating the claim, but he is not entitled to any costs which he would not have incurred had he not counterclaimed. The plaintiff is only entitled to such costs as he would not have incurred had he not been compelled to meet the counterclaim, but in the absence of special directions by the court there is to be no apportionment.

Decision of the Court of Appeal, [1928] 1 K.B. 238, reversed.

Saner v. Bilton (1) (1879), 11 Ch.D. 416, and *Wilson v. Walters* (2), [1926] 1 K.B. 511, approved.

Christie v. Platt (3), [1921] 2 K.B. 17, distinguished.

Notes. Applied: *The Stentor*, [1934] All E.R.Rep. 545; *Cinema Press, Ltd. v. Pictures and Pleasures, Ltd.*, [1945] 1 All E.R. 440. Referred to: *Amsterdamsche Lucifersfabrieken v. H. and H. Trading Agencies, Ltd.*, [1940] 1 All E.R. 587.

As to costs where the defendant sets up a counterclaim, see 29 HALSBURY'S LAWS (2nd Edn.) 518–520; and for cases see 40 DIGEST (Repl.) 473, 474.

Cases referred to:

- (1) *Saner v. Bilton* (1879), 11 Ch.D. 416; 48 L.J.Ch. 545; 40 L.T. 314; 27 W.R. 472; 40 Digest (Repl.) 473, 572.
- (2) *Wilson v. Walters*, [1926] 1 K.B. 511; 95 L.J.K.B. 624; 134 L.T. 597, D.C.; 40 Digest (Repl.) 473, 574.
- (3) *Christie v. Platt*, [1921] 2 K.B. 17; 90 L.J.K.B. 555; 124 L.T. 649, C.A.; 40 Digest (Repl.) 472, 571.
- (4) *Mason v. Brentini* (1880), 15 Ch.D. 285; 43 L.T. 557; 29 W.R. 126, C.A.; 40 Digest (Repl.) 473, 573.
- (5) *Baines v. Bromley* (1881), 6 Q.B.D. 691; 50 L.J.Q.B. 465; 44 L.T. 915; 29 W.R. 706, C.A.; 40 Digest (Repl.) 470, 551.
- (6) *Re Brown, Ward v. Morse* (1883), 22 Ch.D. 377; 52 L.J.Ch. 524; 49 L.T. 68; 31 W.R. 936, C.A.; 40 Digest (Repl.) 471, 556.
- (7) *Shrapnel v. Laing* (1888), 20 Q.B.D. 334; 57 L.J.Q.B. 195; 58 L.T. 705; 36 W.R. 297; 4 T.L.R. 241, C.A.; 40 Digest (Repl.) 468, 536.
- (8) *Atlas Metal Co. v. Miller*, [1898] 2 Q.B. 500; 67 L.J.Q.B. 815; 79 L.T. 5; 46 W.R. 657; 42 Sol. Jo. 653, C.A.; 40 Digest (Repl.) 473, 577.
- (9) *James Crean & Son, Ltd. v. M'Millan*, [1922] 2 I.R. 105; 40 Digest (Repl.) 474, *532.

Appeal from an order of the Court of Appeal (BANKES, ATKIN and LAWRENCE, L.JJ.) reported [1928] 1 K.B. 238.

The plaintiffs, the sellers, brought an action against the buyers claiming £62,000 damages for the repudiation of a contract under which the buyers undertook to take delivery of a quantity of oil. The sellers alleged that the original contract time for delivery had been extended at the request of the buyers because the latter's tanks were not ready to take all the oil. The buyers denied that any extension of time had been asked for or given, and they counter-claimed £46,000 damages, asserting that breaches of contract on the part of the sellers justified them in putting an end to the contract. MACKINNON, J., dismissed both claim and counter-claim and gave the costs of the claim to the defendants, and the costs

A of the counter-claim to the plaintiffs. On taxation the taxing master held that the costs of certain issues were attributable to the claim and those of other issues were attributable to the counter-claim and taxed the costs accordingly. On appeal MacKINNON, J., ordered re-taxation as he differed from the taxing master with regard to the issues which were attributable to the claim and those which were attributable to the counter-claim. The Court of Appeal held, reversing the decision

B of MacKINNON, J., that where in an action all the issues save the amount of damages raised on the pleadings and at the trial were common both to the action and to the counter-claim, though in a varying degree, and both the claim and the counter-claim were dismissed with costs, on taxation the costs must be apportioned under each issue between the claim and the counter-claim and be payable by the parties accordingly. The buyers appealed.

C *Van den Berg* for the appellants.
Cyril Atkinson, K.C., and *Roland Burrows* for the respondents.
 The House took time for consideration.
 Oct. 30. The following opinions were read.

D **VISCOUNT HALDANE** (read by LORD DUNEDIN, who prefaced the judgment with the following observations: "Before his lamented death VISCOUNT HALDANE had prepared a judgment in this case and, as the conclusion he arrived at is that which will be arrived at by the vote of the House, in accordance with precedent I propose to read his judgment").—I think that the real question in this case in the main is one of law. It relates to the principle which ought to prevail in the

E taxation of costs when the successful defendants to an action have put in a counter-claim and have been defeated on it with costs. In this action the appellants, who were defendants, succeeded in defeating with costs a claim for a very substantial sum. This was the effect of the judgment of MacKINNON, J., who tried the case. His judgment on the merits was reversed by the Court of Appeal, but subsequently

F restored by this House. There was controversy over the result arrived at by the taxing master when taxing the costs under the judgment. There was an appeal to MacKINNON, J., from his order, and subsequently a further appeal to the Court of Appeal. That court altered the order, and it is from the judgment thus altering it that the present appeal is brought. The costs as directed in the end to be taxed appear to have finally resulted in £987 9s. 11d. being awarded to the respondents, the plaintiffs, who failed, as costs of the trial, and in £1,808 4s. 3d. being given

G to the appellants as like costs. The respondents have been given £288 6s. 2d. for the costs of the appeal and the appellants have been awarded £583 19s. 10d. for such costs. The amounts in issue, even as to costs alone, are thus substantial. The large amount of costs awarded to the respondents, who failed in their action, but succeeded on the defence to the counter-claim, arises from the decision given that, no damage having been shown to have been caused by them, they were,

H although in breach, entitled to judgment on the counter-claim with costs. The amount of the costs ultimately allocated to the counter-claim is the result of the application of a principle which MacKINNON, J., refused to adopt, but which the Court of Appeal has applied. The view of the Court of Appeal is that where the plaintiff fails with costs in his claim and the defendant with costs in his counter-claim, the proper mode of taxation is not, as MacKINNON, J., thought, to give the

I defendant all costs incurred in resisting the claim, depriving him only of any costs which he has incurred exclusively in supporting his defeated counter-claim. In that view no question of what is called apportionment can arise. The Court of Appeal has, on the contrary, held that where evidence is given of facts which are put forward in connection with the claim and the counter-claim in common, there is no reason why the plaintiff should not be allowed the costs incurred in relation to them when resisting the counter-claim on which he has got judgment, and the duty of the taxing master is to apportion the amounts when taxing the entire costs. There is a real divergence in the working out of the two principles, notwithstanding

that there are cases in which it is impracticable to rely on either as an abstract principle standing by itself. One brief may, for instance, be given to counsel on both claim and counter-claim, and it may obviously be necessary that there should be an apportionment of the single inclusive fee paid with it. But in most other cases no such difficulty arises. It is, therefore, necessary to turn to the character of the litigation in the present case to see whether it comes within the character that is not exceptional, so that the principle adopted by MACKINNON, J., if indeed it be right as a matter of law, can be applied. A B

The respondents sued the appellants to recover damages for an alleged breach of contract to take delivery as purchasers of a large quantity of oil. The appellants succeeded in establishing that the respondents had failed to make delivery of the oil in due time under the contract, and they counter-claimed as damages the difference between the contract and market prices of the oil, alleging that the respondents had themselves wrongfully repudiated their contract of sale. The action was tried before MACKINNON, J., who gave judgment on the claim of the respondents as plaintiffs for the appellants (defendants) with costs, and on the counter-claim for the respondents with costs. The respondents appealed to the Court of Appeal, and the appellants cross-appealed against the dismissal of the counter-claim. The Court of Appeal reversed the judgment of MACKINNON, J., and gave judgment for the plaintiff respondents for £44,788 6s. 8d. with costs, including the costs of the appeal as well as of the cross-appeal, which was dismissed. The appellants then appealed to this House, which reversed the order of the Court of Appeal and restored that of MACKINNON, J. (The judgment of the latter had been that judgment be entered for the defendants (the present appellants) with costs and that judgment be entered for the plaintiffs on the counter-claim with costs of the counterclaim.) The ground assigned by MACKINNON, J., for dismissing the counter-claim was that it was not shown that the defendants had suffered any damage by reason of the plaintiffs having failed to fulfil their contract, and that the latter were, therefore, entitled to have the counter-claim dismissed and with costs, if there were any separate costs of the counter-claim. (The judgment of this House reversed that of the Court of Appeal and restored the judgment of MACKINNON, J.) There was no reversal of the judgment as regards the counter-claim, the dismissal of which by MACKINNON, J., with costs, therefore, stands. C D E F

It becomes necessary to ascertain what the matters put in issue and tried really were. As to this all the courts are in substantial agreement. The issues were four in number: (i) Whether there was an agreement, as alleged by the plaintiff respondents, to extend the time for delivery of the oil. This has been finally disposed of in favour of the appellants by the judgment here. (ii) Whether the appellants' tanks were ready to receive the oil at the contract dates of delivery. (iii) The questions arising with reference to the guarantee. (This was an agreement contained in cl. 6 of the original contract under which the buyers were, if so required, to give the sellers a floating bankers' guarantee for their payments to their own vendors in respect of a certain amount of the oil to be delivered under the contract.) (iv) The allegation of a conspiracy by which it was said that the appellants sought to arrange with the Russian sellers that the latter should fail to supply the respondents with oil, so that the appellants could get out of their contract, and then deal directly with the Russians. (On this again the appellants have finally succeeded.) All these issues were decided in favour of the appellants. MACKINNON, J., considered the first, the third, and the fourth arose solely on the claim. The second, which related to the tanks being in readiness, he thought was relevant on both the claim and the counter-claim, but that, as the appellants had succeeded on that issue, the respondents were entitled only to such extra costs arising in connection with it as were occasioned by the counter-claim. The appellants were, in his opinion, entitled to the costs of this issue which they had actually incurred in defending the action, and the respondents were entitled only to such costs as they would not have incurred had they not been compelled to meet the counter-claim. It is at this point that the Court of Appeal overruled the learned G H I

A judge on the question of taxation. They held that there was a substantial claim and a substantial counter-claim arising out of the same contract, and that, except as to the amount of the damages respectively claimed, all the substantial contentions on either side were common to both claim and counter-claim. There was no reason why the respondents should not be allowed costs incurred in resisting the counter-claim merely because the facts they put forward were common to both claim and counter-claim. The taxing master ought, they held, to have apportioned to the counter-claim such portion of the common items as had arisen and been incurred by reason of the counter-claim.

There is obviously here a conflict of opinion with *MACKINNON, J.*, about a point of principle. One view is that as the costs of the issues were, as the taxing master found, properly incurred in defeating the claim they should be given to the appellants, the respondents getting only such extra costs as were incurred by reason of the counter-claim and but for it would not have been incurred. The other view is that the proper principle of taxation under a judgment such as the judgment in this case is that, when one party has got the costs of a claim and another of a counter-claim, the taxing master ought to allow to each party all such costs as he has properly incurred in maintenance or resistance, as the case may be. When, therefore, the matters in controversy are common to both claim and counter-claim, the costs, so far as common to both claim and counter-claim, should be apportioned. The question is one which, as might be expected, has on a good many occasions come before the judges, and is of a kind, being one of the practice of the courts, in which what they have laid down is of much importance although the decisions are not technically binding in this House. I propose, therefore, to examine the most important of the authorities.

In 1878 *FRY, J.*, decided *Saner v. Bilton* (1). There the plaintiff's claim and the defendant's counter-claim had, as here, both been dismissed with costs. The question was whether the defendant ought to pay only so much of the costs pertaining to the claim as were occasioned by the counter-claim, or whether the costs of all the proceedings which related to both claim and counter-claim should be apportioned. *FRY, J.*, consulted some of the most eminent of the taxing masters, who advised against apportionment. He afterwards gave a considered judgment, in which he said that analysis of the practice before the Judicature Acts threw but little light on the question before him. The true view seemed to him to be that, the plaintiff having begun the litigation, and the counter-claim having only arisen in it as a consequence, the claim should be treated as if it stood by itself, and the counter-claim should bear only the amount by which the costs of the proceedings had been increased by it. Special directions might be given by the court which would vary the application of the rule, but in a case where both claim and counter-claim were simply dismissed with costs, there should be no apportionment, and no question of quantum arose. In 1880 the Court of Appeal, consisting of *JESSEL, M.R.*, and *JAMES and BRETT, L.JJ.*, took the same view in *Mason v. Brentini* (4), *JESSEL, M.R.*, saying that he entirely agreed with the decision in *Saner v. Bilton* (1) and with the reasons given by *FRY, J.*, and that the judgment of the latter was to be considered as expressing the rule of the court.

Baines v. Bromley (5) was decided in 1881 by the Court of Appeal, consisting of *BRAMWELL, BRETT*, and *COTTON, L.JJ.* The circumstances of the case were different in this respect, that the plaintiff had recovered on his claim with costs, and that the defendant had recovered a larger amount with costs on a counter-claim. The Court of Appeal, however, held that, the case not being one of set-off but of counter-claim, the proper course was to take the claim as if it and its issues were an action, and the counter-claim and its issues as though also an action. In such a case *BRETT, L.J.*, observes that if there were items common to both actions the taxing master would divide them. But he did not explain what were the sort of items in which this would be so. *BRAMWELL and COTTON, L.JJ.*, proceeded simply on the ground that the plaintiff, being declared entitled to his costs of suit, had been wrongly allowed only the costs of the issues on which he succeeded.

Re Brown, Ward v. Morse (6) was decided in 1883 by CHITTY, J., and then by the Court of Appeal (BAGGALLAY, COTTON, and FRY, L.JJ.). The plaintiff had succeeded on a claim and the defendant on a counter-claim, the latter recovering the larger amount. Each obtained an order for the costs. It was contended before CHITTY, J., that there ought to be apportionment. But that learned judge, whose experience in such matters was very great, held that the principle of *Saner v. Bilton* (1) applied where the plaintiff who had commenced the litigation was wrong, and that it must also apply where the plaintiff was right and the counter-claiming defendant was also right. The effect of the Judicature Act was to make two writs unnecessary, but the plaintiff was to recover none the less the whole costs of the claim in the action. He referred to the dictum of BRETT, L.J., in *Baines v. Bromley* (5) about the taxing master dividing items common to both actions, and said that on inquiry he was unable to find that there had been made any apportionment, notwithstanding the observation in the Court of Appeal. His own view appears to have been that there could be no apportionment in the absence of special direction. The Court of Appeal took the same view as CHITTY, J. The lords justices thought that the principle of *Saner v. Bilton* (1) applied, just as much where claim and counter-claim both succeeded as where they both failed.

In *Shrapnel v. Laing* (7), decided in 1888, in the Court of Appeal (ESHER, M.R., and FRY and LOPES, L.JJ.), the same principle was applied. The plaintiff had recovered on his claim and the defendant on a counter-claim, both with costs. It was sought to deny to the plaintiff the general costs of his action because the amount recovered on the counter-claim was larger. But the court ordered the taxation to proceed as though the claim were an action in itself, and the counter-claim also an action, to be treated as though there had been no claim. If either of the parties fails in particular issues his costs will be to that extent disallowed, but they will not belong to the other side. ESHER, M.R., explained his dictum in *Baines v. Bromley* (5) about the taxing master dividing common items as limited to items of which both parties get the advantage. Of these, he said, there were very few, the costs of the writ which includes the whole of the proceedings might be one.

In *Atlas Metal Co. v. Miller* (8) LINDLEY, M.R., in the Court of Appeal reviewed the authorities in a careful judgment. He threw some doubt on the dictum of ESHER, M.R., in *Baines v. Bromley* (5) about common items, and said there could not be included in the costs of a counter-claim any costs not occasioned by its being a counter-claim but saved by its being what it is. There can be no apportionment of what are properly costs of the action. Such costs where ascertained must be paid by the party ordered to pay them. This judgment of the Court of Appeal obviously follows the principle of *Saner v. Bilton* (1), and makes it clear that "no costs," to use the words of LINDLEY, M.R., "not incurred by reason of the counter-claim can be costs of the counter-claim." LINDLEY, M.R., and CHITTY, L.J., laid down that the cases were in reality in agreement in the following points: (i) A plaintiff who is to pay or be paid the costs of his action must pay or be paid the whole of such costs as if there were no counter-claim. (ii) The defendant who fails on his counter-claim has to pay all the costs of it, the counter-claim being treated as an independent action. What do these costs include? The costs occasioned by it, and these only. The circumstance, for instance, that if there had been no action the costs of the counter-claim would have been larger because the defendant would then have had to issue a writ, does not make costs not incurred costs incurred, and the costs saved by not bringing a separate action cannot be regarded as costs incurred. Where there are no separate issues requiring special treatment the costs of the defence will be costs of the action, and so with the counter-claim also. Costs common to defence and counter-claim must necessarily be dealt with on this principle, but to apply it is a very different thing from apportioning what are properly costs of the action.

In the authorities which I have now cited successive Courts of Appeal have laid down a principle which is not only intelligible, but capable of being easily applied

A by the taxing master. It may work out apparently harshly in exceptional cases, but when these threaten to occur the remedy is to apply at the trial for special directions as to issues and details. The advantage of the principle is that it is a definite one, which lifts the subject out of the somewhat vague regions of apportionment. So the law had been settled since 1898, the year of the judgment in the *Atlas Case* (8). Even the minor questions suggested by ESHER, M.R., had been

B superseded, partly by the decisions of other judges and partly by his own subsequent observations. But in 1920 a change of attitude seems to have disclosed itself in the Court of Appeal. *Christie v. Platt* (3) was an interlocutory appeal decided by ATKIN and YOUNGER, L.JJ. To a claim by a landlady for rent against her tenant, the latter had pleaded that the demised premises, a furnished house, were uninhabitable. By way of counter-claim the tenant had repeated the allegations in

C his defence and claimed damages. Judgment was entered for the landlady on her claim for £200 and costs, and for the tenant on the counter-claim for £225 and costs. On each side the claim and counter-claim were dealt with in one brief. The taxing master allowed the plaintiff the fee to counsel at the trial and costs and expenses of witnesses. In taxing the defendant's bill of costs he allowed nothing in respect of these items. The Court of Appeal held that the taxation had proceeded on a wrong principle, and that the costs incurred in supporting the claim and opposing the counter-claim ought to be apportioned, and attributed to the costs of the claim and the counter-claim respectively. So, *mutatis mutandis*, with the cost of supporting the counter-claim and opposing the claim. In the particular circumstances of *Christie v. Platt* (3) it was, no doubt, tempting to deal so with the costs. I share the sense of ATKIN, L.J., that there was something in the

E result of the taxation which on the face of it must have been wrong. For although the defendant had recovered the larger amount on what was a cardinal question between the parties, the plaintiff was given on his case, which was practically uncontroverted, £214, while the defendant only got £3 0s. 5d. to cover the whole of his costs. I agree with ATKIN, L.J., that this must have been wrong. There were obviously costs incurred in common; the single fee on the brief given by the

F plaintiff is an example. It may be that this fee would not have been too much if there had been no counter-claim to meet. But that does not affect the fact that it was paid to the plaintiff's counsel to cover his services in both proceedings. It ought, therefore, to have been divided for the purposes of taxation. The same thing appeared to have been true of a good deal of the evidence put forward on the two sides. There may well be costs which have to be divided. In the *Atlas Case*

G (8) LINDLEY, M.R., at one point uses the word "apportioned," but that is where he is quoting ESHER, M.R., on another point. He himself goes on at once to say that while costs common to both claim and counter-claim must necessarily be dealt with in this way,

H "to do so is very different from apportioning what are properly costs of the action. Such costs when ascertained must be paid by the party ordered to pay them. They cannot have been increased by the counter-claim, and no part of them can properly be regarded as costs of the counter-claim."

I My Lords, the distinction between division and apportionment may in certain circumstances be a thin one. But under the rule as laid down by LINDLEY, M.R., and by the judges in the earlier case also, the distinction is fundamental. I do not criticise the result reached in *Christie v. Platt* (3) by ATKIN and YOUNGER, L.JJ. But I do find in their judgment some failure to recognise the importance of the distinction, and to lay emphasis on it. In a case in Ireland, *James Crean & Son, Ltd. v. M'Millan* (9), the question raised in cases such as *Christie v. Platt* (3) was considered by the courts, which contained three lords justices, the Lord Chancellor, and the Master of the Rolls, the case being finally disposed of by them on appeal in what was then the High Court of Appeal for Ireland. O'CONNOR, L.J., delivered a judgment which is as valuable as it is instructive, and there were exhaustive opinions expressed by the Lord Chancellor of Ireland and ANDREWS, L.J. They

disposed of the question as to how the costs should be borne when there was a counter-claim, in accordance with the principle initiated by *Saner v. Bolton* (1), and finally laid down by LINDLEY, M.R. There are expressions in the judgments which I should myself avoid, such as "apportionment." In using them they were obviously influenced by the expression used in *Christie v. Platt* (3), for they do not lay stress on the difference in principle of the *Atlas Case* (8) between apportionment and division.

In *Wilson v. Walters* (2) SCRUTTON and SARGANT, L.JJ., sitting as a Divisional Court only, had the following case before them. The plaintiff brought an action in the county court for damages caused by the negligent driving of the defendant's motor car. The defendant denied negligence, and counter-claimed for negligent driving by the plaintiff. The county court judge gave judgment on the claim for the defendant with costs, and on the counter-claim for the plaintiff with costs. The registrar, in taxing, first gave the defendant the costs of the claim. He then gave the plaintiff only such extra costs as were incurred in defending the counter-claim. Where in the latter case he came to an item which had been already dealt with in the costs of the claim he gave the plaintiff nothing in respect of it. But on appeal to the county court judge the latter held that whenever there was an item common to both claim and counter-claim it should be apportioned, believing that in so holding he was following *Christie v. Platt* (3). The Divisional Court allowed the appeal. They held that the issues on the claim and the counter-claim were one and the same. The defendant who succeeded was, therefore, *primâ facie* entitled to the whole costs of determining them. On the other hand, the plaintiff was only entitled on the counter-claim to such extra costs as were occasioned thereby. In so holding they treated themselves as following the authorities from *Saner v. Bolton* (1) down to the *Atlas Case* (8), and also the judgments of the majority in the Irish case of *Crean* (9). The principle applied in *Wilson v. Walters* (2) may have consequences in individual cases which would be harsh if the taxing master did not supervise the costs of claim and counter-claim closely, and split up the costs of items which are required by both. In such instances he takes an item, a single fee on the plaintiff's brief, for example, and splits it into two notional fees, the one attributable to the claim, and the other to the counter-claim. This is not an apportioning in which the payment is treated as a single item, and the question is to what it is attributable. It is in reality a notional division of what on the face of it is only one item. If the principle is not kept in mind confusion will follow, as was pointed out by LINDLEY, M.R., and other judges.

I now come to the judgment which we have to examine in the appeal before us. The learned judges of the Court of Appeal agreed neither with the taxing master nor with MACKINNON, J. In their order they expressed the opinion that with the exception of the issue whether or not there was an agreement to postpone deliveries, which the parties admitted to arise solely on this claim, all the other issues raised in the pleadings and at the trial were common to both the claims and the counter-claims. I pause to observe that this is not only contrary to what was found by MACKINNON, J., who tried the case, but is impossible to reconcile with the judgment of the Lord Chancellor in this House. The counter-claim raised another issue, which there is no need to consider, inasmuch as the counter-claim for wrongful repudiation was dismissed with costs. The order of the Court of Appeal went on to direct the taxing master to allow the respondents (the plaintiffs) all costs properly in fact incurred by them in defending the counter-claim, and to allow the appellants (defendants) all costs properly in fact incurred by them in defending the action, and directed that all common items be apportioned in the discretion of the taxing master accordingly. The direction given by MACKINNON, J., was in effect that when, as here, the defendant has succeeded in his defence, but failed in his counter-claim, he is entitled to the costs which he has actually and properly incurred in defeating the claim (including in this case the costs of the issues mentioned), but he is not entitled to any costs which he would not have incurred had he not counter-claimed. The plaintiffs are only entitled to such costs

A as they would not have incurred had they not been compelled to meet the counter-claim. The view taken in the Court of Appeal was very different. BANKES, L.J., said :

B "In considering what the real contest between the parties under each of these heads [the issues] was I do not think that justice can be done except by treating the costs of the litigation under each head as costs which must be apportioned if the order as to costs is to be complied with."

ATKIN, L.J., says that

C "It appears to me wrong both in law and fact to say that when a man sues for £62,000 and is sued in counter-claim for £46,000, and the event is to be determined by consideration of the same evidence, he incurs all the costs of evidence because of the claim. He seems to me obviously to incur the costs because of both, in other words the costs are occasioned by both. And it is quite irrelevant as to such costs to consider what he would have incurred if there was no counter-claim, that is with no other cause operating. The result of the rule now laid down is that where there is a substantial counter-claim, involving common evidence, the master will apportion. But apportion does not necessarily mean divide into equal moieties. He will decide how much D in fact should be attributed to the claim, how much to the counter-claim."

He thought that the statement of FRY, J., in *Saner v. Bilton* (1) that the plaintiff was to be represented as letting loose the waters of litigation, and therefore if unsuccessful should be in a worse position than an unsuccessful counter-claimant, unsatisfactory. LAWRENCE, L.J., concurred, being of opinion that the authorities E disclosed no consensus of view. He followed what was laid down in *Christie v. Platt* (3).

F The judgments in the Court of Appeal appear to me to go back in spirit as well as in letter on the series of decisions by FRY, J., JESSEL, M.R., LINDLEY, M.R., and other eminent judges whose opinions I have already examined. The purpose of these opinions was to find a principle which might extricate the law relating to taxation in cases like the present from the hopeless confusion in which FRY, J., found it. The successive decisions, down to *Christie v. Platt* (3), established a principle which in individual cases may seem a hard one. But it is a clear one, and in most cases will operate justly, as was pointed out by FRY, J., while in others the taxing master can correct the effect of applying it in isolation as an abstract rule, by dividing items as distinguished from apportioning general costs. G Such as it is the rule was one necessary to lay down in some form, and I think that the form in which it has been laid down here and in Ireland was adopted by the learned judges who did so because practice and authority alike pointed to it as the proper one. I am, therefore, of opinion that we must reverse the judgment of the Court of Appeal and restore that of MACKINNON, J. The applicants should have their costs here and below.

H **VISCOUNT DUNEDIN.**—I am glad that in this case there is no difference of opinion between my colleagues who are members of the English Bar. I should have been sorry indeed to have been compelled to give a casting vote on a point which is essentially one of English practice. I may, however, permit myself two observations. The result at which your Lordships have arrived seems to me the only result which is consistent with the justice of the case. Further, had the same case arisen in Scotland, where the whole practice as to the form of interlocutors I dealing with expenses and the duties of the auditor therein arising is quite different—a practice which it is not hujus loci to describe—the result would have been the same as that which is now attained.

LORD SHAW.—I feel thoroughly satisfied with the analysis of the decisions affecting this point of English practice, made by the noble and learned and lamented viscount who occupied the Woolsack during the hearing, and whose opinion has been read. In the course of the able address of counsel for the

appellants I put to him a question in order to test in the concrete what were the real topics of contest between the parties on which cost had been incurred. There is a book of the evidence led and of the documents produced in this litigation. It measures 832 pages. My question was: How much of that was occupied with matter relevant to or necessitated by the counter-claim? The answer was that out of the 832 pages only ten were so occupied. The learned counsel for the respondent very faintly challenged this proportion and thought ten pages to be rather too slender an allowance. To deal with such a case on the footing adopted by the Court of Appeal would manifestly lead to a state of matters in which the counter-claim costs awarded would bear no real relation to the costs which the counter-claim actually caused. The other course, and that now proposed, will very largely avoid such a result; and it is, I cannot doubt, the course supported by the main body of authority in England. I agree to the motion to be submitted to the House, and I may be allowed to add further that I concur in the observations of Viscount DUNEDIN.

LORD CARSON.—We have the advantage of knowing from the judgment of MacKINNON, J., who tried the case, that his view at the end of the trial was that the plaintiffs should only receive "such costs as are occasioned by the counter-claim," and I am not surprised that when, on the order as framed, the taxation of costs resulted in £900 being awarded to the defendants and £1,700 to the plaintiffs the result was, as the learned judge has said, "exceedingly startling." In point of fact the defendants had won on every issue, whether considered as an issue on the claim or on the counter-claim, and only failed in obtaining judgment upon the counter-claim by reason of their being unable to prove any damage flowing from the breach of contract which they had succeeded in proving. Among the issues raised was a charge of fraud against the defendants with reference to what has been shortly described as the conspiracy with the Russians. This issue was found in favour of the defendants, but they have been ordered under the taxation appealed from to pay the whole of the costs of such issue as costs of the counter-claim. The mere statement of such an injustice is of itself sufficient to demonstrate that the taxing officer must have acted upon some erroneous principle. I have been unable myself to understand how after the judgment in *Atlas Metal Co. v. Miller* (8) already referred to, which is a judgment of the Court of Appeal, and was reported as far back as 1898, any court felt entitled in such a case as the present one to disregard the principles laid down in that case and which, so far as I am aware, have been generally applied in cases of the failure of a counter-claim when there were no special directions found necessary. The noble viscount, Lord HALDANE, examined all the authorities, and it is unnecessary for me to refer to them in detail. I think the judgments referred to by the noble viscount in *James Crean & Son, Ltd. v. M'Millan* (9), which were delivered in a case on all fours with the present one, are well worthy of perusal, and I would like specially to refer to the summary of conclusions arrived at by ANDREWS, L.J., which, taken as a whole, fairly represent the principles to be deduced from the various authorities and apart from special circumstances. I think MacKINNON, J., stated the principle applicable to this case very shortly when he says:

"I think the proper principle to apply is that which is really stated in *Wilson v. Walters* (2), namely that when a matter arises both on the claim and the counter-claim the plaintiffs are only entitled to such extra costs as were occasioned by the counter-claim."

I agree with the noble viscount, Lord HALDANE, that the use of the word "apportion" is likely to be misleading. I am not sure I understand in the present case what it means or on what principle it can be adjusted. For example, upon the issue of fraud to which I have referred, found in favour of the defendants, how are the costs to be "apportioned" as between the plaintiffs and the defendants and so with the other issues? Such a method of dealing with the costs seems to impose

A upon the taxing master a duty in the exercise of which he is afforded no guidance whatever. I agree that this appeal should be allowed and that the judgment of MacKINNON, J., should be restored.

B LORD BLANESBURGH.—I was party with ATKIN, L.J., to the decision of the Court of Appeal in *Christie v. Platt* (3). I am free, however, to confess that until the full discussion of that case on this occasion I was not conscious that there lurked in its judgments the pronounced departure now suggested from the rule of taxation enunciated in such authorities as *Saner v. Bilton* (1), *Mason v. Brentini* (4), and *Atlas Metal Co. v. Miller* (8)—a rule which, for brevity's sake, it may be convenient to refer to as the rule in *Saner v. Bilton* (1). That no departure as such from the rule was, at least consciously, made in *Christie v. Platt* (3) perhaps C sufficiently appears from the fact that the three cases just mentioned were all of them cited or referred to by ATKIN, L.J., in his judgment and on their effect was rested the order then pronounced. I do not, however, at this stage further refer to this aspect of *Christie v. Platt* (3). I reserve that for later consideration. What I desire to call attention to now was the fundamental misunderstanding of the *Saner v. Bilton* (1) rule disclosed in *Christie v. Platt* (3) which it was the main D purpose of that decision to correct. *Christie v. Platt* (3) so regarded is, in the circumstances of the present case, as I see them, a completely reliable guide to the solution of this appeal.

The action was one by a landlady against her tenant of a furnished house for £200 rent due. By her defence, the tenant, after a formal traverse of the tenancy agreement, alleged in a series of paragraphs that the demised premises were uninhabitable. In a counter-claim, she repeated by reference these paragraphs of her E defence, and concluded with a claim for damages. The defendant's allegations were denied by the plaintiff. By the time of the trial, it had become clear, if indeed it was ever in doubt, that the alleged condition of the premises was no defence to the plaintiff's claim for rent. Her case in support of that claim was accordingly confined to proof of the tenancy agreement and of the rent due thereunder. That proof given, and the evidence was not questioned, she left the F defendant to make good her allegations if she could. A full hearing ensued, with an examination of witnesses on both sides, and, in the result, SANKEY, J., found it to have been an implied term of the tenancy agreement that the demised premises should be reasonably fit for occupation; that they had not been so in fact; and that the defendant had suffered damage in consequence. He gave judgment G for the plaintiff on the claim for £200 and costs. On the counter-claim he gave judgment for the defendant for £225 and costs. The master taxed the costs. ATKIN, L.J., said:

H "To state his conclusion is enough to show that there is some flaw in his reasoning. He has taxed the plaintiff's costs at £214 5s. and the defendant's costs at £3 0s. 5d.; and the defendant, who won on the issue involving nearly all the expense, is allowed £3 while the plaintiff who succeeded on an unopposed allegation recovers £214. That must be wrong."

I How very wrong is perhaps even more strikingly apparent when it is remembered that the bulk of the plaintiff's £214 represented her costs of a disputed issue on which she had entirely failed, and that no part of her costs of the same issue on which she had succeeded was allowed to the defendant. The explanation of the taxing master's action (and it was on this that the question before the court turned) may again be given in ATKIN, L.J.'s words:

"He reasoned thus. The defendant pleaded the breach of the implied term as a defence to the plaintiff's claim for rent; therefore, the expense of proving the breach is attributable to the claim. The result of this reasoning is that he has imputed these costs to an irrelevant plea, and has allowed them no part or share in establishing a relevant and substantial counter-claim. This has produced a miscarriage of justice."

The lord justice pointed out the remedy. The directions as to taxation given in the cases cited were all subject to this overriding condition which, expressed in the terms applicable to the case in hand, was that there must be ascertained what were the costs really incurred by the plaintiff in establishing her claim and what were those really incurred by the defendant in establishing her counter-claim. The taxation was, accordingly, referred back to the taxing master to ascertain these matters and award accordingly.

The effective decision in *Christie v. Platt* (3) emerges, I think, very clearly from this statement. And it is very apposite here. It is that in determining for the purposes of taxation in such a case as this whether a particular issue is an issue on the claim or on the counter-claim or on both the claim and the counter-claim, the taxing master is not by any rule in *Saner v. Bilton* (1) to be enslaved by the form of the pleadings. The question must be determined as one of substance and not of form, the manner in which the action was fought and in which the issues were dealt with by the parties and the court not being disregarded. On the facts in *Christie v. Platt* (3) the master was to be entitled, indeed he was invited, to attribute to the counter-claim exclusively all costs really incurred by the defendant in maintaining the disputed issue although that issue had first appeared in the defence and was introduced to the counter-claim only by reference to the defence. In that sense of the decision, applying it to the present case, I would, with the liberty thereby conceded to me, inquire with reference to all of the four issues here which have been in debate, whether the costs incurred in relation to them, be they the costs of the appellants or of the respondents, were costs really incurred on the claim or its defence, or on the counter-claim or its defence, and I cannot myself doubt the answer to be that these costs were all of them incurred in relation to the claim and none of them in relation to the counter-claim.

It will of course be remembered that their claim was prosecuted by the respondents not only up to judgment, but as far as the Court of Appeal, and this inquiry must be so directed as to ascertain what in relation to these issues was the position and what was the risk of the two parties litigant, in a case so conducted. To begin with the appellants, their position, I cannot doubt, was that unless they succeeded at the trial in establishing their allegations with regard to each of the four issues, judgment for the respondents on the claim must follow, while their own counter-claim would never arise. Further, when that counter-claim did become effective it would be a proceeding in which these issues would no longer remain as issues. They would already have been decided in the appellants' favour in the action. As to the respondents, their position, conversely, may be stated with equal ease. Until they had established their allegations with reference to some one of the issues their claim in the action could not prevail. When, however, they had so far progressed, then not only did their claim in the action succeed, but, as a necessary corollary, the counter-claim against them at once disappeared. The correctness of this view was well illustrated in the fortunes of the respondents' appeal from the judgment at the trial. Before the Court of Appeal they contended that as to one of the issues—that in relation to a guarantee—their view was right, and that they by their contract were under no duty to deliver until the guarantee had been given. The Court of Appeal accepted that contention, with the result that, without more, the respondents' claim in the action was decreed and, with discussion, the appellants' cross-appeal from the order dismissing the counter-claim was dismissed. The counter-claim had automatically collapsed. To me, therefore, it appears clear that it was impossible, in the litigation as conducted, for these issues to arise on the counter-claim at all. It was on this view, taken by the learned judge at the close of his judgment, that he gave to the respondents their costs of the counter-claim. His assumption was that these costs, apart from any divided costs not here in debate, would carry only their costs of the question as to the appellants' damages which was peculiar to the counter-claim. By his present order he has, although by a somewhat different road, in substance reached the same result. For myself, I would be content to restore that order, for the reasons just given.

A But other views of these issues have been taken. LAWRENCE, L.J., for instance, is of opinion that, albeit in differing degrees, they are all common both to the claim and the counter-claim. This also is in substance the view of ATKIN, L.J. The learned trial judge again is now of opinion that so much may truly be said of one of them, and some of your Lordships may possibly share one or other of these views. I, accordingly, proceed to ascertain whether, even so, that ought to affect the result

B which I have reached on the other footing. The question now is whether on this fresh hypothesis the rule of taxation to be applied is that in *Saner v. Bilton* (1), or whether, as the Court of Appeal have held, that rule should now be displaced in favour of one which would apportion, between the claim and the counter-claim, the costs of all issues common to both. Upon this question it is quite academic to inquire whether it was open to the Court of Appeal now, for the first time, at

C least avowedly, to depart in this matter from the rule in *Saner v. Bilton* (1) and, in effect, overrule *Wilson v. Walters* (2) which had recently adopted it. I say this because your Lordships are here quite untrammelled by authority and are in a position to choose for application now and for the future the rule which seems to be best.

With the rest of your Lordships I am satisfied that no reason has been shown

D why the rule in *Saner v. Bilton* (1), which has so long stood, should be departed from. Now that I have had the opportunity for full consideration that rule appears to me to be in every way preferable to its proposed substitute. In its application to the present case, for instance, its operation is in every way satisfactory. Apart from any application of Ord. 65, r. 2, it gives to both parties their costs of matters in which they have been respectively successful and leaves them liable only for

E the costs of those in which they have failed, in contrast with what would be the result of the apportionment rule, namely, that of the issues on which the respondents failed, not excepting that of fraudulent conspiracy, they would receive from the appellants a proportion of their costs of defeat, while the appellants would themselves have to bear a proportion of their own costs of success. The fresh taxation shows that the modification made by the Court of Appeal on the principle

F of taxation followed by the master has greatly qualified the amazing figures reached by him. But the improvement is still one of degree only, and I share with my noble and learned friend opposite his condemnation of the result. Moreover, I am satisfied that such an outcome of the application of the apportionment rule would not be peculiar to the present case. It would, in a measure, always result from it.

But to the rule there is, I think, a further fundamental objection. I myself am

G not satisfied that those who favour its adoption have been sufficiently deterred by the difficulties in the way of its application. It is, as has already been pointed out, one thing to divide, as between claim and counter-claim, expenses incurred with reference to both, e.g., counsel's fees. It is quite another thing to apportion between the two the costs in relation to an issue common to both. If as an example I may again refer to the respondents' costs of the issue of fraudulent conspiracy,

H how with any result capable of rational justification could their costs of that charge which failed be apportioned between the claim and the counter-claim? I know not. And so, even if in less degree, of the other issues. Counsel for the respondents did raise one objection to the rule in *Saner v. Bilton* (1) which struck me as forcible. A rule, he said, is in principle wrong which depends for its result so much upon the accident which of the two parties in a case like this first commences

I proceedings. So far as regards the present litigation the criticism did not strike me as serious, because it is plain from even a superficial consideration of the learned judge's judgment at the trial that if in this litigation the appellants had, instead of the respondents, been plaintiffs, while he might have dismissed both claim and counter-claim—although I greatly doubt whether in such a litigation he would have ventured to dismiss the claim—it is certain that by reference to issues or in some other way he would have brought about the result as to costs which his judgment shows he intended and which, as at long last appears, he has achieved by the order he made in the action as now framed. But I cannot doubt that the

criticism made by counsel of the *Saner v. Bilton* (1) rule is well justified in its application to some cases. *Wilson v. Walters* (2) may, perhaps, be referred to as one of these. The objection, however, is less serious than it looks. There is no obligation on the judge in such cases to dismiss both claim and counter-claim with costs. For the future he will presumably only do so when he is satisfied that an order in that form when worked out will in substance effect the result he desires. As Fry, J., said in *Saner v. Bilton* (1), "the court may in every case give special directions which may vary the rule," and this appeal will not be without permanent utility if it brings home to learned judges the necessity, in cases like these, of adjusting critically their orders as to costs if these orders are not sometimes to produce results at once unintentional and unjust. On the whole case I am of opinion that the order appealed from should be discharged and that of MacKINNON, J., restored.

Appeal allowed.

Solicitors: *Cosmo Cran & Co.; Dehn & Lauderdale.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re REEVES. REEVES v. PAWSON

[CHANCERY DIVISION (Russell, J.), January 26, 1928]

[Reported [1928] Ch. 351; 97 L.J.Ch. 211; 139 L.T. 66;
72 Sol. Jo. 121]

Will—Codicil—Re-publication of will—Confirmation by codicil—Bequest of "my interest in my present lease"—Termination of lease and grant of new lease before codicil—Bequest of new lease.

By his will, made in 1921, the testator bequeathed to his daughter "all my interest in my present lease of No. 1, Chesterfield Street, Mayfair." That lease expired in 1924, but in 1923 a fresh lease was granted to the testator for a term of twelve years. On Feb. 10, 1926, the testator executed a codicil which did not affect the bequest of the lease and by it he confirmed his will of 1921. The testator having died,

Held: the will and codicil were to be read as one document dated Feb. 10, 1926, and, therefore, the words "my present lease" in the will operated as a bequest to the daughter of the lease of 1923.

Notes. Referred to: *Re Tredgold, Midland Bank Executor and Trustee Co. v. Tredgold*, [1943] 1 All E.R. 120; *Re Heath's Will Trusts, Hamilton v. Lloyds Bank, Ltd.*, [1949] 1 All E.R. 199.

As to re-publication of a will and the effect of a codicil, see 34 HALSBURY'S LAWS (2nd Edn.) 95 et seq.; and for cases see 44 DIGEST 370 et seq.

Cases referred to:

- (1) *Macdonald v. Irvine* (1878), 8 Ch.D. 101; 47 L.J.Ch. 494; 38 L.T. 155; 26 W.R. 381, C.A.; 44 Digest 410, 2414.
- (2) *Re Champion, Dudley v. Champion*, [1893] 1 Ch. 101, 115; 62 L.J.Ch. 60, 372; 67 L.T. 344, 694; 2 R. 162, C.A.; 44 Digest 372, 2068.
- (3) *Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726; 73 L.J.Ch. 481; 91 L.T. 48; 52 W.R. 516; 20 T.L.R. 414; 48 Sol. Jo. 383, C.A.; 44 Digest 376, 2102.

- (4) *Re Hardyman, Teesdale v. McClintock*, [1925] Ch. 287; 94 L.J.Ch. 204; 133 L.T. 175; 44 Digest 385, 2196.
- (5) *Re Smith, Prada v. Vandroy*, [1916] 1 Ch. 523; 85 L.J.Ch. 657; 114 L.T. 693; 60 Sol. Jo. 386; affirmed, [1916] 2 Ch. 368; 85 L.J.Ch. 657; 115 L.T. 161; 60 Sol. Jo. 603, C.A.; 44 Digest 387, 2212.
- (6) *Re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685; 72 L.J.Ch. 230; 87 L.T. 712; 51 W.R. 538; 44 Digest 374, 2081.

Adjourned Summons.

The testator had for some years prior to the making of his will been the lessee of the premises No. 1, Chesterfield Street, Mayfair, London, which he held under lease for seven years from Sept. 29, 1917. He had purchased it for the purpose of providing a residence for the defendant, his daughter, and she had resided there for a considerable time. He paid the rates, the ground rent, and the property tax. In 1921 he made his will in which he said:

"I bequeath to my said daughter all my interest in my present lease of No. 1, Chesterfield Street, Mayfair, and I further direct that all obligations arising under such lease shall be discharged out of moneys arising out of my residuary estate."

That estate went to his three children, the defendant's share being settled. By an indenture made in 1923 the premises were demised to the testator for a further period of twelve years less three days. By a codicil to his will, made in 1926, which did not affect the bequest of the lease, he said: "In all other respects I confirm my said will." This summons was taken out by the trustees asking whether the gift of the interest in the premises referred to in the will was effective to include the further lease granted in 1923.

Jenkins, K.C., and *Wright Taylor*, for the trustees, referred to the Wills Act, 1837, s. 24; *THEOBALD ON WILLS* (8th Edn.), p. 157; *JARMAN* (6th Edn.), p. 204; *Macdonald v. Irvine* (1).

Stafford Crossman for the defendant's infant children.

Farwell, K.C., and *D. D. Robertson*, for the defendant, referred to *Re Champion* (2); *Re Fraser* (3); *Re Hardyman* (4).

RUSSELL, J.—But for the fact that the testator executed a codicil to his will there is no doubt that the bequest to his daughter of "my present lease" would have only been a bequest of the lease that expired on Sept. 29, 1924, but it is contended that by confirming his will by codicil on Feb. 10, 1926, during the currency of the new lease, the testator bequeathed that new lease to his daughter.

Reliance is placed on two decisions in the Court of Appeal—*Re Champion* (2) and *Re Fraser* (3). In *Re Champion* (2) the testator by his will devised a freehold cottage and the land and appurtenances thereto belonging, which he described as "now in my own occupation," to trustees upon certain trusts. After the date of his will he bought two other fields adjoining the cottage, and later made a codicil, by which he substituted other trustees for those named in his will, and confirmed his will in other respects. *NORTH, J.*, after holding that on the true construction of the will and codicil the two fields passed to the trustees with the cottage, considered the effect of the words of confirmation. He said:

"It is settled by authority that the effect of such a phrase as 'I confirm my will in other respects' is a re-publication of the will, and when, under the old law, a testator has made a will which would merely pass the property he had at the date of it and then by a codicil he confirmed and re-published his will, the effect was to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date. There is ample authority on this point. . . . It seems to me perfectly well settled that, if there were nothing else in favour of the plaintiffs, the codicil makes the will take effect as if it had been executed at the date of the codicil."

In the Court of Appeal LINDLEY, L.J., who delivered the judgment of the court, A said :

"This codicil having been made after the purchase of the two fields, what is its effect upon the devise contained in the will? In my opinion, it is quite clear that the two fields, which, as well as the cottage, were in his own occupation when he made the codicil, passed to the trustees together with the cottage and its appurtenances."

The other decision in the Court of Appeal is that of *Re Fraser* (3), where STIRLING, L.J., after stating that the testamentary dispositions of the testator included several codicils, and in particular one of July 21, 1898, which contained a confirmation of the will as altered by prior codicils, said :

"The effect of this is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced by the various codicils."

Put in another way the will and the codicil are treated as one document bearing the date of the codicil.

In *Re Smith* (5) the testatrix directed that :

"No legacy given by this my will shall lapse by reason of the death of the legatee before me, but the same shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal personal representative of such legatee."

In one of the codicils to her will the testatrix made a bequest to a person who predeceased her. All the codicils contained an express formal clause confirming in all other respects the testatrix's will. SARGANT, J., held that the clause in the last codicil applied to and saved the bequest in the previous codicil. He said :

"It is well settled law that when a codicil expressly confirms a will the effect is, in the words of NORTH, J., in *Re Champion* (2)

'to bring down the date of the will to the date of the codicil, and to make the devise in the will operate in the same way in which it would have operated if the words of the will had been contained in the codicil of later date.' "

This decision was affirmed in the Court of Appeal, and the principle has been given full effect in such cases as *Re Rayer* (6) and *Re Fraser* (3). This is another instance where a judge, again citing *Re Champion* (2) and *Re Fraser* (3), held that the will and the codicil were to be treated as one document bearing the date of the codicil and using the language used in the will.

The last case is *Re Hardyman* (4). There the testatrix, by her will made in 1898, gave a legacy of £5,000 "in trust for my cousin his children and his wife." The cousin's wife died in January, 1901. In November, 1901, with knowledge of the wife's death, the testatrix added a codicil to her will. She died in December, 1901. In 1903 the cousin re-married. He died in 1924. The question for decision was whether the second wife was entitled to benefit under the bequest of the £5,000. ROMER, J., said ([1925] Ch. at p. 292) :

"It appears to me, in the circumstances, and having regard to the authorities, that I must construe the present will in the light of the fact that by re-publication the testatrix has said to me: 'This will expresses my intentions at this date' (i.e., the date at which this codicil was made), and that I must not disregard that fact. But Mr. Swords, on behalf of those interested in contesting the claim of Col. McClintock's second wife, has asked me to pursue the following line of reasoning: He says that I must take the will first of all and substitute for the word 'wife' the name of Col. McClintock's first wife, and then he says, having done that, the testatrix has by her codicil only re-published a will in which she has given a benefit to his first wife by name,

A and that, as his first wife predeceased the testatrix, the second wife cannot possibly take under that devise. It appears to me that to adopt such a course would be, not to apply the rules as to re-publication with good sense and with discrimination, but to construe the will as though it had not been re-published. I cannot substitute the Christian name of the first wife for the word 'wife'

B unless I disregard the fact of the re-publication of the will and construe the will as though there had been no re-publication. What I have to construe is a will which has been re-published, and which, as I say, is a will which the testatrix tells me expressed her wishes as they were at the date of the codicil. Approaching the document in that light, I find that the testatrix, knowing full well that Col. McClintock's first wife was dead, has directed that this legacy of £5,000 shall be held for the benefit of Col. McClintock, his wife and children.

C Now, he had no wife at that time; therefore, if those were the testatrix's wishes at the date of the codicil, the only person who could take under that provision would be, and is, the lady whom Col. McClintock married after the testatrix's death in 1903."

D Those are the modern authorities, and it is contended that they cannot apply to this case, because, if the will be construed, the expression "my present lease" can only refer to the old lease which has expired. It is true that if the testator in his will had bequeathed to his daughter "my present lease of No. 1, Chesterfield Street, Mayfair, dated the 25th Sept., 1917," the re-publication of his will by the codicil would not have given her any benefit, because the old lease had expired, but the testator has bequeathed to his daughter "my present lease," an expression

E that exactly fits the circumstances that existed at the date of the codicil. If I follow the principle laid down in *Re Champion* (2) and *Re Fraser* (3), and applied in *Re Smith* (5) and *Re Hardyman* (4), and read this will and codicil as one document dated Feb. 10, 1926, the date of the execution of the codicil, there is a bequest in favour of his daughter of "my present lease," the present lease being that dated Dec. 31, 1923. Full effect can be given to that bequest, and the benefit of the lease passes to the testator's daughter under the testamentary disposition.

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Solicitors: *Sydney E. Preston; Chapman-Walker & Shephard.*

[*Reported by A. W. CHASTER, ESQ., Barrister-at-Law.*]

A

SYMINGTON & CO. v. UNION INSURANCE SOCIETY OF
CANTON, LTD

[COURT OF APPEAL (Scrutton, Greer and Sankey, L.JJ.), June 8, 11, 1928]

[Reported 97 L.J.K.B. 646; 139 L.T. 386; 44 T.L.R. 635;
18 Asp.M.L.C. 19; 34 Com. Cas. 23]

B

Insurance—Marine insurance—Voyage policy—"From any port or ports place or places"—"Place or places"—Transit from warehouse to port—Reasonable distance—"Loss reasonably attributed to fire"—Goods damaged by water to stop fire spreading—Effect of f.c. and s. clause.

By a policy of insurance dated Nov. 25, 1919, shippers insured a quantity of cork "at or from any port or ports place or places between Bordeaux and Nice to the United Kingdom" against "any loss which may reasonably be attributed to fire." The policy contained an f.c. and s. clause, and provided that the goods were "covered subject to the terms of this policy from the time of leaving the shipper's warehouse . . . during the ordinary course of transit until on board the vessel . . ." The shippers' warehouse was situated some eight miles from the port of Algeiras, and, as there was no warehouse accommodation at that port, their usual course of business was to stack consignments of cork on the jetty until there was sufficient to make a cargo for shipment. On Feb. 9, 1920, when a large quantity of the shippers' cork was lying on the jetty, fire broke out some distance away from the cork, and, to prevent its spreading, the persons whose duty it was to deal with the fire threw some of the cork into the sea and wetted some of the remainder, so causing damage.

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D
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Held: the words "place or places" must be read ejusdem generis with the words "port or ports" which preceded them, so as to restrict them to shipping places; the distance between the shippers' warehouse and the port was not unreasonable, and cover of the goods during "the ordinary course of transit" for that distance must be added to the sea transit; and, therefore, the risk had attached at the time of the damage to the goods: (ii) the damage was due to perils insured against as being caused by perils ejusdem generis with jettison and fire, there being, while no actually existing fire, an actually existing peril of fire: (iii) the action of those at the port did not bring the case within the f.c. and s. clause, as being a "restraint," since to bring a case within a "restraint" there must be some exercise of force by a government or officers of a government.

F
G

Notes. As to duration of voyage policies on goods, see 22 HALSBURY'S LAWS (3rd Edn.) 57-61; and as to loss by fire and the effect of an f.c. and s. clause, see *ibid.* 75 et seq. For cases see 29 DIGEST 129-134, 215 et seq.

Cases referred to:

H

- (1) *Schmidt v. Royal Mail Steamship Co.* (1876), 45 L.J.Q.B. 646; 4 Asp.M.L.C. 217, n.; 41 Digest 597, 4221.
 - (2) *The Knight of St. Michael*, [1898] P. 30; 67 L.J.P. 19; 78 L.T. 90; 46 W.R. 396; 14 T.L.R. 191; 8 Asp.M.L.C. 360; 3 Com. Cas. 62; 29 Digest 215, 1718.
 - (3) *Kacianoff v. China Traders Insurance Co., Ltd.*, [1914] 3 K.B. 1121; 83 L.J.K.B. 1393; 11 L.T. 404; 12 Asp.M.L.C. 524; 19 Com. Cas. 371, C.A.; 29 Digest 216, 1727.
 - (4) *Stanley v. Western Insurance Co.* (1868), L.R. 3 Exch. 71; 37 L.J.Ex. 73; 17 L.T. 513; 16 W.R. 369; 29 Digest 321, 2635.
- I

Appeal from an order of ROCHE, J., upon a Special Case stated by an arbitrator.

The shippers, who were cork-growers, had a factory and warehouse at San Roque, in Spain, a few miles inland from Algeiras and connected by railway with

A that port. There was a jetty at Algeciras, but no warehouse, and the shippers were accustomed to send their cork daily in small quantities down to the jetty, where it accumulated until there was a sufficient quantity to be shipped to the United Kingdom. On Nov. 25, 1919, the shippers insured their cork with the appellant insurance company at and from any port or ports, place or places, between Bordeaux and Nice, to the United Kingdom, and until delivered at destinations B inland. The policy contained the following clauses :

- "1. Warranted free of capture, seizure, arrest, restraint, or detainment. . . .
6. The insured goods are covered subject to the terms of this policy from the time of leaving the shipper's or manufacturer's warehouse during the ordinary course of transit until on board the vessel . . . and from the vessel whilst on C quays, wharves, or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in policy. . . .
9. Warranted free from particular average . . . but notwithstanding this warranty the insurers are to pay the insured value of any package or packages which may be totally lost in loading, transhipment, or discharge, also for any loss which may reasonably be attributed to fire."

D In the margin of the policy the following clause, which did not appear in the slip, was inserted :

"This policy not to enure to the benefit of any fire insurance company. It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover when the assured or any carrier or other bailee has fire insurance which would attach if this policy had not been issued."

E On Feb. 9, 1920, the shippers had on the jetty awaiting shipment a large quantity of cork, some of which had been lying there since August, 1919, and the remainder of which had been sent down from their warehouse at San Roque in November and December, 1919, and January 1920. They anticipated shipping this cork by a steamer which was expected to sail about Feb. 20, 1920. On Feb. 9, 1920, a fire F broke out on the jetty at some distance from the cork, and the persons whose duty it was to deal with the fire, in order to prevent the fire from spreading, jettisoned some of the cork and threw sea-water on the remainder. At the time of the fire no declaration had been made under the insurance, and no policy had been issued. The shippers claimed in arbitration against the insurers in respect of the goods so destroyed and damaged. The insurers contended that at the time of the fire the G risk had not attached, as the goods were covered only from a place on the coastline and the reference to warehouse meant from a warehouse at the port of loading; that the proximate cause of the loss was not the fire, but the action of the authorities, and was excepted by the warranty free of restraint; and that the marginal note prevented the respondents from recovering, as they had insured the goods against fire with other insurers. The arbitrator awarded in favour of the shippers, and the insurance company appealed.

I ROCHE, J., confirmed the award of the arbitrator and the insurance society appealed.

Le Quesne, K.C., and *Simey* for the insurers.

Porter, K.C., and *Somervell* for the respondents.

I **SCRUTTON, L.J.**—This appeal comes before us from a decision of ROCHE, J., on a Special Case stated by an arbitrator in a claim by owners of goods against a marine insurance company. Messrs. Symington, who are the owners of the goods, are a firm who carry on the business of cork manufacturers and exporters. They grow the cork in Spain where they have a factory and warehouse at a place called San Roque, which is found by the arbitrator to be about eight miles to the north of Algeciras, a port on the coast, and connected with that port by railway. They grow the cork; they then send it to their factory in order that it may go through some process to put it into a condition to be exported, and then bit by bit, because

apparently they have not ready at one time in the factory enough to make a shipload, they send the cork down from their factory by the railway to Algeciras where it lies on the jetty, the amount getting larger and larger as further consignments come down until the ship that they have chartered arrives, there being enough cork then to make a shipload, and it is then shipped to the United Kingdom. They had been carrying on this business for some years, and not unnaturally they desired to insure their cork against risks; and it is pretty obvious to my mind that they desired to insure it from their factory, where it was put into an exportable condition, to various places in the interior of the United Kingdom. So the insurance that they desire is not merely a marine insurance; it is a marine insurance with land transit at the beginning and at the end. In 1920 their broker in London took round a slip to marine companies stating the risk which he wanted to insure, and the particular slip I have in my hand was underwritten by five companies for, in all, £15,000. A loss occurred while the cork was on the jetty at Algeciras waiting for shipment, and the loss was of this nature. A fire broke out, not in the cork, but close to it, and appeared likely to spread so that it would burn the stored cork. Persons described as the port and military authorities, desiring to stop the fire, came down and proposed to put a barrier in the way of the fire spreading (i) by throwing some of the cork into the water so that at a particular place there would be a gap in the goods which the fire would not get over, and (ii) by pouring water on some of the cork so that the fire would not be likely to light that cork by sparks, glowing cinders, or anything of that sort. The cork which was thrown into the water was, of course, damaged by sea-water. The part which was wetted by sea-water was also damaged. Thereupon the shippers claimed upon the underwriters for the loss as one which might reasonably be attributed to fire, or by jettison of the goods, or under the general words under which perils ejusdem generis with the named perils are covered. There was not at first a policy. The matter went to arbitration, and the arbitrator stated a Special Case which came before a judge of the High Court who refused to entertain the Case as there was no policy in existence. The views of the underwriter and the assured as to what should be the policy issued on the particular slip differed, and so the arrangement was made that the underwriters should issue a policy in the form that they said was the right form and that the arbitrator should decide whether any clause in the policy issued by the company to which the assured objected should or should not be struck out of the policy as not being justified by the slip.

So there comes before us, as there came before the arbitrator and ROCHE, J., the question: (i) What should the policy be? (ii) When you have settled what form the policy is in, what are the rights of the parties on the true construction of the policy? I say at once, although I will deal with it later, that we are sending back to the arbitrator the question of rectification of the policy, to ask him to find the fact, and I proceed to deal with the case on the points which have been argued on the construction of the policy irrespective of the clause about fire insurance, which is the clause affected by the question whether there should be rectification or not.

The first point which was argued on which we propose to express an opinion is whether on the policy as drawn the risk had attached at the time that the loss occurred. The policy is in the printed form by which the Union Insurance Society of Canton insure:

"at and from ——— of and in the good ship or vessel called ——— beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship, and so to continue and endure, until the said goods and merchandises shall be safely delivered from on board the said ship."

That was the printed form that the parties were starting from, and it is quite clear that that printed form did not express what the parties intended to cover; and it is a pity, though it is the invariable practice of underwriters, that when they did fill up the form they did not scratch out the words which were not applicable to the risk that they were going to cover, because there is no doubt, first of all, at

the delivery end, that it was intended to cover the goods, not only when they left the ship, but until they were delivered at their destination inland in the United Kingdom; and, secondly, it was clear that before the goods got into the ship it was intended to cover risks in transit by craft, raft and/or lighter to the vessel, because that was cl. 7 of the Institute Cargo Clauses which the slip stated were to be incorporated in the policy. Further, by cl. 6 of the Institute Cargo Clauses it was intended to cover the risk from the time of leaving the shippers' warehouse during the ordinary course of transit until on board the vessel, so that both a water transit by craft and a land transit from warehouse were intended to be covered before the loading thereof on board the ship which the printed form stated was the beginning of the adventure. What was done was to fill in "at and from" the words of the slip—"any port or ports, place or places between Bordeaux and Nice (both inclusive)"—and the first question which was argued was what those words meant, and whether San Roque (where the warehouse was) was a place between Bordeaux and Nice so that on those words the risk would begin on leaving the warehouse. I do not take quite the view that either the arbitrator or the court below has taken of this point. "Any port or ports, place or places between Bordeaux and Nice" certainly does not mean as the crow flies or as an aeroplane would fly if it could; it does not mean anything like a straight line between Bordeaux and Nice. When it talks about port or ports, I think it is talking of the coastline, and I think it is talking of that for the reason that it is primarily talking about transit of goods in a steamer. The goods get into the steamer on the coastlines; and I am disposed to read "place or places" as analogous to "port or ports," and to restrict those words to shipping places and treat "between Bordeaux and Nice" as along the coastline, including, of course, the banks of rivers between Bordeaux and Nice, going round the coast of Spain until you get to Nice. But it appears to me that to that shipping transit from the port or ports, place or places, between Bordeaux and Nice there is added a land transit which is added by the words of cl. 6 of the Institute Cargo Clauses which are expressly incorporated and have nothing to do with the words "port or ports, place or places," except that the transit is from the warehouse to the port or ports, place or places, where the ship is to take on board the goods. Therefore, I should see no difficulty whatever in covering the transit from San Roque to the ship under the warehouse clause. That clause, in my opinion, has been inserted because the shippers, the owners of the goods, want to cover their goods for the whole transit, including both a period before they are in the ship, and a period after they are in the ship, whilst in each case they are completing the transit through on land. Therefore, I see no difficulty whatever in holding that the goods on the pier at Algeciras, having come in the ordinary course of transit from the shippers' manufactory at San Roque, were covered by the policy. That is not exactly the view that the learned judge has taken, but it is the view which appears to me to be the proper construction of the policy and it has the same result as the view which the learned judge has taken.

The goods being within the policy, and the risk having attached, while they lay on the quay at Algeciras waiting to be shipped, were they lost by peril insured against? I leave out for the moment the question of the f.c. and s. clause. What happened to them? Some of them were thrown into the sea to save the rest of them and to avoid their destruction by fire. In my view, that risk is covered, subject to the point about the f.c. and s. clause, by the general words as being a peril ejusdem generis with jettison. Jettison consists in throwing into the sea from the ship generally to save some part of the adventure; this jettison from the pier into the sea was also to save some part of the adventure. It was a jettison and appears to me to be covered, subject to the point about the f.c. and s. clause, by the general words as being a peril of the same character as jettison.

The rest of the goods on which the claim is made were damaged by water thrown on to them in order to prevent the fire spreading to them and to the other goods. There has been considerable difficulty in English law about water used either to extinguish fire or to prevent fire from spreading. For a long time English average

adjusters declined to admit any damage by water into general average. In cases to which I need not refer—*Schmidt v. Royal Mail Steamship Co.* (1) is one of them—that view of English average adjusters was held to be erroneous; and it has now been determined that it is a subject-matter of general average when, there being a fire, goods are damaged, not by the fire, but by the water used either to extinguish the fire or to prevent the fire from spreading, and that such damage can be claimed as a damage resulting from fire, and, in my view, can be claimed under a marine policy as a damage caused by fire. There will be found a long discussion—I do not refer to it—in LOWNDES ON GENERAL AVERAGE (6th Edn.) about the effect of that. The test seems to be as is stated in *The Knight of St. Michael* (2) and in *Kacianoff & Co. v. China Traders' Insurance Co., Ltd.* (3). Is it a fear of something that will happen in the future or has the peril already happened and is it so imminent that it is immediately necessary to avert the danger by action? LORD READING, C.J., puts it in this way ([1914] 3 K.B. at p. 1128):

“Was there at the time such a condition of things that there was an actually existing peril of fire and not merely a fear that it might break out?”

BARNES, J., in *The Knight of St. Michael* (2) puts it in very much the same way. I refer to it without reading it. I, therefore, take the view on the facts found in this case that, there being an existing fire and an imminent peril, the damage caused by water used either to extinguish the fire or to prevent it from spreading was a proximate consequence of fire which could be recovered under the general words as being ejusdem generis with fire—it does not matter which for the purpose.

There is this further question. It is said that this jettison, and this pumping of water on the bales, was a restraint of princes. When I say “restraint of princes” I use it to cover the collocation of words which appear in the f.c. and s. clause. As is well known, the original Lloyd’s policy contained the language:

“Arrests, restraints, and detainments of all kings, princes, and people of whatever nation, condition or nationality whatsoever”;

and when it was desired to exclude the loss covered by those words from the policy so that the underwriters were not liable for loss covered by those words for some reason which I have never understood, underwriters did not use those words, but they used a different set of words, and they framed the f.c. and s. clause:

“Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.”

Like the Statute of Frauds, every word in that clause has been worth a ransom. I am bound to say that I think it would startle anyone if he were told that when a fire engine arrives and pumps water into a house that is a matter covered by the “free of capture, seizure, arrest, restraint or detainment and the consequences thereof” clause. It is difficult, I think, at first to conceive that that sort of operation can be contemplated either by the words arrest, restraint of kings, princes, and people, or by matters enumerated in the f.c. and s. clause. The action of the port authority in saving a man’s property, they being responsible for the safety of the whole port, does not appear to me to be a matter which is at all contemplated either by “restraint of princes” or by the f.c. and s. clause. It would be, I think, going much further than any case on the meaning of those words has yet gone; and I certainly decline to extend those words to a subject-matter which appears to me to be not in the contemplation of the parties who framed those words or who have used them for centuries.

It follows, therefore, that we are deciding three points. We are deciding that the policy attached to the goods as they lay on the quay at Algeciras, that while on the quay at Algeciras they were lost by perils insured against, and that the underwriters were not relieved from liability by the f.c. and s. clause.

There remains the question on which we propose to send the matter back to the

A arbitrator. It is said by the underwriters, although this slip says nothing about it: Our (the insurers') usual form of policy has got in the margin:

"This policy not to enure to the benefit of any fire insurance company. It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover when the assured or any carrier or other bailee has fire insurance which would attach if this policy had not been issued."

B It is argued that that marginal clause ought to be part of the policy granted under this slip; the assured has such a fire insurance; consequently, though the policy attached and though, but for that clause, there would be a loss within the policy, the assured cannot recover. This is undoubtedly a point of some difficulty, and I do not propose to say anything about the view which I at present take on it. It appears to the court material to know a fact which we might gather inferentially from some information that has been supplied to us, but on which we think it desirable to have a finding of fact from the arbitrator, and the question which we want the arbitrator to answer is this: Is the policy issued so far as it contains the fire policy clause contrary or not contrary to the usual form of marine insurance on goods, that is to say, is it usual in a marine policy on goods to have this clause in it or a clause substantially similar? When we have heard that answer we shall then be in a position to discuss and to decide the view which we take on this particular point.

GREER, L.J.—I agree with my Lord on the three points it has been proved desirable we should decide at present, leaving out of consideration the question which has just been mentioned. The claim before the arbitrator was a claim upon **E** a policy of insurance, and, with the exception of one clause in the margin of the policy which has been referred to as the fire-policy clause, it is not disputed that the policy, together with the clauses attached, is in accordance with the agreement of the parties of which the slip is evidence. The questions we are now deciding depend upon the true interpretation and the right application of the words contained in this policy.

F In the first place, it is said that the risks covered by the policy do not begin, or, as it is usually expressed in marine insurance, the risks do not attach. At the time of the fire the goods were on the jetty at a port or place where it is conceded they would have been covered if they had come from a warehouse at that port or place, namely, Algeciras; but it is contended that, as they came from a warehouse which is at a place called San Roque, eight miles away from Algeciras, the risk **G** was not covered. In my judgment, one has to read No. 6 of the Institute Cargo Clauses as an extension of the insurance beyond that which it would be if one had to read the policy only without the attached clause, and I read it as meaning that the further period to be covered in respect of fire, among other things, is the period of time, and also the operation which takes place, when the goods are coming from the shipper's or the manufacturer's warehouse during the ordinary course of transit **H** until they are put on board the vessel. It is conceded that if that warehouse were in the port of loading the transit, however far the distance might have been from the warehouse to the ship, would have been covered by this clause extending the insurance. It seems to me that there is nothing in the clause which limits that extended insurance to the distance between a warehouse which is in the port of loading and a warehouse some few miles distant from the port of loading, and I am **I** of opinion that the learned arbitrator was not wrong in concluding that the insurance covered the goods while they were on a stage in the transit from the manufacturer's or shipper's warehouse to the ship. It may be that, if the shipper's warehouse was so far away that no one would ever imagine that it was contemplated that the transit would be so long, that it would not be included, but it seems to me to be included, provided it is not an unreasonable distance from the port, and provided it is a place where it is not unusual or not unreasonable for a shipper to hold his cargo in readiness for shipment. I cannot find that the arbitrator was wrong in law in finding that the risk had attached.

The next question is whether or not the loss was caused by fire within the policy. In my judgment, it is right to say that the cause of the loss was the fire. It is quite true that fire never touched the goods; they were touched by the enemy of fire, that is to say, by water, and were damaged by water. But it has long been decided, and for a long time acted upon in relation to fire insurance on land, that damage by water done to save the consequence of fire and damage by the destruction of property to save fire reaching that property, can be held to be the consequences of the fire and within a policy of fire insurance. This matter was dealt with in *Stanley v. Western Insurance Co., Ltd.* (4). KELLY, C.B., says:

"I agree that any loss resulting from an apparently necessary and bonâ fide effort to put out a fire, whether it be by spoiling the goods by water, or throwing the articles of furniture out of window, or even the destroying of a neighbouring house by an explosion for the purposes of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy."

In expressing those views it was not necessary for the judgment he was giving to deal with the point raised in some of the cases to which our attention has been called. A similar question came up for decision in *The Knight of St. Michael* (2) before BARNES, J., in which the question was concerned with a loss of freight by reason of coal heating but not actually getting on fire. Fire had not taken place, but the loss of freight arose upon the master of the vessel taking a course which would enable him to prevent fire destroying the ship and the goods on board, and the learned judge calls attention to the fact that, though there was no actually existing fire, there was an actually existing state of peril of fire. Those words apply to the present case. There was in the present case an actual peril of fire though no actual fire affected the shippers' goods. That view agrees also with what was said by LORD READING, C.J., in *Kacianoff & Co. v. China Traders' Insurance Co., Ltd.* (3). I think, therefore, that the true view on that part of this policy is that it is right to say, without considering the effect of the f.c. and s. clause, that this loss came within the insurance against fire.

The question then arises whether or not the insurers have proved themselves on the facts to come within the warranty contained in the policy, "free of capture, seizure, arrest, restraint or detainment, and the consequences thereof." That must mean arrest or detainment of princes or people. It is not proved here that there was on the part of the government, or of the executive, or of any public authority, an act of force contrary to the wishes of the owner of the goods, or of the captain of the ship, and I think, in order to bring the case within the restraint of princes, it must be shown somehow or another that force was exercised by the government, or the officers of the government, before it can be said there was any arrest, detainment, or restraint of princes or people. It might have been proved here; it is possible that there was a law or regulation that soldiers and port authorities should, immediately they saw a risk of fire, hurry to put into the water or to cover with water any goods which were likely to be damaged, or any property of their own which was likely to be damaged; but nothing of that sort has been proved, and what has happened is consistent with the authorities, that is to say, the people who were there at the time, doing their best on their own motion for the benefit of all concerned to see that the fire did not do more damage than they could prevent. In those circumstances I think the restraint of princes does not apply.

SANKEY, L.J.—I agree, and I only desire to add a few words on each of the three points upon which I am in agreement with my Lord and GREER, L.J.

Three points are taken for the insurance company: (i) that the risk had not attached at the time of the loss; (ii) that the loss was not due to a peril insured against; and (iii) that the loss was due to restraint of princes. One has in approaching those three points to consider what is the contract between the parties.

A The contract is contained not only in the body of the policy which provides that it is "from any port or ports, place or places between Bordeaux and Nice (both inclusive) to the United Kingdom and until delivered at destination inland";

there are also stipulations in the body of the policy which are, in my view, extended by cl. 6 of the Institute Cargo Clauses that the insured goods are covered subject to the terms of this policy from the time of leaving the shipper's or manufacturer's warehouse during the ordinary course of transit until on board the vessel. It is found that at the time of the loss these goods were in ordinary course of transit from the manufacturer's warehouse, and the distance from the manufacturer's warehouse at San Roque to Algeciras was not, in my view, an unreasonable distance. In this particular case I think there is material upon which the arbitrator could find, and, indeed, ought to find, that the goods were in ordinary course of transit, that is, land transit.

With regard to the next point, that the loss was not due to perils insured against, I agree with my Lord in thinking that part of the loss comes under the word "jettison" in the words in the body of the insurance policy and part of it comes under the word "fire."

D With regard to the last point, I will not repeat what GREER, L.J., has read from the judgment of KELLY, C.B., in *Stanley v. Western Insurance Co.* (4), but it is to be observed that in this case as in other cases similarly decided the peril had begun to operate. In *Kacianoff & Co. v. China Traders' Insurance Co., Ltd.* (3) LORD READING, C.J., said ([1914] 3 K.B. at p. 1127):

E "It would have been a totally different state of things if the vessel had left and then, outside, had been met and threatened by a Japanese vessel, or if, approaching Nagasaki, she had been in some such danger. No doubt there may be circumstances in which judges may differ as to when the particular peril did begin to operate, but there must be the beginning before the judge can exercise his judgment upon it."

F In discussing *The Knight of St. Michael* (2) later he says:

"The danger was present, and if nothing had been done spontaneous combustion and fire would have followed in the natural course. That means that the peril had begun to operate."

I think those remarks apply in this case; the peril had begun to operate, and the loss comes within the words which are expressed in the body of the policy.

G With regard to the last point—namely, that the loss was really due to restraint of princes under the Institute Cargo Clauses, No. 1, "warranted free of capture, seizure, arrest, restraint, or detainment"—I desire to repeat the words used by the learned judge in the court below, with which I am in entire agreement. He says:

H "I am concerned to say in my judgment that this is not a restraint of princes. It seems to me a very far-reaching use of language to say that a fireman when he is pouring water upon goods which are within the ambit of the fire is using restraint of princes or anyone else. He is putting out a fire; he is dealing with a fire, and he is, I think, no more within the capture or restraint clause if he happens to be employed by the State than if he happens to be employed by the district authority or if he happens to be a volunteer member of the fire brigade."

I For these reasons I am in agreement on the three points, and with regard to the point which we are sending back to the arbitrator I desire to say nothing until we know what the exact facts of the case are.

Order varied.

Solicitors: *Waltons & Co.; Parker, Garrett & Co.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

SIR W. C. LENG & CO. (SHEFFIELD TELEGRAPH) LTD. *v.*
SILLITOE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Acton, JJ.), November 21, 1928]

[Reported [1929] 1 K.B. 366; 98 L.J.K.B. 262; 140 L.T. 500;
93 J.P. 26; 45 T.L.R. 94; 72 Sol. Jo. 810; 28 Cox, C.C. 593]

Gaming—Football betting—Publishing coupon of ready money business—Coupon in the newspaper sold to public—Money prizes for foretelling results of matches—Proof of offence—Evidence that some persons bought newspaper partly to obtain coupon—Ready Money Football Betting Act, 1920 (10 & 11 Geo. 5, c. 52), s. 1.

To support a conviction of a newspaper proprietor of publishing a coupon of a ready money football betting business contrary to s. 1 of the Ready Money Football Betting Act, 1920, where persons who purchased the newspaper were invited to cut out a coupon and to forecast the result of football matches for prizes of money, one coupon only being inserted in each issue of the newspaper, it is not necessary that there should be a finding that the great majority of the purchasers of the newspaper bought it for the purpose of the competition, and it is immaterial that the proprietor carries on a newspaper business, and has done so for many years before he added the ready money football betting business, however well established, well managed and well known that newspaper business may be. If he chooses to annex to his original business some other business which comes within the definition contained in the Act he contravenes the statute. Further, the case against the newspaper proprietor can be proved by evidence as to the advertisements of the betting business, its conduct and scope, and the concomitant increase in circulation of the newspaper, without the actual evidence of any witness that he bought the newspaper either solely or partly for the coupon contained in it. It is sufficient if the facts proved show that some persons bought the newspaper partly for the sake of obtaining the coupon and thereby acquiring the chance or possibility of acquiring the prize.

Notes. As to ready money football betting, see 18 HALSBURY'S LAWS (3rd Edn.) 198, 199; and for cases see 25 DIGEST 449. For Ready Money Football Betting Act, 1920, see 10 HALSBURY'S STATUTES (2nd Edn.) 780.

Cases referred to:

- (1) *Suttle v. Cresswell*, [1926] 1 K.B. 264; 95 L.J.K.B. 367; 134 L.T. 144; 90 J.P. 3; 42 T.L.R. 75; 23 L.G.R. 695; 28 Cox, C.C. 94, D.C.; Digest Supp.
- (2) *R. v. Stoddart*, [1901] 1 K.B. 177; 90 L.J.Q.B. 189; 83 L.T. 538; 64 J.P. 774; 49 W.R. 173; 17 T.L.R. 55; 45 Sol. Jo. 61; 19 Cox, C.C. 587, C.C.R.; 25 Digest 463, 498.
- (3) *Caminada v. Hulton* (1891), 60 L.J.M.C. 116; 64 L.T. 572; 55 J.P. 727; 17 Cox, C.C. 307; sub nom. *R. v. Hulton*, 39 W.R. 540; 7 T.L.R. 491, D.C.; 25 Digest 463, 496.
- (4) *Turf Publishers, Ltd. v. Davies*, [1927] W.N. 190, D.C.; Digest Supp.
- (5) *Strang v. Brown*, 1923 S.C.(J.) 74; 25 Digest 464, d.
- (6) *Jameson v. Sinclair*, 1925 S.C.(J.) 1; Digest Supp.

Case Stated by justices of Sheffield.

On July 4, 1928, an information was preferred by the respondent, Percy Joseph Sillitoe, chief constable of Sheffield, under the Ready Money Football Betting Act, 1920, against the appellants, Sir W. C. Leng & Co. (Sheffield Telegraph), Ltd., for that they, on Mar. 14, 1928, at the city of Sheffield, unlawfully did in the "Sheffield Daily Telegraph" publish a coupon of a ready money football betting business carried on by them contrary to that Act which provides:

A "Section 1. Any person who in the United Kingdom writes, prints, publishes or knowingly circulates any advertisement, circular or coupon of any ready money football betting business, whether such business is carried on in the United Kingdom or elsewhere, or who knowingly causes or procures, or attempts to cause or procure any of those things to be done, or knowingly assists therein, shall be liable on summary conviction to a fine not exceeding £25 or, in default of payment, imprisonment for not exceeding one month . . ."

B "Section 2. 'Ready money football betting business' shall mean any business or agency for the making of ready money bets or wagers or for the receipt of any money or valuable thing as the consideration for a bet or wager in connection with any football game."

C On the hearing of the information the following facts were proved or admitted :

The appellants, a company duly incorporated under the Companies Acts, were the owners and publishers of the following newspapers: the "Sheffield Daily Telegraph," published every morning except Sundays at the price of one penny; the "Yorkshire Telegraph and Star," published every afternoon except Sundays, also at the price of one penny; and the "Sports Special" ("The Green Un"), published every Saturday at the price of three halfpence. The "Sheffield Daily Telegraph" was a well-known daily newspaper of a high-class character, with an average circulation of 60,000 copies a day. It contained all the general news usually found in a high-class daily newspaper. Before Aug. 6, 1927, a competition, in respect of which £7,000 had been paid during the preceding football season, had been conducted by the appellants weekly and continuously throughout the season on the following lines. In every issue of the three newspapers published by them there appeared a coupon setting out the names of a number of football teams, and the public were invited to forecast which team would win (or draw) each of the twelve matches set out in the coupon, the person who most nearly got the correct results receiving at the end of the week a prize of £200. A member of the public was permitted to send in as many coupons as he liked. On July 25, 1927, the respondent wrote to the appellants a letter, after which the appellants suspended their competitions for a time. On Aug. 18, 1927, the competition was started again under rules which had been amended in accordance with legal advice and which precluded any competitor from sending in more than one coupon from one and the same issue of each of the three newspapers owned by the appellants. Football competitions were conducted each week during the ensuing football season or for forty weeks. Up to Jan. 12, 1928, a prize of £200 was offered weekly for forecasting most correctly the results of twelve specified football matches. On and after that date a prize of £1,000 was offered every week to the competitor who gave the exact correct results of twenty-four football matches selected by him out of forty-four matches, and a few weeks later a coupon showing forty-four matches was printed each week. If, as always happened, no competitor won this prize of £1,000 the usual weekly prize of £200 was awarded to the competitor who was most nearly correct. During the whole of the football season the competitions were "boomed" by the appellants in the "Sheffield Daily Telegraph" and their associated newspapers. The prosecution and conviction were based on the coupons appearing in the issue of the "Sheffield Daily Telegraph" for Mar. 14, 1928. A copy of the issue was purchased by a police officer for cash at the head office of the appellants, and it contained the coupon alleged by the prosecution to be a coupon of a ready money football betting business carried on by the appellants at Sheffield. Thirteen coupons—or one coupon from each of the issues of the "Sheffield Daily Telegraph," the "Yorkshire Telegraph and Star" and the "Sports Special"—could be used for each competition in each week. The coupons in voucher (i.e., complimentary) copies of the newspapers were mutilated or cancelled so that they could not be used for the competitions. Every competitor was required to write his name on the envelope containing his coupon or coupons. Only the envelopes of competitors who had claimed that they were successful were opened.

A box with a slot in it, and having on it a notice " 'Sheffield Telegraph' Football Competition Coupon Box," was habitually placed outside the main entrance to the appellants' offices and adjoining the public pavement in High Street, Sheffield. More than forty other similar boxes were provided in other places at Sheffield and about forty at places outside Sheffield where the "Sheffield Daily Telegraph" circulated. These boxes were intended for the receipt of envelopes containing the football competition coupons. The envelopes containing coupons were very numerous. During certain hours on Mar. 14, 15 and 16, 1928, 17,000 envelopes were deposited in the High Street, Sheffield, box alone, and four boxes elsewhere the envelopes averaged 1,000 per box. Four or five sacks of envelopes in connection with which no claims had been made, and which had therefore not been opened, were destroyed each week. To cope with the work arising from the football competition during the forty weeks it lasted the appellants had a special competition department consisting of ten girls, whom it took about three days to go through the envelopes and the coupons in respect of which claims had been made. In addition to the £200 a week paid in prizes the cost of the scheme was about £10 a week. The competition was not limited to purchasers of the newspaper. The finder of an abandoned newspaper for which some other person had paid could compete. Copies of the newspaper could be purchased for cash at the head office of the appellants. The ordinary method of distribution, apart from street newspaper boys, about whom no evidence was given, was through newsagents, some of whom paid cash at the office daily, when they called for their supplies, but the great majority of whom had the newspapers delivered on credit terms and paid weekly or monthly for them. The circulation of the "Sheffield Daily Telegraph" was fairly constant, but it went up abnormally for special events, such as the eclipse of the sun, the general election, the general strike, and when a photograph of the Sheffield Wednesday football team appeared. When the competition ceased in 1927 the circulation dropped 791 copies a day. When the competition re-started there was a rise of about 5,000 copies a week. The competition was conducted as a commercial undertaking for profit, with three objects in view—(i) to interest the readers of the newspaper; (ii) to keep up, or to increase, the circulation of the newspaper; and (iii) to meet the competition of other newspapers which conducted similar competitions. The circulation was of importance to the appellants, as the number of advertisements and the price to be obtained therefrom might decrease if the circulation went down. Advertisers were supplied from time to time with certificates of the number of the net sales of the newspaper. The competition was run at a cost of over £8,000 a year to increase, or to prevent a decrease in, the circulation, and it had that effect.

The justices stated that so far as they were entitled to draw inferences from the evidence tendered, they drew the inference and found as a fact that some persons bought the newspaper solely, and that others bought it partly, to obtain the coupons and thereby to acquire the chance or possibility of winning a prize of £200 or £1,000. They also found that there was some relation between the pennies paid for some of the sold copies of the newspaper and the coupons printed in them. A calculation was laid before the justices which assumed that twenty-four matches had been selected from the forty-four given, and showed that it would be necessary for a competitor to send in 282,429,536,481 coupons before he could be sure of sending in a coupon giving twenty-four correct results. Without vouching for or accepting the accuracy of that calculation, the justices found that the number of coupons necessary to ensure success was so large that the winning of a prize by forecasting the exact results, or by being nearest to the exact results, was substantially, or in the main, by chance. The chances of the competition were not alike favourable to all the competitors or players, including among them the appellants, by whom the competition or game was managed, and against whom the competitors played. The justices were of opinion that the appellants had published a coupon of a ready money football betting business, i.e., a business or agency for the making of ready money bets or wagers, or for the receipt of money or some

A valuable thing as the consideration for a bet or wager in connection with certain football games. They, therefore, convicted the appellants and fined them £5. The appellants appealed.

Stuart Bevan, K.C. (Cassels, K.C., and Theobald Mathew with him), for the appellants, referred to Suttle v. Cresswell (1); R. v. Stoddart (2); Caminada v. Hulton (3); Turf Publishers, Ltd. v. Davies (4); Strang v. Brown (5); Jameson v. Sinclair (6).

R. M. Montgomery, K.C. (Paley Scott with him), for the respondent.

LORD HEWART, C.J.—This is a Case stated by justices, and the question for us arises on an information under the Ready Money Football Betting Act, 1920, which is

C “an Act to prevent the writing, printing, publishing or circulating in the United Kingdom of advertisements, circulars or coupons of any ready money football betting business.”

The appellants were charged for that they on Mar. 14, 1928, at the city of Sheffield unlawfully did in the “Sheffield Daily Telegraph” publish a coupon of a ready money football betting business carried on by them, contrary to the said Act. D The justices, having heard the case, convicted the appellants and fined them, and the question for this court is whether in so doing they came to a correct determination and decision in point of law. The justices stated :

“We accepted the contention for the respondent and were of opinion that the appellants had published a coupon of a ready money football betting business— E i.e., a business or agency for the making of ready money bets or wagers or for the receipt of money or some valuable thing as the consideration for a bet or wager in connection with certain football games.”

The argument which has been addressed to us on this appeal by way of Case Stated is that there were no materials before the justices on which they could come to the conclusion at which they arrived. I need not re-read the whole of

F this carefully stated Case, but it may be observed that the justices found that a box with a slot in it and having on it a notice “ ‘Sheffield Telegraph’ Football Competition Coupon Box” was habitually placed outside the main entrance to the appellants’ offices and adjoining the public pavement in High Street, Sheffield. More than forty other similar boxes were provided in other places in Sheffield and about forty at places outside Sheffield where the “Sheffield Daily Telegraph”

G circulated. These boxes were intended for the receipt of envelopes containing the football competition coupons. The justices also found as a fact that during certain hours on Mar. 14, 15 and 16, 1928, 17,000 envelopes were deposited in the High Street, Sheffield, box alone, and in four boxes alone elsewhere the envelopes averaged 1,000 per box. Four or five sacks of envelopes in connection with which no claims had been made, and which had, therefore, not been opened, were

H destroyed each week. So systematic was this business that, as the Case finds, to cope with the work arising from the football competition during the forty weeks it lasted, the appellants had a special competition department consisting of ten girls, whom it took about three days to go through the envelopes and the coupons in respect of which claims had been made. In addition to the £200 a week paid in prizes, the cost of the scheme was about £10 a week. Moreover, they found as a

I fact that when the competition ceased in 1927 the circulation dropped 791 copies a day. When the competition re-started there was a rise of about 5,000 copies a week. The findings of fact upon this point are compendiously re-stated in the final finding of fact—that the competition was run at a cost of over £8,000 a year to increase or to prevent a decrease in the circulation “and it had that effect.” Upon these materials the justices have formed a certain opinion undoubtedly based upon an inference. They say: We drew the inference and we find as a fact that some persons bought the newspaper solely to obtain the coupons and that some persons bought the newspaper partly to obtain the coupons and thereby to win the chance

or possibility of winning a prize of £200 or £1,000. The justices also found that there was some relation between the pennies paid for some of the sold copies of the newspaper and the coupons printed in them. A

The attention of the court has been directed to the decision in *Suttle v. Cresswell* (1). It is of some importance that the decision in that case should not be treated as if it applied only to a case where exactly similar facts are found. In *Suttle v. Cresswell* (1) the justices undoubtedly found as a fact ([1926] 1 K.B. at p. 270) B that the great majority of the purchasers of the newspaper there in question bought it for the purpose of obtaining the coupon in it. But, as was clearly pointed out in *Turf Publishers, Ltd. v. Davies* (4), this finding was not in the least necessary to support a conviction. What is necessary is that there should be materials to show that in fact there was a ready money football betting business, meaning, as the definition in s. 2 of this statute says, C

"any business or agency for the making of ready money bets or wagers or for the receipt of any money or valuable thing as the consideration for a bet or wager in connection with any football game."

In my opinion, it is immaterial that the defendant in such a prosecution is carrying on some other business and has done so for a long time, as well as the ready money football betting business, however well established, well managed and well known that other business may be. If he chooses to annex to his original business some business which comes within the definition contained in this Act he is liable to the penalties which this Act imposes. I am satisfied from the statement of facts in the present case that there was overwhelming material before the justices which entitled them to come to the conclusion at which they arrived. Indeed I am unable to see how they could have come to any other conclusion. It may well be that the facts which were found, justifying as they do the inferences which have been drawn, also show that an offence was committed under the law relating to lotteries, but that matter does not now arise. D

In my opinion, the justices were right for the reasons they state. I need not re-trace the argument which counsel for the appellants has presented to the court. But there is one fact which upon the statement of this Case leaps to the eye. It is conceded that as long as the rules of this competition were such that a person taking part in it might purchase any number of copies of the same issue of the journal, cut the coupons out of them, and make a separate guess upon each coupon, there were large numbers of people who bought extra copies for the sole purpose of having additional guesses in order to improve their chances of winning these prizes or one of them. When the new rules came into force in 1927 no one competitor could have more than thirteen attempts in a week; that is to say, by six coupons cut out of the six issues of the morning paper, by six coupons cut out of the six issues of the evening paper, and by one coupon cut out from the issue of the weekly paper. We have been invited to believe that the true inference from these facts is that while under the old rules there was a willingness to purchase extra copies for the mere sake of obtaining additional coupons, no one of these thirteen copies can properly be regarded as being purchased for the sake of this competition. E F G H I In my opinion, that is a desperate contention, and I do not wonder that the justices resisted it. I think, therefore, that this appeal fails and ought to be dismissed.

AYORY, J.—I am of the same opinion. I think that in this case there were ample facts to justify the justices in drawing the inference that some persons at all events bought this paper partly for the sake of obtaining the coupon and thereby acquiring the chance or possibility of winning the prizes of £200 or £1,000. I do not think that it is necessary to support this conviction that the justices or that this court should necessarily draw the inference that there were persons who bought the newspaper solely for the sake of obtaining the coupon, although I have no doubt that upon these facts one would be justified in drawing that inference, because in the later case alluded to, which is not reported upon this point—*Turf Publishers, Ltd. v. Davies* (4)—**LORD HEWART, C.J.**, in giving judgment said: I

- A** "It is said that a great many persons may have bought this newspaper without reference to this scheme of ready money betting. That may be so, although, so far as the mere numbers in the case are concerned we are expressly told that the competitors—that is to say the living individuals who competed—were 15,000 to 20,000, and that the number of the copies of the newspaper sold was from 60,000 to 80,000. If, therefore, each competitor bought on an average four copies—in other words, if he risked the sum of 8d.—the whole circulation of the newspaper is accounted for. But I do not think that it is at all necessary to apply that test. Reference has been made to *Suttle v. Cresswell* (1). In that case, it is true, the justices found as a fact that the vast majority of the purchasers of the sheet bought it for the football coupon, but the expression 'vast majority' was not in the least necessary for the decision of the case. In giving judgment in that case I said ([1926] 1 K.B. at p. 267): 'Here this small pamphlet was sold at sixpence, and the justices were of opinion, as they could not fail to be, that purchasers bought it for the sake of the coupon.' That does not necessarily mean all or the vast majority of the purchasers, but that in fact purchasers had bought it in that way. . . . I have no doubt that the justices had ample materials to justify the conclusion at which they arrived"
- B**
- C**
- D**

—namely to convict. In other words, if there is evidence that some of the purchasers of the paper bought it for the sake of the coupon, that would be sufficient to bring it within the statute. In the same case SHEARMAN, J., said:

- "It is obviously not necessary in the words of the statute to prove that the newspaper complained of is really a coupon and nothing else. I am quite willing to accept the argument that there is a good deal in this newspaper, which is called the 'Racing and Football Winner,' which may appeal to other classes of the community."
- E**

Turf Publishers, Ltd. v. Davies (4) appears to me to be a direct decision that it is not necessary, in order to constitute an offence under this statute, that there should be direct evidence that persons have bought the paper for the sake of the coupon only.

F

There is only one other observation I wish to add. It is upon the contention that was put before the justices on behalf of the appellants: "that to constitute an offence the substantial object of the newspaper must be to sell a coupon and nothing else." I can see no ground for that contention. In fact, in any business

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there may be two substantial objects, and a newspaper proprietor may have as one of the objects of his business the sale of newspapers and at the same time another object, namely, the making of ready money bets on contingencies relating to football. For these reasons, I agree that the justices were quite entitled to convict and that the appeal should be dismissed.

- H** **ACTON, J.**—I agree.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.*; *Rollit, Sons & Haydon*, for Sir William Hart, Town Clerk, Sheffield.

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

Re ROBINS. HOLLAND v. GILLAM

[CHANCERY DIVISION (Tomlin, J.), June 5, 6, 1928]

[Reported [1928] Ch. 721; 97 L.J.Ch. 417; 139 L.T. 393]

Settled Land—Trust for sale—Land held in undivided shares vested in possession—Land devised to trustees to pay income to specified persons with ultimate trust for sale—One person surviving—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), Sched. I, Part IV, para. 1.

By his will the testator devised real estate to trustees to apply the income in certain proportions among certain persons, on the death of the survivor of whom it was directed that the property should be sold and the trustees stand possessed of the proceeds for the benefit of issue of the persons entitled to the income. At the date of the coming into force of the Law of Property Act, 1925, all the specified persons except one were deceased.

Held: the land was held in undivided shares vested in possession within para. 1 of Part IV of Sched. I to the Act of 1925, and was, therefore, subject to a trust for sale under the act.

Re Higgs' and May's Contract (1), [1927] 2 Ch. 249, applied.

Settled Land—Repairs—Expenses—Payment out of capital or income—Discretion of trustees—Power of court where discretion not exercised.

The effect of s. 28 (1) of the Law of Property Act, 1925, as amended by the schedule to the Law of Property (Amendment) Act, 1926, is that trustees with a statutory trust for sale have vested in them the powers of management which are conferred during minority upon trustees under s. 102 of the Settled Land Act, 1925. Under s. 102 (3) a duty rests on the trustees to exercise a proper discretion as to whether expenses which they have incurred in relation to repairs should be paid out of capital or out of income. There is nothing in s. 28 (2) of the Law of Property Act, 1925, which deprives trustees of their discretion and makes it obligatory on them when acting under s. 28 to pay the cost of all repairs out of income. But where trustees have provided for repairs temporarily out of income and are not prepared to exercise their discretion the court is free to determine how the expenses of the repairs ought to be borne. In arriving at a conclusion the court must adhere to the principles laid down in such cases as *Re Hotchkys* (2) (1886), 32 Ch.D. 248.

Notes. Applied: *Re House, Westminster Bank v. Everett*, [1929] 2 Ch. 166. Followed: *Re Smith, Vincent v. Smith*, [1930] 1 Ch. 88. Referred to: *Re Conquest, Royal Exchange Association v. Conquest*, [1929] 2 Ch. 353; *Re Whitaker, Rooke v. Whitaker*, [1929] 1 Ch. 662.

As to the statutory powers of trustees for sale, see 29 HALSBURY'S LAWS (2nd Edn.) 764 et seq.; and for cases see 40 DIGEST (Repl.) 790 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427; and for the Settled Land Act, 1925, see *ibid.*, vol. 23, 12.

Cases referred to:

- (1) *Re Higgs' and May's Contract*, [1927] 2 Ch. 249; 96 L.J.Ch. 413; 137 L.T. 803; 71 Sol. Jo. 761; 40 Digest (Repl.) 862, 3356.
- (2) *Re Hotchkys, Freke v. Calmady* (1886), 32 Ch.D. 408; 55 L.J.Ch. 546; 55 L.T. 110; 34 W.R. 569, C.A.; 40 Digest (Repl.) 699, 1954.
- (3) *Re Flint, Flint v. Flint*, [1927] 1 Ch. 570; 96 L.J.Ch. 248; 137 L.T. 178; 40 Digest 859, 3339.
- (4) *Re Dawson's Settled Estates*, post, p. 472; [1928] Ch. 421; 97 L.J.Ch. 343; 139 L.T. 94; 40 Digest (Repl.) 858, 3334.
- (5) *Re Frewen*, [1926] Ch. 580; 95 L.J.Ch. 297; 134 L.T. 747; 70 Sol. Jo. 650; 40 Digest (Repl.) 804, 2832.

- A (6) *Re Myhill, Hull v. Myhill*, [1928] 1 Ch. 100; 97 L.J.Ch. 81; 138 L.T. 486; 72 Sol. Jo. 86; 40 Digest (Repl.) 859, 3337.
- (7) *Re Gray, Public Trustee v. Woodhouse*, [1927] 1 Ch. 242; 96 L.J.Ch. 159; 136 L.T. 401; 70 Sol. Jo. 1112; 40 Digest (Repl.) 699, 1957.

Adjourned Summons.

B By his will, dated Dec. 3, 1870, the testator, Ebenezer Robins, devised his real estate to trustees upon trust that, during the lifetime of the survivor of the testator's three sisters, Elizabeth, Martha, and Rebecca, the children of his said three sisters, and the children of four brothers and sisters of the testator who had predeceased him, the trustees should apply the income thereof in the following manner. One-seventh part thereof was to be paid annually to the testator's sister Elizabeth during her life; one of two further seventh parts was to be paid similarly

C to each of his said sisters Martha and Rebecca during their lives; and the four remaining seventh parts thereof were to be divided similarly between the nephews and nieces of the testator in equal shares. The will further declared that upon the deaths of the three sisters of the testator, Elizabeth, Martha, and Rebecca, each respective seventh share of the said income which had been allotted to them was to fall into the residue of the testator's estate, and the trustees were to apply the

D same in the same way as they had been applying the four remaining seventh shares thereof which the testator had devised for the benefit of his nephews and nieces and ultimately for the benefit of their issue. There was a direction in the will that, upon the death of the survivor of the sisters, nephews, and nieces of the testator, the real estate should be sold, and the trustees should stand possessed of the

E proceeds of such sale upon trust for the benefit of such of the grandchildren of the brothers and sisters as should then be living, in equal shares, and for the issue, if any, of such of the grandchildren as should then be deceased; such issue were to take per stirpes and not per capita. There was in the will power for the trustees to sell the real estate at any time before the coming into being of the trust for sale in favour of the grandchildren, and trusts of the proceeds of such sale were declared

F corresponding to those of the income of the testator's real estate. On June 25, 1873, by an order made on further consideration in an administration action, it was declared that the income of the real estate was, upon the true construction of the said will, divisible, as from the testator's death (i) from July 1, 1871, to Feb. 23, 1872 (the date of the death of the testator's sister Elizabeth), and (ii) from Feb. 23, 1872, to Aug. 19, 1872 (the date of the death of the testator's sister

G Martha), as in the order directed; (iii) from the death of the testator's sister Martha until that of his sister Rebecca similarly, and, finally, (iv) from the death of Rebecca until that of the last survivor of the grand-nephews and great-nieces of the testator into twenty-three equal shares. Of these twenty-three equal shares, one was to belong to each of the twenty-three persons who were named in the order, and was to go at his or her death to his or her personal representatives or assigns. This

H division had, in fact, been put into effect upon the death, on Mar. 13, 1874, of the testator's sister Rebecca. At the date of the coming into force of the Law of Property Act, 1925, all of the twenty-three named persons save one were deceased, and the present summons asked for the decision (*inter alia*) of the questions:

I (i) Whether, on Dec. 31, 1925, real estate by the will devised was held at law or in equity in undivided shares vested in possession under para. 1 of Part IV of Sched. I to the Law of Property Act, 1925; (ii) if not, whether the said land was "settled land" within the meaning of the Settled Land Act, 1925; (iii) whether there was at the date of the summons a tenant for life of the land or whether the trustees of the testator's will had the powers of a tenant for life for the purposes of the Settled Land Act, 1925; and (iv) that the direction of the court might be given as to how the sum of £94 14s. 8d. (expenditure incurred in complying with a notice respecting a dangerous structure on certain freehold lands forming part of the said lands of the said testator) ought to be borne.

R. G. Nicholson Combe, for the applicants, trustees of the will, cited *Re Flint*,

Flint v. Flint (3); *Re Higgs' and May's Contract* (1); *Re Dawson's Settled Estates* (4); and *Re Frewen* (5).

Charles Church, H. Norman Daynes, and Lloyd Williams for persons interested.

TOMLIN, J.—The point for determination in this case is really whether the land, the subject-matter of the settlement, is settled land which does not fall within Part IV of Sched. I to the Law of Property Act, 1925, or whether it is land which is held at law or in equity in undivided shares vested in possession so as to fall within one or other of the sub-paragraphs of para. 1 of that schedule. The effect of the testator's dispositions is really this, that, in the events which have happened, the property was held on trust during the lives or life of the survivors or survivor of a number of persons for the division of the income among certain persons.

A number of cases have been referred to in the argument, in which it has been at any rate assumed that a trust (which it is difficult to distinguish from this trust) does in fact fall within Part IV of the schedule. The first case that has been brought to my notice was one before ASTBURY, J., *Re Flint, Flint v. Flint* (3). There was there no trust for sale, I think, but apart from that it is difficult to see how the case would be distinguished from the present case. The question was whether—there being a power of sale in the will—a right of pre-emption (which arose on the exercise of the power of sale) arose upon the exercise of the statutory trust for sale, and the case was concluded upon the basis that the statutory trust for sale applied, i.e., that it was within Part IV; and the point for consideration was whether the right of pre-emption attached in those circumstances. I myself do not see any sign in that case of there having been any argument directed to the particular point that I have to determine here, but it was certainly assumed—and the learned judge says that it was not disputed—that, before the commencement of the Law of Property Act, 1925, land was held in equity in undivided shares vested in possession. Thus, it does not seem to have occurred to the learned judge that it was arguable that the case did not fall within Part IV; and he proceeded upon that footing, since it was not in fact disputed.

The next case referred to was *Re Higgs' and May's Contract* (1), before EVE, J. That case goes further, for there was there a trust for sale, i.e., a trust to pay the income among a number of people up to a certain time, and then, when the time for the division of the income was ended, to sell, and to divide the proceeds of sale between the members of a certain class. The language of that trust is such that it seems to me to be impossible to distinguish it from the language of the trust in this case, so far as the effect of it goes. Substantially, the trust is on the same lines. The point which the learned judge was invited to decide was whether the case fell within para. 4, which was added, by the schedule to the Law of Property (Amendment) Act, 1926, to Part IV of Sched. I of the Act of 1925, or within para. 1 (3) thereof. The learned judge certainly decided that the entirety of the land was settled land, for he begins his judgment by saying:

"On the 1st Jan., 1926, the entirety of the land was settled land, held under one and the same settlement in equity in undivided shares in possession, and by virtue of para. 1 (3) of Part IV of Sched. I to the Law of Property Act, 1925, would appear to have vested on that date in the applicants, as trustees of the settlement, as joint tenants upon the statutory trusts."

The learned judge, having observed that the purchaser declined to accept the title on that basis, decided that the case came within sub-para. (3), and that it was not affected by the new para. 4.

It seems to me that, if I am to decide, as I am asked to do, that this is a case which does not fall within Part IV, I should certainly be arriving at a conclusion which could not be reconciled with the conclusion at which EVE, J., arrived in *Re Higgs' and May's Contract* (1). I do not think that *Re Frewen* (5), to which I was referred, is necessarily inconsistent with *Re Higgs' and May's Contract* (1). I think that it may well be capable of being distinguished; and the subsequent cases of *Re Myhill, Hull v. Myhill* (6) before ASTBURY, J., and *Re Dawson's Settled*

A *Estates* (4) before CLAUSON, J., although they are not precisely so closely in point as the case before EVE, J., may, I think, be fairly said to point in the same direction. The question is whether I ought to arrive at a conclusion which is inconsistent with those decisions, especially the decision in *Re Higgs' and May's Contract* (1). This is a conveyancing matter, and it is very desirable that there should be uniformity on such a question. As a matter of mere convenience,

B probably the view which is embodied in *Re Higgs' and May's Contract* (1) and *Re Myhill, Hull v. Myhill* (6) is the more convenient of the two, for the other view would involve the execution of a vesting deed. I certainly hold no strong view—or, perhaps, I may go so far as to say any view—that there is any language in this schedule which is inconsistent with that. What view I might have taken had the matter been *res integra* I do not know. The point is that the matter has already,

C as it seems to me, been decided in one direction, and I can see nothing which would justify me in deciding this in a way inconsistent with what has already been determined by EVE, J., in *Re Higgs' and May's Contract* (1). I shall, therefore, hold that upon the true construction of this will and in the events which have happened, the case falls within Part IV of Sched. I to the Law of Property Act, 1925.

D The court then heard arguments as to how the expenditure incurred in respect of the dangerous structure notice—which the trustees had for the time being paid out of income—should be borne.

By Settled Land Act, 1925, s. 102 (3):

E “The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.”

By Law of Property Act, 1925, s. 28, as amended by the schedule to the Law of Property (Amendment) Act, 1926:

F “(1) Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including, in relation to land, the powers of management conferred by that Act during a minority; and where, by statute, settled land is or becomes vested in the trustees of the settlement

G upon the statutory trusts, such trustees and their successors in office shall also have all the additional or larger powers (if any) conferred by the settlement on the tenant for life, statutory owner, or trustees of the settlement; and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable in the same manner as if the money represented

H proceeds of sale arising under the trust for sale. . . . (2) Subject to any direction to the contrary in the disposition or trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings, shall be paid and applied except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income

I of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested.”

Lloyd Williams, for persons contingently interested in the capital, referred to the Settled Land Act, 1925, s. 102 (2); Law of Property Act, 1925, s. 28 (2); *Re Gray, Public Trustee v. Woodhouse* (7).

Norman Daynes, for the trustees, referred to *Re Hotchkys, Freke v. Calmady* (2).

TOMLIN, J.—The point which falls for determination now is how certain expenses are to be borne which have been incurred by the trustees as the result of

the service upon them of a dangerous structure notice under the Towns Improvement Clauses Act, 1847. They executed the necessary repairs, and, in the first instance, they paid those repairs out of income, without prejudice as to how they should ultimately be borne, and they are now asking me to determine how, as between income and capital, that expenditure should be distributed. Under the Towns Improvement Clauses Act it is plain that the expenditure is one which, if the owner makes default, can be incurred by the authority, and that, ultimately, the authority, in certain events, has power to sell the property and apply the proceeds in repayment to itself of the money expended in executing the work. I have no difficulty in coming to the conclusion that, apart from recent legislation, it is one of those cases in which the court could undoubtedly have held that this expenditure is of such a character that it ought, upon the general principles governing the court in matters of this kind, to be borne by capital, so that the burden is distributed between capital and income, capital losing the sum, and income losing the interest on the sum. But it is said that I have no longer a free hand to deal with the matter in the way which was described by one learned judge as common justice, and that I am to-day bound by the provisions of recent statutes to deal with it in a wholly different way. It is further said that I shall find, if I look at authority, that the statutes have been so construed as to lead to that result.

The first relevant section is s. 28 (1) of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926. The effect of that amended subsection is that trustees in the position of these trustees—and I have already held that they are trustees with a statutory trust for sale—have vested in them the powers of management which are conferred during minority upon trustees under the Settled Land Act, 1925. It has been held by CLAUSON, J., in *Re Gray, Public Trustee v. Woodhouse* (7), that, although these powers under the Settled Land Act, 1925, are confined to minority, powers given by reference to s. 28 are not confined to minority, and that seems reasonably obvious, the reference to minority in s. 28 being only a descriptive reference, and not a reference for the purpose of limiting the powers, so that it comes to this, that the trustees have these powers vested in them. Turning to s. 102 of the Settled Land Act, 1925, we ascertain what those powers are. Under sub-s. (4) the powers include a wide power to execute repairs, and sub-s. (3) is in these terms: [His Lordship read the subsection, and continued:] So that there the trustees have conferred on them the power of paying out of income expenses incurred in management. It is to be observed that the section does not say that they shall pay the expenses of management out of income; the section says that they may pay, and it seems to me plain that under s. 102 (3) there rests upon the trustees a duty to exercise a proper discretion, and that, if they have in fact incurred expenses in relation to repairs, it is their duty to consider whether those expenses are expenses which they ought properly to pay out of income or out of capital. They are in the same position under s. 28 of the Law of Property Act, 1925, unless, as is said, their position is altered by sub-s. (2) of that section. Subsection (2) is in these terms: [His Lordship read the subsection and continued:] It is said that, because in that subsection the words are "after keeping down costs of repairs and insurance and other outgoings," it is obligatory on trustees acting under s. 28 to pay the costs of all repairs out of income: in other words, that it deprives them of any discretion they may have under s. 102, and makes it compulsory on them to pay all repairs out of income. It is said that that interpretation has been put upon the section by CLAUSON, J., in *Re Gray, Public Trustee v. Woodhouse* (7). Before I consider whether that is so, I desire to say that, apart from authority and unless I am compelled by authority to take a different view, I am satisfied that on the true construction of these sections the position is this. In regard to the costs of repairs, trustees have a discretion whether they will or will not pay them out of income, and s. 28 (2) does not deprive the trustees of their power to exercise a discretion in the matter, and does not compel them to pay out of income the costs of all repairs, including even those which obvious justice demands should be paid out of

A corpus. That is my view of the section and of its meaning, and the only question is whether it is my duty to take some other view because some other judge thinks differently about it.

I am referred to the decision of CLAUSON, J., in *Re Gray, Public Trustee v. Woodhouse* (7). It seems to me that that decision contains nothing which compels me to depart from the view which I have indicated. In that case the trustees had executed a number of repairs and had paid for them out of income: they were contemplating executing further repairs; and the assignee of the life interest, i.e., the person entitled to the income, objecting to their being paid out of income, came to the court, and said that the trustees ought not to pay them out of income. The learned judge, as I read his judgment, held that the trustees had power to pay them out of income. They had a discretion, and if they chose to exercise that discretion and pay them out of income, it was not for the court to interfere, and, as I read the case, he said that, where trustees exercise their discretion and determine to pay the expenses in a particular way, it is no longer open to the court to say: "We do not think you have done right; you ought to have exercised your discretion in some other way, and we are free to deal with it on the principle of *Re Hotchkys* (2)." That is only saying, as has so often been said in this court, that where the trustees have a discretion, and have exercised the discretion *bonâ fide*, the court will not interfere with it. But that is a wholly different position from the position here. The position here is that the trustees come and say: "We have executed these repairs, we have provided for them temporarily out of income, we are not prepared to exercise our discretion, and we invite the court to tell us how the expenses ought to be borne between the parties." In these circumstances, the court to-day, in my judgment, is in the same position as it was in before 1926, and is free to determine how the expense of these repairs ought to be borne; and, in arriving at a conclusion, the court must adhere to those principles which have been laid down again and again in such cases as *Re Hotchkys* (2). Adopting that view of this case, I hold that these repairs ought to be paid for out of corpus, and in doing that I do not consider that I am doing anything that is inconsistent with the decision of CLAUSON, J., in *Re Gray, Public Trustee v. Woodhouse* (7). That case seems to me to be confined to the simple point that where the trustees have exercised their statutory discretion, it is not for the court to interfere.

F Solicitors: *Iliffe, Sweet & Co.*, for *E. R. Williams & Son*, Birmingham; *Winter & Co.*

[Reported by K. R. A. HART, Esq., Barrister-at-Law.]

Re HOULDER. Ex parte RABBIDGE (TRUSTEE) v. EAGLE
STAR AND DOMINIONS INSURANCE CO.

[CHANCERY DIVISION (Astbury, J.), November 12, 1928]

[Reported [1929] 1 Ch. 205; 98 L.J.Ch. 12; 140 L.T. 325;
[1928] B. & C.R. 114]

Bankruptcy—Surety—Guarantee of whole debt—Receipt by creditor after receiving order of payments from sources other than principal debtor—Right to prove for whole amount of debt.

Where a surety has guaranteed the whole amount of the debt of a principal debtor, the creditor of the principal debtor is entitled in the surety's bankruptcy to prove for the whole amount of the debt due at the date of the receiving order, although he may have subsequently received sums on account of his debt from other sources than the principal debtor, e.g., from co-sureties, provided that he does not receive more than twenty shillings in the pound. The rule that the creditor must deduct such sums obtained aliunde from his proof is limited to claims in connection with negotiable instruments.

Re Sass, Ex parte National Provincial Bank of England, Ltd. (1), [1896] 2 K.B. 12, applied.

Notes. As to a creditor's right of proof against a surety, see 2 HALSBURY'S LAWS (3rd Edn.) 472, 473; and for cases see 4 DIGEST 264 et seq.

Cases referred to:

- (1) *Re Sass, Ex parte National Provincial Bank of England, Ltd.*, [1896] 2 Q.B. 12; 65 L.J.Q.B. 481; 74 L.T. 383; 44 W.R. 588; 12 T.L.R. 333; 40 Sol. Jo. 686; 3 Mans. 125; 4 Digest 385, 3535.
- (2) *Re Blakeley, Ex parte Aachener Disconto Gesellschaft* (1892), 9 Morr. 173, D.C.; 4 Digest 267, 2508.
- (3) *Re Blackburne, Ex parte Strouts* (1892), 36 Sol. Jo. 668; 9 Morr. 249, D.C.; 4 Digest 259, 2458.
- (4) *Re Houghton, Ex parte Taylor* (1857), 1 De G. & J. 302; 26 L.J.Bey. 58; 29 L.T.O.S. 254; 3 Jur.N.S. 753; 5 W.R. 669; 44 E.R. 740, L.J.J.; 4 Digest 283, 2646.
- (5) *Re London, Bombay and Mediterranean Bank, Ex parte Cama* (1874), 9 Ch. App. 686; 43 L.J.Ch. 683; 31 L.T. 234; 22 W.R. 809, L.J.J.; 4 Digest 282, 2634.
- (6) *Commercial Bank of Australia, Ltd. v. Wilson & Co.'s Estate Official Assignee*, [1893] A.C. 181; 62 L.J.P.C. 61; 68 L.T. 540; 41 W.R. 603; 9 T.L.R. 307; I.R. 331, P.C.; 4 Digest 267, 2509.
- (7) *Edwards v. Hood-Barnes*, [1905] 1 Ch. 20; 74 L.J.Ch. 167; 91 L.T. 766; 21 T.L.R. 89; 4 Digest 493, 4433.
- (8) *Cooper v. Pepys* (1741), Barr. Ch. 438; 1 Atk. 107; 27 E.R. 710; 4 Digest 283, 2647.
- (9) *Ex parte Wildman* (1750), 1 Atk. 109; 26 E.R. 72; sub nom. *Ex parte Wyldman*, 2 Ves. Sen. 113; 4 Digest 284, 2650.
- (10) *Midland Banking Co. v. Chambers* (1868), L.R. 7 Eq. 179; 19 L.T. 548; 17 W.R. 156; affirmed (1869), 4 Ch. App. 398; 38 L.J.Ch. 478; 20 L.T. 346; 17 W.R. 598, L.J.J.; 4 Digest 385, 3532.
- (11) *Re Rees, Ex parte National Provincial Bank of England* (1881), 17 Ch.D. 98; 44 L.T. 325; 29 W.R. 796, C.A.; 4 Digest 385, 3534.

Motion in the bankruptcy of one Houlder for an order that the proof of the Eagle, Star, and Dominions Insurance Co. should be reduced by sums received by them after the date of the receiving order.

By a mortgage dated Aug. 16, 1921, between the principal debtor, of the first part, three sureties (of whom Houlder was one), of the second part, and the

A respondents (the mortgagees), of the third part, the sureties jointly and severally covenanted to repay with interest the sum of £15,000 advanced to the principal debtor by the mortgagees, and the principal debtor assigned to the mortgagees certain policies. A further advance and a further charge were subsequently made on the same terms. On Jan. 10, 1924, the sum of £8,249 was due to the mortgagees for principal and interest. On that day a receiving order was made against **B** Houlder, and on Jan. 25 he was adjudicated bankrupt. On Feb. 13 the mortgagees put in a proof for £8,249. Between the date of the receiving order and the date of the proof the mortgagees had received a sum of £5,372, partly by payments by the other two sureties, and partly by sums credited as the surrender value of lapsed policies. The trustee in Houlder's bankruptcy now moved for a declaration that the sum of £5,372 should be deducted from the amount of the proof.

C *W. N. Stable* for the trustee.
Tindale Davis for the mortgagees.

ASTBURY, J., stated the facts and said: The question is whether the mortgagees can prove for the amount due at the date of the receiving order, or whether they can prove only for the net amount owing at the date of the proof. A large number of authorities have been cited which are by no means easy to reconcile. I do not, however, propose to discuss the authorities in the general sense at all. I propose to limit my judgment to the question what is the proper amount for which the principal creditor is entitled to prove in the bankruptcy of a surety as distinct from his right of proof in the bankruptcy of the principal debtor. Counsel for the trustee, in an able argument, submitted that this was a case where the mortgagees **E** ought to be restricted to the debt due at the date of the proof. If between the date of the receiving order against the surety and the date of proof the creditors have received from the estate of the principal debtor moneys in reduction of their claim, it is clear that in the bankruptcy of the surety they can only prove for the amount due at the latter date.

F In *Re Blakeley, Ex parte Aachener Disconto Gesellschaft* (2), the headnote states the rule as follows (9 Morr. 173):

"Where proof is made against a bankrupt's estate on a guarantee entered into by the bankrupt on behalf of another person, if at the time of proving the creditor has received part of the debt, either by payment or as a dividend from the estate of the principal debtor, or even if such dividend has been declared though not actually paid, such creditor will be allowed to prove for the residue **G** only after deducting the amount so paid or declared. But if after proof is made the creditor receives a dividend from the estate of the principal debtor that will not be deducted from the amount of his proof."

H In other words, where a creditor is proving in the bankruptcy of a surety, and that surety is only responsible for the amount in fact owing by the principal debtor, any payment by or on behalf of the principal debtor before proof must be taken into account. Where, however, the creditor has received from some other source payments in reduction of the principal debtor's debt between the receiving order and the proof the position is different.

In *Re Blackburne, Ex parte Strouts* (3), VAUGHAN WILLIAMS, J., said (9 Morr. at p. 252):

I "The second point raised is that sometimes a person seeking to prove has to give credit for a sum of money received, not from the bankrupt's estate, but from elsewhere. The case of a bill of exchange was mentioned, and it was said that according to the practice in bankruptcy, when several parties are liable on a bill of exchange and proof is made against the estate of one of those parties, if a sum has been received from another party before proof is made, that sum must be deducted from the proof. The answer to that is, that, although it is true that such is the rule, it is a rule which applies to bills of exchange and negotiable instruments alone."

Counsel for the trustee questions the accuracy of this view, and suggests that the right to reduce the proof in such a case is not limited to negotiable instruments, but is of general application. This is only one of the questions I have to decide.

The trustee relies upon *Re Houghton, Ex parte Taylor* (4), which was a bill of exchange case. The headnote is as follows (26 L.J.Bky. 58):

"The holder of a bill of exchange received from the drawers payments in respect of it amounting to nearly 15s. in the pound. The acceptor afterwards became bankrupt, and upon the holder tendering a proof against the estate for the full amount of the bill and interest in arrear, the proof was cut down to the amount of principal money due at the time of the proof."

KNIGHT BRUCE, L.J., said:

"Still the fact remains here that the appellants have actually received sums of money on account of the bill of exchange after it reached maturity. According to the general rule of bankruptcy (which I think a wholesome and rational rule), the appellants are not entitled to prove for more than the balance remaining, after deducting the sums so received by them from persons liable to them either directly or indirectly; and to me there appears no ground for making the present case an exception (if indeed there can be under any circumstances an exception) to this general rule, the payments having been made by reason of the liability of making the payments as a party to the bill."

It is true that this judgment treats the matter generally and does not state that the general rule in bankruptcy is confined to negotiable instruments. But it was in fact a case relating to a negotiable instrument, and it was only decided that the rule stated by VAUGHAN WILLIAMS, L.J., applied.

The trustee then relied on *Re London, Bombay and Mediterranean Bank, Ex parte Cama* (5). That again was a bill of exchange case. It related to bills of exchange and the method of proving on them, and it does not touch the present point. He also relied on *Commercial Bank of Australia, Ltd. v. Wilson & Co.'s Estate Official Assignee* (6). There again the actual decision has no bearing on the present case, but there are expressions in the judgment of the Privy Council which justify the argument that they intended to convey their view that in cases not relating to negotiable instruments payments by one surety in reduction of debt might have to be taken into account in proving against another surety. But there was no direct decision to that effect. Counsel for the trustee then properly referred to *Edwards v. Hood-Barnes* (7), which he admitted was against him. That was, however, not a question of suretyship, but as to the liability of trustees for a breach of trust, and I am unable to find anything that bears on the present point, or helps either side.

The authorities are summarised with great accuracy in WILLIAMS ON BANKRUPTCY (13th Edn.), p. 161, as follows:

"The holder of a bill of exchange is entitled to prove his debt in the bankruptcies of all the prior parties to the bill, and to receive a dividend from each upon his whole debt, provided he do not on the whole receive more than 20s. in the pound. But where a creditor applies to prove his debt after having received part, he can only prove for so much as remains unpaid, and this is true not only if he has actually received a part of the bill before proof, but even if a dividend under another bankruptcy has been declared: *Cooper v. Pepys* (8), *Ex parte Wildman* (9), *Ex parte Taylor* (4). But this rule only applies to negotiable instruments: *Re Blackburne* (3); and even in the case of these, if after having proved for the whole, he receives a part from any person liable, he is entitled to a dividend upon the whole, provided it do not exceed 20s. in the pound upon such part as remains due: *Ex parte Taylor* (4), *Ex parte Wildman* (9), *Ex parte Cama* (5)."

I will now come to the facts of the present case. It has no relation to negotiable instruments. It is a pure question of principal and surety, and I shall base my

A decision on that ground alone. The authorities on right of proof in principal and surety cases are quite clear. If the instrument of guarantee is of such a character as to make the sureties liable for the whole debt, then, whether or not the actual liability of the surety to the creditor is limited, the creditor can prove for the whole debt.

B I will now refer shortly to a few of the authorities relied on by the mortgagees. In *Midland Banking Co. v. Chambers* (10) the headnote in the LAW REPORTS is as follows (4 Ch. App. 398):

C "A bank permitted a customer to overdraw his account on having a guarantee from a surety to the extent of £500, which guarantee provided that all dividends, compositions and payments received on account of the customer should be applied as payments in gross, and that the guarantee should apply to secure any ultimate balance that should remain due to the bank. [The result of that was that the surety guaranteed the whole overdraft.] The customer gave the surety a mortgage on part of his estate by way of indemnity. Afterwards the customer compounded with his creditors by a deed which provided for the administration of the assets as in bankruptcy. His banking account was over-
D drawn £410. The mortgage was realised and the surety paid the bank the £300 secured by it."

Stopping there, the case can be treated as one on which the surety guaranteed the whole debt, and had paid the principal creditor the amount to which his liability was limited. It was held (affirming the decree of MALINS, V.-C.)

E "that the bank was not restricted to proof for the balance of £110, but was entitled to receive dividends on the whole £410, not receiving in the whole, including the £300, more than 20s. in the pound."

That appears to me to be a decision affirming the proposition that in a principal and surety case a creditor who receives payment otherwise than from the principal
F debtor can prove for his whole debt in the surety's bankruptcy, so long as he does not get more than 20s. in the pound.

Re Rees, Ex parte the National Provincial Bank of England (11) was again a principal and surety case. A customer gave to his bankers, as a security for the balance that might from time to time be due from him to them, the joint and several bond of himself and a surety, the liability of the surety being expressly
G limited to £500. There was a proviso in the bond that any dividends received by the bankers in the bankruptcy of the customer should not, so far as concerned the surety, go in discharge of his liability, but the bankers should, notwithstanding, be entitled to recover on the bond to the full extent of £500, or so much thereof as should, together with the dividends, amount to 20s. in the pound on the debt due from the customer to the bankers. The customer filed a liquidation petition, and
H the bankers proved for the debt due to them. Afterwards the surety paid the bankers £500, and he then proved in the liquidation for £500. BACON, V.-C., held that the bankers' proof must be reduced by £500, but that this reduction would not prejudice their rights against the surety. The Court of Appeal, however, held that the bankers were entitled to retain their proof for the full amount.
I COTTON, L.J., said:

"I think, especially having regard to the proviso, that this debt must be taken to be a bond, not for part of the debt, but to secure payment of the ultimate balance. The proviso clearly points out that that is so, that the surety is not to take advantage of any payments made from time to time by the principal debtor, but is to be liable, though not to a greater extent than £500. Therefore he is not entitled to hold the bank as accountable to him for any dividend they may receive from the principal debtor's estate, or to expunge part of their proof."

In *Re Sass*, *Ex parte National Provincial Bank of England* (1), again a principal and surety case, the trustee's authorities were all cited, and the matter is set completely at rest, as far as the present case is concerned. In that case a surety guaranteed the bank the payment of all sums of money which then were or might thereafter from time to time become due or owing to the bank from their customer Sass, but nevertheless the total amount recoverable from the surety was not to exceed £300. The guarantee was to be a continuing security, and any dividends which the bank might receive on the bankruptcy of Sass was not to prejudice their right to recover from the surety to the full extent of the guarantee any sums which after the receipt of such dividends might remain owing to them by Sass. Sass became bankrupt, and the bank, after receiving the £300 from the surety, claimed to prove in the bankruptcy for the full amount due to them from Sass. The trustee in bankruptcy contended that the proof ought to be reduced by the amount the bank received from the surety. VAUGHAN WILLIAMS, J., held that the bank was entitled to prove for the whole debt without any reduction. He said:

"I think that the common law right of the bank here was to sue the debtor for the whole amount that was due from him to them, irrespective of the sum that was paid by the surety, unless that sum amounted to 20s. in the pound. When bankruptcy supervened the right of the principal creditor—the bank—was to prove for that amount, unless there was a surety, and that surety was surety for part of the debt. . . . Now for the purpose of this guarantee all I have to determine here is whether, as between the bank and the surety, the surety became a surety for the whole debt or for a part. In my judgment the surety here became surety for the whole of the debt. It is true that his liability was to be limited; but still, notwithstanding that, his suretyship was in respect of the whole of the debt, and he, having paid only a part of that debt, has, in my judgment, no right of proof in preference or priority to the bank to which he became guarantor. I should have said that myself upon the first paragraph in this guarantee; but, if there were any doubt about it, it seems to me that the last clause is also amply sufficient, either by itself or in conjunction with the earlier parts of the guarantee, to show that, as between the bank and the surety, the bargain was that the bank should have the benefit of all sums paid by the debtor, whether by way of dividend or otherwise, and of all securities held by the bank against the debtor's liability, until the whole of the amount due from the debtor to the bank was discharged; and that it would have been manifestly wrong on the words of this guarantee to hold that the surety could, as against the bank, get any right to dividend or security or anything else by reason of this part of what was to be treated, as between him and the bank, as the whole debt, unless and until the bank had received every sixpence of the full debt."

If the facts of the present case bring the matter within *Re Sass* (1), it is a complete authority against the trustee. The trustee contends that the present mortgage does not bring the case within the ambit of *Re Sass* (1). That is not accurate. It is true that in the present case the mortgagors paid next to nothing. But they were principal debtors borrowing from creditors and guaranteed by three sureties, one of whom has become bankrupt. There is no doubt that the three sureties were jointly and severally liable for the whole debt, and, in my opinion, the mortgagee creditors are entitled to prove for the whole amount due at the date of the receiving order. On these grounds I am of opinion that the trustee's motion fails and must be dismissed, but, as this rather difficult matter had to be decided, the right order will be to allow the costs of both parties out of the assets.

Solicitors: Coward, Chance & Co.; Capron & Co.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

A

Re PINTO LEITE & NEPHEWS. Ex parte VISCONDE DES OLIVAE

[CHANCERY DIVISION (Clauson, J.), June 12, 13, 14, 26, 1928]

B

[Reported [1929] 1 Ch. 221; 98 L.J.Ch. 211; 140 L.T. 587;
[1928] B. & C.R. 188]

C

Bankruptcy—Postponement of creditor—Loan to debtor on agreement for share of profit—Loan on condition of payment of share to third party—Position of assignees of loan—Partnership Act, 1890 (53 & 54 Vict., c. 39), s. 2 (3) (d)—Set-off—Set-off against assignee of debt payable in futuro—Set-off of debt becoming payable by assignor to debtor after notice of assignment, but before assigned debt becomes payable—Debitum in praesenti at date of notice of assignment.

D

By an agreement made in May, 1918, between the debtors, a partnership firm, and one C., C. was credited with £100,000 which she agreed to leave on deposit with the debtors at 5 per cent. interest and commission at the rate of 1 per cent., it being further agreed that as from a specified future date V. should receive seven-fortieths of any profits made from that date and divided among the partners of the debtors. In July, 1920, the £100,000 was transferred in the debtors' books from C.'s name into the name of F. who agreed to leave the money on deposit with the debtors. On Mar. 2, 1926, the £100,000 was transferred in the debtors' books from the credit of F. to that of V. On that date F. was indebted to the debtors in a sum of £10,000. Between that date and Mar. 15, 1926, F. became further indebted to the debtors in the sum of £15,000, F.'s liability arising from contractual obligations undertaken by F. towards the debtors before Mar. 2, 1926. On Mar. 15 the debtors presented their petition for a receiving order and on April 13 they were adjudicated bankrupt.

E

F

Held: (i) on the true construction of the agreement of May, 1918, C. did not advance money by way of loan to the debtors on a contract with them that she should receive a rate of interest varying with the profits, or a share of the profits, of the debtors' business, within s. 2 (3) (d) of the Partnership Act, 1890, and, therefore, neither she nor F., as an assign from her, or V., as an assign from F., were postponed to other creditors in the bankruptcy under s. 3 of the Act, and V. was entitled to prove for the £100,000;

G

H

(ii) but, when a debt assigned was at the date of the notice of assignment payable in futuro, the debtor could set off against the assignee a debt which became payable by the assignor to the debtor after notice of assignment, but before the assigned debt became payable, provided that the debt so to be set off was debitum in praesenti at the date of the notice of assignment, and, therefore, the trustee was entitled, as against V., to set off the £10,000, but not the £15,000.

I

Notes. As to set-off against a creditor in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 480–485; and as to postponed creditors, see *ibid.* 493–496. For cases see 4 DIGEST 389 et seq., 481–485. For Partnership Act, 1890, see 17 HALSBURY'S STATUTES (2nd Edn.) 579.

Cases referred to:

- (1) *William Brandt's, Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1, H.L.; 8 Digest (Repl.) 573, 230.
- (2) *Watson v. Mid Wales Rail. Co.* (1867), L.R. 2 C.P. 593; 36 L.J.C.P. 285; 17 L.T. 94; 15 W.R. 1107; 40 Digest 426, 193.

- (3) *Christie v. Taunton, Delmard, Lane & Co., Re Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175; 62 L.J.Ch. 385; 68 L.T. 638; 41 W.R. 475; 37 Sol. Jo. 304; 3 R. 404; 10 Digest (Repl.) 1058, 7345. A
- (4) *Jeffries v. Agra and Masterman's Bank* (1866), L.R. 2 Eq. 674; 35 L.J.Ch. 686; 14 W.R. 889; 3 Digest 294, 923.
- (5) *Tweddle v. Atkinson* (1861), 1 B. & S. 393; 30 L.J.Q.B. 265; 4 L.T. 468; 25 J.P. 517; 8 Jur.N.S. 332; 9 W.R. 781; 121 E.R. 762; 12 Digest (Repl.) 234, 1752. B
- (6) *Reynolds v. Doyle* (1840), 1 Man. & G. 753; Drinkwater, 1; 2 Scott, N.R. 45; 4 Jur. 992; 133 E.R. 536; 6 Digest 129, 859.
- (7) *Webb v. Stenton* (1883), 11 Q.B.D. 518; 52 L.J.Q.B. 584; sub nom. *Re Hatton, Webb v. Stenton*, 49 L.T. 432, C.A.; 21 Digest 625, 2107.
- (8) *George v. Clagett* (1797), 7 Term Rep. 359; Peake, Add. Cas. 131; 2 Esp. 557; 101 E.R. 1019; 1 Digest 570, 2140. C
- (9) *Rowe v. Young* (1820), 2 Bli. 391; 2 Brod. & Bing. 165; 4 E.R. 372, H.L.; 6 Digest 64, 519.
- (10) *O'Driscoll v. Manchester Insurance Committee*, [1915] 3 K.B. 499; 85 L.J.K.B. 83; 113 L.T. 683; 79 J.P. 553; 31 T.L.R. 532; 59 Sol. Jo. 597; 13 L.G.R. 1156, C.A.; 21 Digest 634, 2156. D
- (11) *Newfoundland Government v. Newfoundland Rail. Co.* (1888), 13 App. Cas. 199; 57 L.J.P.C. 35; sub nom. *A.-G. for Newfoundland v. Newfoundland Rail. Co.*, 58 L.T. 285; 4 T.L.R. 292, P.C.; 40 Digest (Repl.) 417, 117.

Motions by the trustee in bankruptcy of a firm trading under the name of Pinto Leite & Nephews.

The following statement of the facts is taken from his Lordship's considered judgment. In May, 1918, the firm, then consisting of Count José Pinto Leite, his father Julio Pinto Leite, and Henry James Glanville, were carrying on a merchant banking business in London. The firm had originally been founded in 1851 by Count Sebastian de Penha Longa, who died in 1892, leaving him surviving a widow (hereinafter referred to as "the countess"). At the time of his death he and Mr. Glanville were partners in the firm, Mr. Glanville's interest being a very small one. Count Sebastian by his will left his interest in the firm and the firm's assets to his great nephew, José Pinto Leite, who thereupon entered into partnership in the business with his father, Count Julio, and Mr. Glanville. The countess, however, established in the Portuguese courts a claim to one-half of Count Sebastian's property notwithstanding his testamentary dispositions, with the result that the firm, by way, as it would seem, of satisfying her claim on her husband's estate, opened an account in the London books to her credit of the amount of £190,000, or thereabouts, and acknowledged her right to certain stocks and shares in their hands of the value of upwards of £40,000. Between 1895, when this account was opened, and May, 1918, the countess withdrew some of the moneys standing to her credit. The Visconde des Oliveira was a brother of José Pinto Leite and a son of Count Julio, and was a partner in the firm from the year 1899 until the end of the year 1913. He retired from the firm on the terms of an agreement executed in November, 1914, and in May, 1918, he was no longer, at all events ostensibly, a partner in the firm. By May, 1918, the countess reduced her account with the firm to the round sum of £100,000, and on May 30, 1918, an agreement was entered into between her and the firm, the material terms of which were as follows. The countess agreed to leave £100,000 on deposit with the firm for fifteen years as from Jan. 1, 1917, at interest of 5 per cent. per annum, and commission at the rate of 1 per cent. per annum, the commission (by the countess's request given by the agreement) to be paid to the Visconde, or in the case of his death before the termination of the contract, to be paid to his surviving family, half to his wife and half to his children, the countess to have the right to withdraw certain sums on notice, but not more than a total of £20,000 during the whole term of fifteen years. At the end of the term the balance was to be repayable in half-yearly instalments of £8,000, the firm having an option after the fifteen years of paying off the whole

A or part of the deposit in sums of not less than £8,000 at any one time. If the Visconde should be living twelve months after the end of the war the firm were to admit him as a partner, he to receive seven-fortieths of any profits made from that date onwards which the firm might from time to time divide among the partners. The Visconde never in fact claimed the right to be admitted under this agreement to partnership in the firm, but he did in the years 1918, 1919, and 1920, and to

B some extent in 1921, draw from the firm the seven-fortieths share of profits mentioned in the agreement. Since 1921 there had been no profits. In July, 1920, the £100,000 deposit was, by direction of the countess, transferred in the firm's books from her name into the name of Fonseca and Aranjo, Ltd., a Portuguese limited company, and an agreement dated July 19, 1920, was entered into between that company (hereinafter referred to as "Fonseca") and the firm, under which

C Fonseca agreed to leave the £100,000 on deposit with the firm until Jan. 1, 1932, upon the conditions set forth in the agreement of May 30, 1918, and Fonseca and the firm mutually undertook as from July 19, 1920, to perform the conditions and agreements contained in the document of May 30, 1918, in all respects as if the name of Fonseca had originally been inserted therein instead of the name of the countess. In 1921 the securities held by the firm on behalf of the countess were

D in part realised, and the balance was with her consent transferred in the firm's books to Fonseca. There was no document in writing governing the terms on which those securities were held by the firm, but it was agreed that as between the firm and Fonseca the firm were authorised to pledge the securities for their own purposes. On Sept. 17, 1921, the countess died. It was not disputed that according to Portuguese law the effect of her testamentary dispositions was to give the

E Visconde and his children full power to deal with the whole of the countess's estate, including the £100,000 and the securities. Whatever the exact rights may have been as between Fonseca, on the one hand, and the Visconde and his children, on the other, the firm, until Mar. 2, 1926, with the acquiescence of the Visconde and his children, treated Fonseca as the real owners of the £100,000 deposit, and dealt with the interest and commission payable in respect of the deposit in

F accordance with Fonseca's directions, which, in fact, from time to time authorised the firm to pay this interest and commission to the Visconde. In February, 1925, Fonseca, at the Visconde's request, directed the firm to hold the securities for the Visconde, and they were accordingly, on Feb. 26, 1925, transferred to the credit of the Visconde in the firm's books. In 1925 things were not going well, either with the firm or with Fonseca. The Visconde, who was conducting a merchant's

G business of his own in Lisbon, was becoming uneasy as to the position, and was minded to require Fonseca to transfer to him (as they would apparently be bound, as between themselves and him, to do at his request) their rights against the firm in respect of the £100,000 deposit. Early in 1926, by reason of various bill transactions between Fonseca and the firm, the firm either had or looked forward to having various cross-claims against Fonseca. On Feb. 24, 1926, the acting directors

H of Fonseca met the Visconde in Lisbon, and the Visconde pressed them to direct the firm to transfer into his name the £100,000 deposit. It was proved that at this meeting these directors on behalf of Fonseca agreed with the Visconde to give the necessary authority to the firm to transfer the deposit in their books to the credit of the Visconde. In other words, the debt at that meeting was made over by Fonseca to the Visconde, and although no formal assignment took place, the effect

I of what occurred was to transfer the debt in equity to the Visconde: *William Brandt's, Sons & Co. v. Dunlop Rubber Co.* (1); and in view of the position which existed between the Visconde and Fonseca the transfer was binding and effective as between them. Shortly after that interview one of those directors returned to Oporto and was taken ill. The other director was sent for to Oporto, which was the place at which the Fonseca business was carried on, and in pursuance of his instructions a certain shareholder in Fonseca cabled on behalf of Fonseca to the firm in London a message in these terms: "Please transfer to the credit of Visconde des Olivaes deposit £100,000." Mr. Glanville, the partner in London who was

administering the affairs of the firm in London, thereupon made entries in the firm's books transferring £100,000 from the credit of Fonseca to the credit of the Visconde. The effect of that message was that on Mar. 2 the firm received notice of the equitable assignment of the debt to the Visconde, and thereafter, as between Fonseca, the Visconde, and the firm, the assignment of the debt to the Visconde was complete. On Mar. 2, 1926, Fonseca was indebted to the firm in a sum of £10,000, in respect of moneys expended prior to that date by the firm in taking up accommodation bills for which as between Fonseca and the firm, the firm was liable, Fonseca having failed to provide the necessary funds. Between Mar. 2 and 15 Fonseca became indebted to the firm in the sum of £15,000 for moneys expended by the firm between those dates in taking up bills (apparently accommodation bills drawn by Fonseca on and accepted by the firm for which, as between Fonseca and the firm, the firm was liable, Fonseca not having supplied the necessary funds), the liability of Fonseca in respect of that £15,000 arising in every case from contractual liabilities undertaken by them towards the firm at dates earlier than Mar. 2, 1926. On Mar. 15, 1926, the firm presented their petition for a receiving order, which was made on the same day, and the firm was adjudicated bankrupt on April 13 following. The immediate reason for the receiving order was the failure of Fonseca to carry out their obligation to provide funds for bills on which the firm were liable. On April 7, 1926, the Visconde lodged his proof against the bankrupt's estate for the £100,000 debt and for the amount of the securities, and on Sept. 20, 1926, his proof to the extent of the £100,000 was rejected. On Oct. 8, 1926, the Visconde gave notice of motion by way of appeal from the rejection of his proof by the trustee. There was a counter notice of motion by the trustee asking for a declaration that the Visconde was not entitled to prove against the estate of the bankrupts for the debt of £100,000, or for the amount of the securities, and that his proof in respect of the latter might be expunged, or, in the alternative, that the Visconde was not entitled to receive any dividend from the bankrupt's estate in respect of his proof, until the claims of the other creditors of the bankrupts for valuable consideration had been satisfied. A declaration was also made that at the date of the receiving order and at all material times the Visconde was a partner in the firm of Pinto Leite & Nephews. The securities specified in the trustees' notice of motion were pledged by the firm, and, as between them and the Visconde, quite properly pledged. Some were realised by the pledgees, and it was not disputed that the securities retained in the hands of the firm's trustee were the property of the Visconde, or that the Visconde was a creditor for the value of the securities realised.

Stuart Bevan, K.C., and Kenelm Preedy, for the Visconde, referred to Watson v. Mid Wales Rail. Co. (2); Re Taunton, Delmard, Lane & Co. (3); Jeffryes v. Agra and Masterman's Bank (4).

Edward Clayton, K.C., and Stable, for the trustee in bankruptcy, referred to Tweedle v. Atkinson (5); Jeffryes v. Agra and Masterman's Bank (4).

Cur. adv. vult.

June 26. **CLAUSON, J.**, read a judgment in which he stated the facts and continued: The questions which I have to determine in this state of the facts are: First, whether the Visconde is entitled to prove *pari passu* with the other creditors of the firm for the £100,000; and, secondly, assuming him to be so entitled, for what sums the trustee in bankruptcy is entitled to credit as against that sum—in other words, whether the trustee can set off the £10,000 and the £15,000, which in the circumstances became due from Fonseca to the firm, as regards the £10,000 before Mar. 2, 1926, and as regards the £15,000 between Mar. 2 and Mar. 15, 1926.

Upon the first point, the contention of the trustee is, first, that the Visconde was a partner in the firm. [His Lordship held that the Visconde was not a partner and proceeded:] It is, however, then said that, by reason of the provisions of the Partnership Act, 1890, s. 3, his proof for the £100,000 must be postponed to the claims of the other creditors of the firm. The case is put in two alternative ways.

- A First, it is said that the countess was a person who had advanced money to the firm on a contract that she should receive a share of profits arising from the business, and that, accordingly, she could not claim her advance, except subject to the priority of the general creditors. On the construction of the document of May 30, 1918, it is, in my opinion, impossible to say that it is a contract which provides that the countess should receive a share of the profits. It does not appear
- B on the contract, nor is it a fact, that the payment of the profits to the Visconde was to be a payment to him as a mere agent or trustee for the countess. The intention undoubtedly was that the Visconde should take the profits for his own use, and he did in fact so take them. It was pointed out by counsel for the trustee that there would have been a difficulty in the Visconde himself bringing any action for the profits: see *Tweddle v. Atkinson* (5). But I cannot see how this circumstance can be effectually relied upon for the purpose of bringing the countess within the provisions of the Act. The Act might, of course, have been differently framed; but, as it stands, a creditor is postponed only if he advanced money on a contract that he should receive a share of the profits, and that cannot be predicated of the countess. If, contrary to my view, the countess would have had to be postponed to the other creditors had the claim been by her, it would, of course, have followed
- D that Fonseca as a mere assign from her and the Visconde as an assign from Fonseca would equally have been postponed. The point was put alternatively in another way. It was said that the events of February and March, 1926, which I have already stated, amounted to this, that by a tripartite agreement between Fonseca, the Visconde, and the firm, the liability of the firm to Fonseca was destroyed, and a new liability was brought into being between the firm and the
- E Visconde to pay him, on the terms contained in the document of May, 1918, a share of the profits as a consideration for an advance of £100,000, then treated as made by him in replacement of the £100,000 which was treated as having been paid to Fonseca. I find it quite impossible to infer any such contract from the facts before me. True it is that the firm recognised the Visconde as their creditor in place of Fonseca, and made the relevant entries or transfers in their books, but
- F they did so, in my view, merely because they received notice of the transfer of Fonseca's rights to the Visconde, and they had not, in my view of the facts, any notion whatever of themselves entering into a new contract. In this view of the position, the Visconde's right to prove in respect of the £100,000 must be treated as established subject only to the question what, if any, are the amounts which the trustee in bankruptcy is entitled to set off as against that claim.
- G First, there is the sum of £10,000, which became due to the firm from Fonseca before Mar. 2, when they received notice of the assignment of Fonseca's rights to the Visconde, being the amount which had, before Mar. 2, 1926, been paid in meeting acceptances for which, as between Fonseca and the firm, Fonseca was liable to provide the funds. I do not see how the right to make this set-off can reasonably be contested. The only argument against this set-off that I appreciated
- H was that the transactions of February and March ought to be taken to amount to this, that the firm's liability to Fonseca was cancelled by agreement of the firm, and that a new liability for £100,000, clear from any antecedent right as against Fonseca, was created. True it is that on receiving notice of the transfer of Fonseca's rights to the Visconde, Mr. Glanville transferred to the Visconde's credit
- I in the firm's books in a new deposit account the £100,000 which had previously stood to Fonseca's credit in their deposit account, and it may be that a transfer in the firm's books might, in some circumstances, be taken as evidence that the firm recognised the transfer as one which was to be free of cross-claims as between the firm and Fonseca, thus waiving the rights of set-off. I cannot, however, in the circumstances, satisfy myself that this was the true transaction. It appears to me that the entry made by Mr. Glanville was intended merely to record that Fonseca's rights in the deposit had been transferred to the Visconde, and I do not believe that Mr. Glanville had any thought or intention of waiving any then

existing right or equity which the firm might have against Fonseca in regard to Fonseca's claim on the deposit. A

If, as I hold, the transfer of Fonseca's claim to the Visconde must be taken to have been subject to all such rights of set-off as at the date of notice of the transfer, namely, Mar. 2, the firm had against Fonseca, the remaining question which arises, and it is one which has caused me considerable difficulty, is whether one of the rights of the firm against Fonseca to which the Visconde's claims are to be subject, is a right to set off the £15,000, which between Mar. 2, 1926, and the commencement of the bankruptcy on Mar. 15, 1926, was expended by the firm in taking up acceptances for which, as between Fonseca and the firm, Fonseca had become, before Mar. 2, bound to provide funds. The principles applicable are those which apply in any case in which a chose in action is assigned. It is, of course, well settled that the assignee of a chose in action (and the Visconde is an assignee from Fonseca of this particular chose in action, that is, the right, on the terms stated in the document of May 30, 1918, to recover the £100,000 from the firm) takes subject to all rights of set-off which were available against the assignor, subject only to the exception that after notice of an equitable assignment of a chose in action, a debtor cannot set off against the assignee a debt which accrues due subsequently to the date of notice, even though that debt may arise out of a liability which existed at or before the date of the notice, but the debtor may set off as against the assignee a debt which accrues due before notice of the assignment, although it is not payable until after that date: *Watson v. Mid Wales Rail. Co.* (2); *Re Taunton, Delmard, Lane & Co.* (3). Taking these familiar summaries of the principle which is to be applied, it would seem at first sight clear, and it is, in my opinion, the fact, that the firm had no right to set off the £15,000 against the Visconde. The liability of Fonseca to pay the £15,000 to the firm arose out of a liability which I assume existed at or before Mar. 2, the date of the notice, but the money became a debt from Fonseca only when, by reason of Fonseca's failure to provide the £15,000, the firm paid the £15,000, and this was at a date subsequent to Mar. 2: see *Reynolds v. Doyle* (6). On Mar. 2, 1926, when the firm received notice of the assignment, the £15,000 had not accrued due. It was not debitum in praesenti. B C D E F

The case in favour of the set-off was, however, put by counsel for the trustee in this way. While accepting, as I understood, the principle to be as I have stated it, he suggested that the cases in which the principle has been thus accepted were all cases in which the chose in action assigned consisted of a debt payable by the debtor at or before the date of notice of assignment, while in the present case the debt payable by the debtor, and constituting the subject-matter of the assignment, was a debt payable in futuro for which the assignor was not, at the date of notice of the assignment, in a position to sue. He suggested that where the subject-matter of the assignment is a future debt, the true rule is that the debtor, after notice of the assignment, remains entitled, as against the assignee, to set off all sums accruing due and payable from the assignor at any time before the debt the subject-matter of the assignment becomes due, provided such sums arise out of a liability which existed at or before the date of notice of assignment. He based this proposition upon the decision of Wood, V.-C., in *Jeffryes v. Agra and Masterman's Bank* (4), and, if the proposition is properly to be deduced from that decision, it would be my duty to follow it. I reserved my judgment in order to consider that case, and I am bound to say that there appear to me to be some obscurities in the case as reported. However, on a careful scrutiny of the report of that case, it does not appear to me to support the suggested proposition. In that case, the debt assigned was, it would seem, not debitum in praesenti solvendum in futuro, but a debt payable on a contingency, and it was suggested that on that ground alone the decision could be distinguished from the present case. I am not satisfied that a distinction on that ground can be justified. At the date, which was Oct. 12, 1864, of notice of assignment of the debt, the position as between Speltz, the assignor, and the Agra Bank, the debtor, seems to have been as follows: (i) The assignor was G H I

- A liable to the debtor on general account; (ii) he was liable to the debtor as acceptor in respect of current bills drawn by or endorsed to the debtor; (iii) he was liable as endorser to the debtor as endorsee in respect of bills endorsed by him to the debtor on which sums were at the date of notice presently due and payable; (iv) he was liable as endorser to the debtor as endorsee in respect of bills endorsed by him to the debtor before the date of notice in respect of which nothing was at the date of notice presently due and payable. The Vice-Chancellor's order, as I read it, proceeded on the footing that the debtor was to have the right to set off, as against the Bank of Liverpool, the assignee, so much as, at the date when the debt assigned became due, was still remaining owing from the assignor to the debtor of the following sums: First, the sums due under heads (i) and (iii), being existing debts (*debita et solvenda in praesenti*) at the date of notice; secondly, such of the sums under head (ii) as become payable before the date when the assigned debt became payable, these being sums which at the date of the notice were "liabilities actually accrued," that is *debita in praesenti*, though *solvenda in futuro*: see *Webb v. Stenton* (7); but which had, before the assigned debts became payable, become "matured," that is *solvenda in praesenti*. The debtor was, however, held not to be entitled to set off either (a) such of the sums under head (ii) as had not become payable before the date when the assigned debt became payable or (b) any of the sums under head (iv), the latter sums being, at the date of notice, what the Vice-Chancellor calls "mere liabilities," that is, not *debita* at all. It is to be borne in mind that an acceptor's liability is normally an absolute liability on acceptance to pay at a future date, and, therefore (see *George v. Clagett* (8) and *Re Taunton, Delmard, Lane & Co.* (3)) available as a set-off at any time after acceptance, while the endorser's liability is normally a conditional liability contingent upon the default of the acceptor, and thus "accruing only upon such default: see per BAYLEY, J., in *Rowe v. Young* (9) (2 Bli. 467); and note the language of PHILLMORE, L.J., in *O'Driscoll v. Manchester Insurance Committee* (10).

This seems to me to give the key to the distinctions drawn by WOOD, V.-C., in *Jeffryes v. Agra and Masterman's Bank* (4) and embodied in his order. The proposition to be deduced from that case seems, accordingly, to be that, when the debt assigned is at the date of the notice of the assignment payable in *futuro*, the debtor can set off against the assignee a debt which becomes payable by the assignor to the debtor after notice of assignment, but before the assigned debt becomes payable if, but only if, the debt so to be set off was *debitum in praesenti* at the date of notice of the assignment. If my view of the decision in *Jeffryes v. Agra and Masterman's Bank* (4) is correct, it is, accordingly, no authority in favour of the proposition which the trustee seeks to establish in order to support his claim to set off the £15,000, and I am free to act on the view, which I have already indicated, that the firm had not, and the trustee has not, any right to set off the £15,000 against the Visconde, that sum not being at the date of notice *debitum in praesenti* or "actually accrued though not matured."

In order to prevent any misunderstanding, I ought to make it clear that it is not suggested that the debt assigned, and the liabilities sought to be set off against it, are so connected as to bring the case within the authorities of which *Newfoundland Government v. Newfoundland Rail. Co.* (11) is typical. The result of the whole case is that there will be an order which—after prefacing that the court is of opinion that the Visconde was not a partner in the firm, and that he is not postponed to other creditors under s. 3 of the Partnership Act, 1890—will declare: First, that the securities retained by the trustee are the property of the Visconde; secondly, that the Visconde is entitled to be admitted to prove for the value as at the date of the bankruptcy of the securities which were pledged by the firm, and were sold by the pledgees, but nothing in this order is to prejudice any claim the Visconde may be advised to make to be treated as a secured creditor against any balance coming to the trustee from securities belonging to the firm pledged to the same pledgees; thirdly, that the Visconde is entitled to be admitted to prove for the amount of the deposit of £100,000, less the £10,000, and less the sum (the

figure of which is, I understand, agreed) due to the firm from the Visconde on current account at the commencement of the bankruptcy. There does not seem to be any dispute as to figures, and, accordingly, the order should merely contain declarations to the above effect with liberty to apply. As regards costs, the trustee must pay the Visconde's costs of the two motions out of the estate.

Solicitors: *Stoneham & Sons; Kearsley, Hawes & Wilkinson.*

[Reported by K. R. A. HART, Esq., Barrister-at-Law.]

Re PROFITS AND INCOME INSURANCE CO.

[CHANCERY DIVISION (Romer, J.), November 7, 26, 1928]

[Reported [1929] 1 Ch. 262; 98 L.J.Ch. 155; 140 L.T. 526;

[1929] B. & C.R. 17]

Insurance—Company—Winding-up—"Annuity"—Valuation—Annual pension previously granted to retiring employee—Services not exclusively devoted to life department of company—Assurance Companies Act, 1909 (9 Edw. 7, c. 49), ss. 17 (1), 29, Sched. 6, para. (A).

An insurance company which, in addition to other kinds of insurance business, carried on the business of life assurance, granted an annual pension to a retiring employee whose services had not been exclusively connected with the life department of the company. The company was ordered to be wound-up, and the employee died before the proof of his claim for the arrears of his pension and its capital value had been dealt with by the liquidator. The liquidator sought to restrict the claim of the employee's personal representative to the amount which should have been paid to the deceased to the date of his death.

Held: although the employee had not been engaged exclusively in the life department of the company and so the life fund did not receive the whole consideration for the granting of the pension, the annuity was an "annuity" within the meaning of s. 17 (1) and s. 29 of, and para. (A) of Sched. 6 to, the Assurance Companies Act, 1909, and in the winding-up of the company must be valued as provided by para. (A) of Sched. 6 as on the date of the winding-up order.

Notes. The Assurance Companies Act, 1909, is repealed and replaced by the Insurance Companies Act, 1958. See now ss. 17 (2), 33 (1), and Sched. 3, paras. 1, 2 of the latter Act. As to the winding-up of a life assurance company, see 22 HALSBURY'S LAWS (3rd Edn.) 434 et seq.; and for cases see 10 DIGEST (Repl.) 1160 et seq. For Insurance Companies Act, 1958, see 38 HALSBURY'S STATUTES (2nd Edn.) 127.

Cases referred to:

- (1) *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1880), 17 Ch.D. 337; 50 L.J.Ch. 273; 44 L.T. 299; 10 Digest (Repl.) 1171, 8150.
- (2) *Re Nelson & Co., Ltd.* (1906), 22 T.L.R. 406; 10 Digest (Repl.) 1151, 8014.
- (3) *Re Law Car and General Insurance Corpn.*, [1913] 2 Ch. 103; 108 L.T. 862; sub nom. *Re Law Car and General Insurance Corpn., J. J. King & Son's, Ltd. Claim*, 82 L.J.Ch. 467; 29 T.L.R. 532; 57 Sol. Jo. 556; 6 B.W.C.C.N. 100; 20 Mans. 227, C.A.; 10 Digest (Repl.) 1172, 8154.
- (4) *Re British Union and National Insurance Co., Ltd.*, [1914] 2 Ch. 77; 83 L.J.Ch. 596; 111 L.T. 357; 30 T.L.R. 520; 21 Mans. 297, C.A.; 10 Digest (Repl.) 1168, 8127.

- A** (5) *Re United London and Scottish Insurance Co., Newport Navigation Co.'s Claim*, [1915] 2 Ch. 12; 84 L.J.Ch. 544; 113 L.T. 400; 31 T.L.R. 424; 59 Sol. Jo. 529; 13 Asp.M.L.C. 170; 20 Com. Cas. 296, C.A.; 10 Digest (Repl.) 1171, 8152.
- (6) *Re City Life Assurance Co., Ltd.*, [1926] Ch. 191; 95 L.J.Ch. 65; 134 L.T. 207; 42 T.L.R. 45; 70 Sol. Jo. 108; [1925] B. & C.R. 233, C.A.; 10 Digest 1173, 8160.
- B**

Adjourned Summons.

On May 26, 1924, Charles Windett, who had for many years been employed as the actuary and secretary of the Profits and Income Insurance Co., which, in addition to other branches of insurance business, carried on the business of life assurance within s. 1 (a) of the Assurance Companies Act, 1909, resigned his appointment. On the same date his resignation was accepted by the board of directors, who passed a resolution granting him a pension of £666 13s. 4d., payable quarterly, free of income tax. On June 9, 1925, the company was ordered to be compulsorily wound-up. On July 24, 1925, Mr. Windett lodged his proof as a creditor in the winding-up for the arrears of pension due to him at the date of the winding-up and for the capital value of the pension. Before the proof was dealt with by the liquidator Mr. Windett died, and the liquidator sought to restrict the claim to the amount of the payments which had accrued due to the date of his death. The present applicant, Mr. Windett's personal representative, then took out this summons by way of appeal from the liquidator's decision, and claimed that the proof should be admitted on the basis of the value of the annuity at the date of the liquidation.

E *Upjohn, K.C.*, and *Beebee* for the applicant.

Preston, K.C., and *J. M. H. Wilson* for the liquidator.

The following cases were referred to: *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1), *Re Nelson & Co., Ltd.* (2), *Re Law Car and General Insurance Corpn., King & Sons, Ltd. Claim* (3), *Re British Union and National Insurance Co., Ltd.* (4), *Re United London and Scottish Insurance Co., Newport Navigation Co.'s Claim* (5), and *Re City Life Assurance Co., Ltd.* (6).

F Nov. 26. **ROMER, J.**, read the following judgment.—The facts giving rise to the claim and rejection are as follows. Charles Windett had for some years prior to May 26, 1924, been employed by the company as its actuary and secretary. On that day his resignation was accepted by the board of directors, who thereupon passed a resolution to grant him a pension of £666 13s. 4d. payable quarterly free of income tax, such pension to date from July 1, 1924. It was at the same time resolved to invite him to take a seat on the board, his fee as director to be considered as part of his pension. His salary at the date of his retirement was £2,000 a year. The company was at this time carrying on the business of ordinary life assurance both by the issue of policies upon human life and the granting of annuities upon human life. In addition it carried on the business of insuring against loss of income through sickness or accident, and certain re-insurance business. Mr. Windett's services were not, therefore, connected solely with the life department and his salary was not in practice paid exclusively out of the life fund. On June 9, 1925, the company was ordered to be wound-up compulsorily, and in due course the Official Receiver was appointed liquidator. On July 24, 1925, **G** Mr. Windett lodged his proof for £430 arrears of his pension due on April 1, 1925, for £7,000 damages for loss of his pension after that date, and for £146 6s. 8d. in respect of the costs of certain proceedings taken by him against the company in the King's Bench Division. On Nov. 15, 1926, Mr. Windett died, his proof not having at that time been dealt with by the liquidator. On Jan. 21, 1927, the liquidator, in ignorance of Mr. Windett's death, addressed a letter to him asking for the date of his birth in order that the actuary might make the necessary calculation of the valuation of the pension at the date of liquidation. Thereupon **I** the applicant, being the widow and legal personal representative of Mr. Windett,

wrote to the liquidator furnishing him with the dates of her husband's birth and death respectively. On April 20, 1927, the liquidator replied to the applicant as follows:

"I have now had an opportunity of considering the proof of debt lodged by your late husband in respect of his claim in the liquidation of this company. The claim has now been calculated as follows: Taxed costs in judgment of King's Bench Division and under order of Court of Appeal, £146 6s. 8d.; arrears of pension from Sept. 30, 1924, to Nov. 15, 1926 (date of claimant's decease), at £666 13s. 4d. per annum, free of tax, equivalent to a gross pension of £833 6s. 8d. per annum (assuming income tax at 4s. in the pound)—pension for two years and forty-seven days, £1,773 19s. 5d. Total claim £1,920 6s. 1d. The amount originally included in the proof of debt was based on the purchase price of an annuity for the normal expectation of life of a person of the same age as the claimant. As, however, the actual period of survival is now known this will require to be substituted for the period of expectation of life that was originally estimated, the result being that the claim will require to be altered from the original amount of the proof of £7,576 6s. 8d. to the amount as calculated above of £1,920 6s. 1d. I shall be glad accordingly if you will sign and return the enclosed form of withdrawal."

It will be observed that in this letter the liquidator treated Mr. Windett as having had a gross pension of £833 6s. 8d. per annum. In this, of course, he was wrong. But if this was the amount of the pension and if the amount of the claim had to be ascertained in accordance with the provisions of the Companies Act, 1908, the liquidator's reduction of the proof was justified: see *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1). If, however, the pension fell to be valued in accordance with the provisions of the Assurance Companies Act, 1909, as to the valuation of an annuity, the liquidator's rejection was wrong, the provisions of that Act excluding any other method of valuation and negating the principle applied in *Macfarlane's Claim* (1): see *Re Law Car and General Insurance Corpn.* (3) and *Re City Life Assurance Co., Ltd.* (6). The applicant through her solicitors then stated her contention to be that the proper basis of computation was to value the pension as at the date of liquidation and not as at the date of Mr. Windett's death, but without making any express reference to the Assurance Companies Act, 1909, and on July 14, 1927, the liquidator served upon her a formal rejection of her claim to the extent of £6,010 16s. 5d. He stated his grounds to be that the claim must be limited to the unpaid arrears of pension which accrued during the lifetime of Mr. Windett, and he now treated the pension as being, what it in fact was, one of £666 13s. 4d. Those arrears amounted to £1,419 3s. 7d. The liquidator then added that income tax at the current rate would have to be deducted from any dividend paid on this sum, the agreement to pay an annual sum free of income tax being void.

On Aug. 2, 1927, the applicant issued her summons asking to have the Official Receiver's decision reversed, supporting it by an affidavit which submitted that the proper basis for ascertaining her claim was the value of a pension of £666 13s. 4d. free of tax calculated according to insurance companies' actuarial tables as at the date of the liquidation, and further submitting that no tax should be deducted from any dividend paid to her. The affidavit made no reference to the Act of 1909 or any other Act. In reply to this affidavit the Senior Official Receiver made an affidavit in which he submitted amongst other things that the amount of the claim should be ascertained under s. 206 of the Companies (Consolidation) Act, 1908.

In this state of things the matter came before me in court on Nov. 15, 1927. The learned counsel who then represented the applicant presented the case to me on the footing that the claim had to be ascertained under s. 206 of the Companies Act, 1908; that *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1), applied; and that, therefore, the only question which I

A had to deal with was the question of the deduction of income tax. This point I decided against her, with the result that her summons was dismissed with costs. On Dec. 29, 1927, the applicant, having changed her legal advisers, gave notice of appeal from my order and the appeal came on for hearing on Mar. 2, 1928. It then appeared that the appeal was based upon the ground that the pension ought to be valued in accordance with the provisions of the Assurance Companies Act, 1909, and not under the Act of 1908. Objection was at once taken on behalf B of the liquidator that this point had been abandoned before me. In these circumstances the Court of Appeal came to the conclusion that the question whether the applicant ought to be bound by the admission could best be determined by me. They, accordingly, discharged my order and referred back to me the whole matter, including the question how the costs in the Court of Appeal and the costs of the original hearing before me should be dealt with. The summons was, therefore, C restored to my list and came on for hearing with further evidence. I gather that it was the intention of the Court of Appeal that I should hold the applicant bound by the admission of her counsel, if I so thought fit. Seeing that my order has been discharged I should have felt some difficulty in holding the applicant precluded from raising any contention she thought fit, whether abandoned previously or not. But however that may be, I am satisfied that the admission made before D me was made under a misapprehension, and that the applicant's counsel had not present to his mind the provisions of the Act of 1909, but that, thinking that the Act of 1908 was applicable, he merely intended to abandon the task, which in that case was hopeless, of distinguishing *Macfarlane's Claim* (1) from the one before me. In these circumstances it appeared to me only right that the applicant E should not be held precluded from re-arguing her case on the proper grounds, seeing that it is open to me to make such an order as to costs as will prevent the liquidator from being in any way prejudiced. I, therefore, allowed the question whether the 1909 Act applied to be argued, and that question I must now decide.

F That the Act of 1909 applies to the company is quite clear. The company carried on within the United Kingdom life assurance business, as defined by s. 1 of the Act. The provisions contained in s. 17 of the Act with reference to the valuation of policies are, therefore, applicable in the winding-up. Subsection (1) of that section provides as follows:

G "Where an assurance company is being wound-up by the court, or subject to the supervision of the court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding-up shall be estimated in manner applicable to policies and liabilities of that class provided by the sixth schedule to this Act."

This must be read in connection with s. 30 (b), which enacts that:

H "Where the company grant annuities upon human life, 'policy' shall include the instrument evidencing the contract to pay such annuity, and 'policy holder' includes annuitant."

I Assuming, therefore, for the moment that the pension of Mr. Windett is an annuity within the meaning of the Act the liability of the company to him must be ascertained in the manner stated in sub-s. (A) of Sched. 6, for I cannot doubt that the minute recording the resolution of the board of May 26, 1924, signed by the chairman of the next meeting, is an instrument evidencing the contract to pay that annuity, and is, therefore, a policy within the meaning of s. 17 (1). That being so, and still making the assumption above-mentioned, the claim of the applicant would appear to be well founded. For it is not disputed that the value of the annuity as at the date of the winding-up order has been ascertained according to a proper rate of interest and table of mortality, and though neither s. 17 nor Sched. 6 expressly mention the date at which the valuation of a policy or liability is to be made, it seems quite clear that the date must be that of the winding-up order. The word "unexpired" in sub-ss. (B), (C), and (D) of Sched. 6 must, for example, mean unexpired at the time of the winding-up order. It was,

in fact, so decided by KENNEDY, L.J., in *Re Law Car and General Insurance Corp., King & Sons, Ltd., Claim* (3); see, too, *Re United London and Scottish Insurance Co., Newport Navigation Co.'s Claim* (5). A

It is, however, submitted by the liquidator that Mr. Windett's pension is not an annuity on human life within the meaning of the Act at all. The expression "annuities on human life" is one of those dealt with in the interpretation section —s. 29. It is there provided that the expression does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade or employment or of the dependants of such persons. The pension of Mr. Windett was not payable out of any such fund, so that the section has no direct application to him. It does, however, show by implication that such a pension as his may be an annuity within the meaning of the Act. Why, then, is it not one? The answer to this question is to be found, so the liquidator says, in s. 3 of the Act. That section is as follows: B C

"(1) In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund." D

Subsection (2) says: E

"A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable." F

It is not at first sight easy to see what bearing this section has upon the matter. It was, however, contended on the part of the liquidator, as I understood his argument, that, as Mr. Windett was not engaged exclusively in the life department of the company, his pension could not be paid out of the life fund, and that, therefore, it is not an annuity within the meaning of the Act. But sub-s. (2) provides in effect that the life fund shall be held as security for, among other, the holders of annuities. If, then, the pension cannot be paid out of the life fund, it must be because it is not an annuity. For, if it be an annuity, Mr. Windett was a policy holder of the life assurance class, his pension formed part of that class of business for which the life fund was applicable, and the concluding words of sub-s. (2) would not exclude him from sharing in the fund. The liquidator's argument would, therefore, seem to be reduced to the simpler proposition that the pension is not an annuity within the meaning of the Act, because, seeing that Mr. Windett was not engaged exclusively in the life department, the life fund did not receive the consideration or did not receive the whole of the consideration for the granting of the pension. G H I

This was the ground upon which ASTBURY, J., held that an annuity was not an annuity within the meaning of the Act in *British Union and National Insurance Co., Ltd.* (4). In that case one Urch was employed as manager of the life department of an insurance company to which the Act of 1909 applied. Disputes having arisen between him and the company, an agreement of compromise was entered into under which, in consideration of Urch releasing the company from all liability under his service agreement, the company covenanted to pay an annuity during Urch's lifetime. The company was subsequently ordered to be

A wound-up, and, thereupon, Urch claimed to have his annuity valued according to Rule A of Sched. 6 to the Act, and to be paid out of the life fund. It was held by ASTBURY, J., that the annuity was not an annuity within s. 30 (b) of the Act. He said this ([1914] 1 Ch. at p. 739):

B "Section 30 provides: 'Where a company carries on life assurance business, this Act shall apply with respect to that business, subject to the following modifications,' and sub-s. (b), which is an ordinary definition clause, provides that 'Where the company grant annuities upon human life "policy" shall include the instrument evidencing the contract to pay such an annuity, and "policy holder" includes annuitant.' The section does not, however, say that every instrument creating an annuity granted by an insurance company is a policy nor that every annuitant is a policy holder. What I think it means is this, that where the company in the ordinary course of its business does in fact grant annuities upon human life as part of its life assurance business, then the instrument used by it in granting such an annuity shall be a policy within the meaning of the Act, and the person entitled to such an annuity shall also be a policy holder. But it is to be observed that in those cases the consideration for the grant of the annuity would form part of the life annuity fund, and the persons entitled to be so regarded as policy holders would be confined, and I think ought to be confined, to those who have made the appropriate subscriptions to the life annuity fund of the company. If this were not so, an insurance company could, I think, largely evade its obligations under the Act by granting annuities to creditors whether they were creditors under fire or accident policies or otherwise, in which case the distribution of their assets in due course would be prevented in the liquidation. In my judgment, although the point is not free from difficulty, I do not think that the deed creating this annuity in Urch's favour comes within the language, meaning, or intent of s. 30."

F His view, therefore, was that only those annuities which are granted in the ordinary course of business for a cash consideration are annuities within the meaning of the Act. The Court of Appeal, however, took a different view of the meaning of the Act. LORD COZENS-HARDY, M.R., after pointing out that there was abundant consideration for the grant of the annuity and that it was not ultra vires, said this ([1914] 2 Ch. at p. 85):

G "ASTBURY, J., considered that the annuity was not granted in the ordinary course of business, i.e., in consideration of a payment to the life assurance fund, and therefore was not within the Act, but with great respect I am unable to agree with this view. It is not consistent with the decision in *Re Nelson & Co., Ltd.* (2), and it involves the insertion in s. 30 (b) of the words 'for a cash consideration only.' For this I think there is no justification. This annuity was granted for valuable consideration, and the nature of that consideration is not important."

H Pausing there, it should be stated that the annuity was granted to Mr. Windett for valuable consideration, as was held by FRASER, J., and the Court of Appeal in the proceedings taken by him against the company in the King's Bench Division already referred to. It would seem from the judgment of LORD COZENS-HARDY I that the nature of the consideration need not be inquired into. In the present case, therefore, the fact that the consideration flowing to the company was not one that exclusively benefited the life fund would not seem to affect the matter. SWINFEN EADY, L.J., said this ([1914] 2 Ch. at p. 87):

"The learned judge below decided that this annuity is not an annuity within the meaning of the Act, and has not the security of the life assurance fund, as it was not granted for a consideration which could be carried to the credit of and form part of the life annuity fund; he held that the persons entitled to be regarded as policy holders within the meaning of the Act ought to be

confined to those who have made the appropriate subscriptions to the life annuity fund of the company. I am unable to adopt this view, as there is not any provision in the statute which justifies restricting in this manner the class of persons entitled to be regarded as policy holders."

So far the lord justice agrees with the Master of the Rolls that the consideration for an annuity under the Act need not be cash or its equivalent. But he then proceeded as follows:

"Under these circumstances I am of opinion that an annuity granted in good faith and for value is entitled to the security of the life assurance fund so long as the transaction does not infringe the provisions of s. 3 (2). The learned judge below stated that, unless annuities were confined to those who made the appropriate subscriptions to the life assurance fund, an insurance company could largely evade its obligations under the Act by granting annuities to creditors under fire or accident policies. But this objection is not well founded. Section 3 (2) provides that a fund of any particular class shall not be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable; and therefore no annuity granted in respect of any fire or accident loss could become a valid claim against the life assurance fund. But the annuity granted to Urch was in respect of his claim to damages for breach of a contract relating solely to the life department, and providing for such a claim is not within the mischief which it is the object of s. 3 (2) to prevent."

It will be observed that in this passage the lord justice is no longer dealing, in terms at any rate, with the question whether the annuity was an annuity within the meaning of the Act. He would seem to have disposed of that question in the earlier passage that I read. If that be so he would appear to be now considering the question whether every annuity under the Act is entitled to the security of the life assurance fund and to hold that it is, but only so long as the granting of the annuity does not infringe the provisions of s. 3 (2). But this would appear to treat the concluding words of s. 3 (2) as a qualification of the first part of the subsection, which constitutes the fund the security of the policy holders of the life assurance class. They are not, however, expressed to be a qualification and can hardly be so treated seeing that the granting of the policies entitled to the charge is the very class of business referred to in the words in question.

One alternative would be to treat the lord justice as still considering the question whether the annuity was an annuity within the Act, that is to say, whether the holder was a policy holder of the class to whom the charge was given. But it is impossible to suppose that the lord justice intended to indicate that any light was thrown on that question by a provision that the fund was not to be applied directly or indirectly for any purposes other than those of the class in question. I cannot help thinking that the lord justice was merely pointing out that a life annuity must be granted *bonâ fide* in exercise of the powers of granting such annuities and not with the motive of making the life fund liable for a debt that ought to be discharged out of some other fund. His reference to the granting of an annuity in respect of a fire or accident loss points in this direction. So, too, does his statement that the annuity granted to Urch was in respect of his claim to damages for breach of a contract relating solely to the life department. Those damages would not have been payable out of the life fund, as had been in effect pointed out by *ASTBURY, J.* They would have been payable out of the company's general assets, and the reference by the lord justice to the fact that the contract related to the life department was, I think, merely for the purpose of negating the possibility of there having been any want of *bonâ fides* or improper motive on the company's part.

The same observation applies to the judgment of *PICKFORD, L.J.* He emphasised the fact that the annuity had been granted *bonâ fide* and for good consideration, the consideration being the settlement of a claim for damages which the lord

A justice recognised would only have been recoverable out of the general assets of the company. He did indeed add this:

“Whether an annuity given in settlement of a debt arising out of the general business of the company would be contrary to s. 3 it is not necessary to consider, as in this case the claim in respect of which it was given arose entirely out of the business of the life department.”

B But when once it is conceded that the consideration coming to the company need not be one that benefits the life fund, it is difficult to see how the question whether the annuity is an annuity within the meaning of the Act, assuming it to have been given *bonâ fide*, can depend upon whether it was or was not given for a reason that can be connected with the life department. The fact that the claim in
C respect of which the annuity was given in that case arose entirely out of the business of the life department was, I think, treated by the lord justice as having ruled out the possibility of its having been given for an improper purpose, a possibility that would not necessarily have been ruled out had the annuity been given in settlement of a debt arising out of the general business of the company. In the present case Mr. Windett as secretary and actuary was necessarily connected very closely with the work of the life department. It seems to me impossible to come to the conclusion that, in granting him an annuity in consideration of his resigning his position, the company was actuated by the improper motive of throwing upon the life fund a liability that ought to have been borne by some other portion of the company's assets merely because Mr. Windett's activities were not confined to the life department. In my opinion, his annuity was an
E annuity within the meaning of the Act of 1909 and falls to be valued in the manner there indicated. It is obvious that no income tax can be deducted by the liquidator from any dividends payable in respect of the value so ascertained.

There is one other matter that I ought to mention. It was contended by the liquidator that the result of allowing the claim may be that the applicant will receive a larger sum by way of dividend than would have come to Mr. Windett
F had the company never gone into liquidation, and that this would be grossly unfair to the other creditors. But this is not a matter with which the court is concerned. The legislature has thought fit to enact that an annuitant under the Act is to prove for the value of his annuity as at the date of the winding-up order. That value will be ascertained by reference to his expectation of life, as fixed by the table of mortality taken for the purpose. Should his life be in fact prolonged
G beyond the normal expectation it is an irrelevant consideration that he will receive less than he would have done had the company continued to carry on its business. The fact that in the result he gets more by reason of his life falling short of the normal expectation is equally irrelevant. In my judgment, the claim must be allowed with costs.

Solicitors: *H. F. K. Ireland; William Charles Crocker.*

H [Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

Re EMERSON. MORRILL v. NUTTY

[CHANCERY DIVISION (Tomlin, J.), July 27, 1928]

[Reported [1929] 1 Ch. 128; 98 L.J.Ch. 145; 140 L.T. 217]

Will—"Money"—*Bequest* of ". . . the residue of my money at the time of my death"—*Death* of testatrix after Jan. 1, 1926—*Estate* consisting of cash, securities, freehold house, ground rents—*Beneficiary* entitled to residuary personal estate—*Administration of Estates Act, 1925* (15 & 16 Geo. 5, s. 23), s. 34 (3), *Sched. I, Part II*.

The testatrix died on Oct. 29, 1927, after the coming into force of the Administration of Estates Act, 1925. By a codicil, dated Aug. 14, 1927, to her will, which she had made on July 26, 1927, she bequeathed to N. "the residue of my money at my death." At her death, she had about £3 in cash in her house and no money in the bank. She owned a number of investments and a freehold house, which she had specifically devised in her will, and she was also entitled to the freehold of two other houses which were subject to long leases at ground rents and were not devised by the will.

Held: on the true construction of the will and codicil, the property which passed under the bequest of "the residue of my money" was the residuary personal estate and the two freehold ground rents remained undisposed of, since, although under the Administration of Estates Act, 1925, s. 34 (3) and Sched. I, there was no distinction between real and personal estate for the purpose of paying debts, funeral and testamentary expenses and legacies, the words of the bequest meant the residuary personal property after the payment thereof of the debts, funeral and testamentary expenses and legacies.

Notes. As to the meaning of "money" in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 253-257, para. 307; and for cases see 44 DIGEST 720-730. For the Administration of Estates Act, 1925, s. 34 and Sched. I, Part II, see 9 HALSBURY'S STATUTES (2nd Edn.) 718.

Cases referred to:

- (1) *Lowe v. Thomas* (1854), 1 Kay 369; 23 L.J.Ch. 453; 23 L.T.O.S. 49; 2 W.R. 252; affirmed 5 De G.M. & G. 315; 2 Eq. Rep. 742; 23 L.J.Ch. 616; 23 L.T.O.S. 238; 18 Jur. 563; 2 W.R. 499; 43 E.R. 891, L.J.J.; 44 Digest 720, 5699.
- (2) *Rogers v. Thomas* (1837), 2 Keen, 8; 48 E.R. 531; 44 Digest 743, 6006.
- (3) *Dowson v. Gaskoin* (1837), 2 Keen, 14; 6 L.J.Ch. 295; 48 E.R. 533; 44 Digest 726, 5783.
- (4) *Re Egan, Mills v. Penton*, [1899] 1 Ch. 688; 68 L.J.Ch. 307; 80 L.T. 153; 44 Digest 756, 6149.
- (5) *Re Taylor, Taylor v. Tweedie*, [1923] 1 Ch. 99; 91 L.J.Ch. 801; 127 L.T. 684; 38 T.L.R. 850; 66 Sol. Jo. 693, C.A.; 44 Digest 723, 5737.
- (6) *Prichard v. Prichard* (1870), L.R. 11 Eq. 232; 40 L.J.Ch. 92; 24 L.T. 259; 19 W.R. 226; 44 Digest 726, 5793.
- (7) *Re Tribe, Tribe v. Truro Cathedral (Dean and Chapter)* (1915), 85 L.J.Ch. 79; 113 L.T. 313; 59 Sol. Jo. 509; 44 Digest 722, 5718.

Adjourned Summons.

The testatrix, Anne Emerson, died on Oct. 29, 1927, having made a will dated July 26, 1927, and a codicil thereto dated Aug. 14, 1927. The will bequeathed to Dorothy Annie Nutty, her adopted niece, and a defendant on this summons, the testatrix's freehold house where she lived, and all articles of personalty of which it did not otherwise dispose. She gave pecuniary legacies of about £300 in all and appointed as sole executor George E. Morrill, the plaintiff on this summons. The codicil contained a bequest by the testatrix to Dorothy Annie Nutty of "the residue of money at the time of my death." At the time of her death, the testatrix was

A possessed of the freehold house which she had bequeathed by the will and which was valued at £650, articles of personalty and some stocks and shares. In the house she had £2 17s. in cash, and in the bank no money at all. By this summons the plaintiff asked for a decision of the question whether the defendant Dorothy Annie Nutty was entitled, under the bequest in the codicil, to the whole of the residuary estate of the testatrix, and, if not, what property did pass to her under the bequest.

B *J. V. Nesbitt* for the plaintiff.

G. P. Slade, for the defendant Dorothy Annie Nutty, referred to *Lowe v. Thomas* (1); *Rogers v. Thomas* (2); *Dowson v. Gaskoin* (3); *THEOBALD ON WILLS* (8th Edn.), p. 219; *Re Egan, Mills v. Penton* (4); *Re Taylor, Taylor v. Tweedie* (5); and *Prichard v. Prichard* (6).

C *W. F. Waite*, for one of the next-of-kin, referred to *Re Tribe, Tribe v. Truro Cathedral (Dean and Chapter)* (7).

TOMLIN, J.—The question before me on this summons is one arising under the will and codicil of a Miss A. Emerson, who died on Oct. 29, 1927. The will is as follows. [His Lordship read the will, and continued:] On Aug. 14, 1927, the testatrix made a codicil to her will in the following terms: "I bequeath to my adopted niece Dorothy Annie Nutty the residue of money at the time of my death." At her death the testatrix owned a number of investments, such as India Stock, National War Bonds, corporation stocks, and other investments of that character. She had, apparently, £2 17s. in cash in the house, and household goods valued at about £130. She was entitled to a freehold house, being the house in which she lived, and which she had specifically devised; and she was also entitled to the freehold of two other houses in Kenilworth Road, Ealing, which were subject to long leases at ground rents; the value of these two houses, that is to say, of her freehold reversion therein, is stated to be about £288. The total of her estate, therefore, was just about £2,000, of which some £900 was represented by the house specifically devised, valued at £650, and by the freehold reversion valued at £288. **F** The legacies, I think, came to somewhere about £300, and, of course, there were debts to be paid, and the duty on the legacies, which were given free of duty.

In these circumstances, I have to determine what she meant when she said in her codicil: "The residue of money at the time of my death." The question of the meaning of "money," a word that seems much in favour with testators, has been frequently considered. The general rules in regard to it are reasonably clear, **G** that is to say that "money" without any explanatory context, and taken in its primary sense, cannot carry anything more than cash, and possibly money at call; it cannot cover investments or other items of personal estate, and still less can it cover real estate; that is the general rule. On the other hand, it is admitted that the primary meaning will yield to a context, and the question in all these cases is whether there is some wider meaning which should be attributed to the word by **H** reason of the context, and, if so, to what extent that wider meaning goes. It has sometimes been held, in such cases as *Rogers v. Thomas* (2), that it is wide enough to carry the whole of the residuary personal estate. On the other hand, it has been held in such cases as *Re Taylor* (5) that, although not confined to its primary meaning, it has not acquired in the particular context a meaning wide enough to carry all the residuary estate, but only some personal estate of a particular kind.

I Looking at this will and codicil—and it seems to me that I am bound to read the will and codicil together—I have no doubt that what she meant in the codicil is this: she meant to give the residue that was left, after provision had been made for these things which, at her death, became payable by reason of her death, and her testamentary dispositions. In other words, she meant to leave the residue of the fund available for debts, funeral and testamentary expenses, legacies and duties, and, if this lady had died prior to that important date, Jan. 1, 1926, I should have had no hesitation in coming to the conclusion that the gift carried all her residuary personal estate. But counsel for the defendant Dorothy Annie Nutty has raised an

interesting and novel point. He has said that this lady died after Jan. 1, 1926, and that the administration of her estate is regulated by a new law, the Administration of Estates Act, 1925. Under that new law there is no distinction between real and personal estate for the purpose of paying those matters to which I have referred, namely, debts, funeral and testamentary expenses, legacies and duties—duties are not, perhaps, quite in the same position, but, at any rate, debts, funeral and testamentary expenses and legacies are—and the real and personal estate constitute one fund, as it were, out of which these things are payable, and, therefore, the gift carries not only the residuary personal estate, but the real estate as well. It is quite true that, in the times before Jan. 1, 1926, the courts have said that special consideration was shown to the heir, and that you could not take away from the heir except by express words. The heir is no more, but whether real estate is now in a better or worse position than personal estate is a matter to be considered. But, even under the law as it stands to-day, there is a substantial difference between real estate and personal estate, because, unless I am under a misapprehension, the duties which fall to be paid in respect of the real estate are still duties which are payable out of the real estate itself, and are payable under different terms and conditions from the duties which are payable in respect of the personal estate. It seems to me to be a little difficult to say that, because the real estate has become chargeable with legacies and debts, and notwithstanding that it stands for many purposes—or, at any rate, for the purpose of duty—in a different position from the personal estate, it must be treated as simply thrown into a common pot, and that the words which before Jan. 1, 1926, would undoubtedly not carry the undisposed of real estate will do so now. After all, the question is what did she mean by “money,” and I see no reason why, because the law has said that the real estate is chargeable with debts and legacies, that should give a meaning to the word “money” different from that which I should otherwise have attributed to it. I am disposed to think that the phrase “residue of money at the time of my death” does mean money, but it means money in this sense, that particular personal property which is left after there have been paid all those things which are properly payable in respect of debts, legacies and funeral and testamentary expenses. I, therefore, come to the conclusion that, on the true construction of this will and codicil, the property which passes is the residuary personal estate, and that, so far as the two houses in Kenilworth Road, Ealing, are concerned, they are undisposed of.

Solicitors: *W. E. Singleton; Taylor, Jelf & Co.; Gregory Rowcliffe & Co., for Ascroft, Whiteside & Co.*

[Reported by K. R. A. HART, Esq., Barrister-at-Law.]

A

BELL v. BENNETT

[KING'S BENCH DIVISION (Salter and Charles, JJ.), March 22, 23, 1928]

[Reported [1928] 2 K.B. 206; 97 L.J.K.B. 713; 139 L.T. 70; 92 J.P. 106; 44 T.L.R. 424; 72 Sol. Jo. 284; 26 L.G.R. 249]

B

Coal Mine—Checkweigher—Appointment—Notice of intention to appoint—Notice of meeting—Appointment by minority—Right to payment from weight-paid workmen—Coal Mines Regulation Act, 1887 (50 & 51 Vict., c. 58), s. 13 (1), s. 14 (1)—Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 1 (2), (3), s. 3.

C

On the termination of the coal strike in 1926, a new union was formed at the G. colliery, and, in purported accordance with the provisions of the Coal Mining (Weighing of Minerals) Act, 1905, s. 3, a notice convening a meeting to appoint a checkweigher was addressed to the members of the union. At a ballot held on Dec. 18, 1926, C. was appointed checkweigher by a minority of votes, and on Dec. 30, 1926, a statutory declaration was made in accordance with the provisions of s. 1 (2) of the Act of 1905, recording C.'s appointment as a minority checkweigher. On Jan. 3, 1927, a notice convening a meeting to appoint checkweighers was addressed to all workers at the mine. At a ballot held on Jan. 7, 1927, the plaintiffs were appointed by a majority vote, and on Jan. 10, 1927, the statutory declaration recording their appointments was made. By the Coal Mines Regulation Act, 1887, s. 14 (1), a checkweigher appointed by the majority, ascertained by ballot, of persons employed in a mine who are weight-paid, "may recover from any person for the time being employed at such mine and so paid, his proportion of the checkweigher's wages or recompense. . . ." The plaintiffs claimed a proportion of their wages from the defendant, a weight-paid hewer at the mine, under s. 14 (1). The defendant denied liability on the ground that he had already paid contributions to C., who, he contended, had been duly appointed minority checkweigher at an earlier date.

D

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Held: C.'s appointment was invalid since the notice of Dec. 10, 1926, was bad in that it was not addressed to all persons at the mine who were entitled to appoint a checkweigher; even if C.'s appointment had been valid, it was no defence to the plaintiffs' claim against the defendant since the plaintiffs were appointed by a majority and they were deemed to represent all the weight-paid workers in the mine; and, therefore, the plaintiffs were entitled to succeed.

G

Per **Curiam:** Section 1 of the Act of 1905 did not contemplate the existence of a minority checkweigher alongside a majority checkweigher.

H

Notes. The Coal Mines (Weighing of Minerals) Act, 1905, s. 1 (2), has been amended, as from Jan. 1, 1957, by the Mines and Quarries Act, 1954, s. 188, s. 189, s. 194, and Sched. IV and Sched. V, by the omission of the word "agent."

As to checkweighers in coal mines, see 22 HALSBURY'S LAWS (2nd Edn.) 755-758, paras. 1580-1584; and for cases see 34 DIGEST 732-733. For the Coal Mines Regulation Act, 1887, s. 13 (1), s. 14 (1), and the Coal Mines (Weighing of Minerals) Act, 1905, s. 1, s. 3, see 16 HALSBURY'S STATUTES (2nd Edn.) 62, 64, 86, 87.

I Case referred to:

(1) *Addie & Sons' Collieries, Ltd. v. Sullivan*, 1916 S.C. 770; 34 Digest 732, b.

Appeal from Newcastle-on-Tyne County Court.

The plaintiffs, George Bell and Wheatley Jacobson, claimed 10s. 2d. as a proportion of their wages as checkweighers duly appointed by a majority, ascertained by ballot, of the weight-paid workers at the Greenside Colliery, Durham, from the defendant, Peter Bennett, who was employed as a hewer at that colliery and was paid by weight. The defendant denied liability on the ground that he had already

paid contribution to one Clark, who, he contended, had been duly appointed minority checkweigher at an earlier date. The county court judge held that Mr. Clark's appointment was invalid, and also that, even if his appointment had been valid, he had been properly removed from office, and gave judgment for the plaintiffs. The defendant appealed. The facts appear in the judgment of **SALTER, J.** A

Fairfax Luxmoore, K.C., and A. Wilson for the defendant. B

Sir Henry Slessor, K.C., and C. B. Fenwick for the plaintiffs.

Cur. adv. vult.

Mar. 28. **SALTER, J.**—This is an appeal from the judgment of the learned judge of the Newcastle-on-Tyne County Court, in an action which was brought by the plaintiffs claiming to be the duly appointed checkweighers for a mine known as the Greenside Mine, in Durham, and claiming under two statutes, to which I will refer, to be paid by the defendant, a hewer employed in that mine, a proportion of their wages as checkweighers. The learned judge gave judgment for the plaintiffs; the defendant appeals. C

The question is whether, on the proper construction of the relevant parts of two statutes, the plaintiffs are entitled to recover against the defendant. The matters raised are in regard to the due appointment and the rights to remuneration of checkweighers in coal mines. The statutes are the Coal Mines Regulation Act, 1887, s. 13 (1), s. 14 (1), and the Coal Mines (Weighing of Minerals) Act, 1905, s. 1 (2), (3), (5), s. 3. Checkweighers had, in fact, been employed for generations. They had received some statutory recognition in the Coal Mines Act, 1872. The Act of 1887 was passed to consolidate and amend that and other Acts. It is unnecessary to go behind the Act of 1887. Section 13 (1) of the Act of 1887 provides: D

"The persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as 'a checkweigher') at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions in order that he may on behalf of the persons by whom he is so stationed take a correct account of the weight of the mineral or determine correctly the deductions as the case may be." F

We were referred to the words "on behalf of the persons by whom he is so stationed." In my view, that merely means on behalf of the employees of the mine who are paid by weight and are, therefore, concerned to have the weight and allowances correctly determined. I think the words mean no more than that. The power given is to station a person. Nothing is said so far in regard to the method of appointment, but the object of the section clearly is to give a statutory right to the men's representative, which the employer must respect. Section 14 (1), entitled "Remuneration of checkweigher," provides: G

"Where a checkweigher has been appointed by the majority, ascertained by ballot, of the persons employed in a mine who are paid according to the weight of the mineral gotten by them, and has acted as such, he may recover from any person for the time being employed at such mine and so paid, his proportion of the checkweigher's wages or recompense, notwithstanding that any of the persons by whom the checkweigher was appointed may have left the mine or others have entered the same since the checkweigher's appointment, any rule of law or equity to the contrary notwithstanding." H

That is plainly a provision which gives a special right to a checkweigher who has been appointed by a majority, determined by ballot, of weight-paid workmen in the mine. It gives him a general right as against the weight-paid employees in the mine from time to time. The Act of 1905, by s. 1, gives power to appoint deputy checkweighers, and then makes provision for the proper ascertainment and notice to the employers of the appointment of checkweighers by the men. Section 1 (2) provides: I

A "A statutory declaration, made by the person who presided at a meeting for the purpose of appointing a checkweigher or deputy checkweigher, to the effect that he presided at that meeting, and that the person named in the declaration was duly appointed checkweigher or deputy checkweigher, as the case may be, by that meeting, shall be forthwith delivered to the owner, agent, or manager of the mine, and shall be *prima facie* evidence of that appointment."

B Subsection (3) provides:

C "Where the checkweigher or deputy checkweigher was appointed by a majority, ascertained by ballot, of the persons employed in the mine, and paid according to the mineral gotten, the declaration shall so state, and, if he was not so appointed, then it shall state the names of the persons by whom or on whose behalf the checkweigher or deputy checkweigher was appointed. Where a checkweigher or deputy checkweigher is appointed by such a majority as aforesaid, he shall be deemed to be appointed on behalf of all the persons employed in the mine who are entitled to appoint him."

D It is clear, therefore, that the statutory declaration which must be made by the chairman of the meeting which makes the appointment must state whether or not the person purported to have been appointed was appointed by a majority, ascertained by ballot, of all the weight-paid employees in the mine. It must say whether that was so or not. If it was so, then it is not necessary to enumerate the persons on whose behalf the checkweigher has been appointed, because he is deemed to have been appointed on behalf of all the weight-paid workmen. If he is not appointed by that majority thus ascertained, then the declaration must give the name of every person by whom or on whose behalf he has been appointed. It would seem to follow from those words that the persons by whom he is appointed are not necessarily the same as the persons on whose behalf he is appointed, but happily we are not called on in this case to go any further into that point. Therefore, there are clearly, if not two classes of checkweighers, two methods of appointing a checkweigher, and, according to the class to which they belong, or perhaps, F to the method of appointment, their rights are widely different. Section 1 (5) of the Act of 1905 provides:

G "When a checkweigher or deputy checkweigher is appointed by a majority, ascertained by ballot, of the persons employed in the mine, and paid according to the mineral gotten, he shall not be removed by the persons employed in the mine except by a majority, ascertained by ballot, of the persons employed and paid as aforesaid at the time of the removal."

H There are other methods of removing a checkweigher, not by the persons employed in the mine, but where it is a question of removing him by the persons employed in the mine, if he is a checkweigher appointed by a majority, ascertained by ballot, he is not to be removed except by a majority, ascertained by ballot, and that is a majority of all the people thus employed and paid at the time of the removal. Just as he is entitled to be paid by persons who were not in the mine when he was appointed, so he can be removed by persons who were not in the mine at that time. Section 3 of the Act of 1905 provides:

I "All persons who are entitled, by the principal Act or this Act, to appoint a checkweigher or deputy checkweigher shall have due notice given to them of the intention to appoint a checkweigher or deputy checkweigher, by a notice, posted at the pithead or otherwise, specifying the time and place of the meeting, and have the same facilities given to each of them for the purpose of recording their votes, either by ballot or otherwise, in such appointment."

Those are the sections and subsections which we have to consider. They were considered in a Scottish case of *Addie & Sons' Collieries, Ltd. v. Sullivan* (1). It is only necessary to refer to a few words in the judgment of the Lord

President. That case was concerned with the appointment of timekeepers in A
mines. The Lord President says (1916 S.C. at p. 773):

"The procedure to be followed in the appointment of a time checker is by B
statute declared to be the same as the procedure to be followed in the appoint-
ment of a checkweigher. No express statutory procedure is enjoined. It is
very easy to infer from the provisions of s. 1 (2) and (3) of the Coal Mines
(Weighing of Minerals) Act, 1905, what the essential steps must be. There
must be a meeting of those entitled to appoint, at which the appointment is
made. Of that meeting due notice must be given to all those who are entitled
to make the appointment. The appointment may be made by the persons
present at the meeting, whose names must subsequently be given, or it may
be made by a majority of those in the mine entitled to appoint, that majority C
to be ascertained by ballot. When the appointment at a meeting has been
made, the person who presided at the meeting must forthwith deliver to the
mine owners a statutory declaration to the effect that he presided at the meet-
ing at which the person named was appointed time checker. If the appoint-
ment was made by majority, the statutory declaration must say so. If it was
made by the persons present, the names of those persons must be given. And
I ought to add that, when a ballot is taken, equal facilities for recording their
votes must be given to all those entitled to vote."

Speaking with great respect, it may perhaps be that certain qualifications and
additions have to be made to that passage if it is to be quite complete, but it is,
I think, a very valuable outline of the practice with regard to the appointment of
checkweighers in mines. It is plain that there must be a meeting. At that E
meeting the appointment may take place, or it may not. There may afterwards
be a ballot. If a checkweigher is appointed at the meeting in the absence of
ballot, it is plain that he cannot be what I will call a majority checkweigher, be-
cause, quite apart from the numbers voting for him, the majority has not been
ascertained by ballot, and, therefore, he cannot be a majority checkweigher. If
a ballot follows the meeting, the result of the ballot may be to appoint a majority F
checkweigher, or the result may be to appoint what I will call, for convenience, a
minority checkweigher, as in this case Mr. Clark was. Mr. Clark was not a
majority checkweigher, but he was appointed as the result of a ballot. In order,
therefore, to appoint a majority checkweigher, there must be first of all a meeting
of which due notice must be given, and at which nomination for the ballot must
be made. Then there must be after that a ballot, and that ballot must show a G
sufficient majority of the persons entitled to appoint. A majority checkweigher
and a minority checkweigher have both a status under the statutes. They have
a right, while their office lasts, to go into the cabin and check the weighing. In
each case their appointment must be notified to the employers, who must recognise
it. The majority checkweigher has certain important rights which are not en-
joyed by a minority checkweigher. He is deemed to represent all the weight-paid
workers in the mine. He has a right to payment from them, and, by agreement, H
the employers may deduct his wages from the wages of the weight-paid men.
That, I think, is a summary of the effect of these sections.

I come to the facts of this case. This mine had, of course, been idle during the
coal strike. That strike ended on Dec. 1, 1926, and work was gradually re-
commenced at the mine. On Dec. 10 there was exhibited at the pithead a notice I
of the intention to appoint a checkweigher. That notice was in the following
terms:

"Greenside All Grades Union.—Mr. Matthew Golightly and Mr. M. R.
Clark are the two nominations for checkweighmen. The ballot will take place
in the shelter on Saturday next, the 18th Dec., 1926, between the hours of
11 a.m. and 12.30.—C. FORSTER, Secretary."

The men working at the mine, or most of them, had belonged, before the strike,
to the Durham Miners' Union, and after the strike, when the men began to go

A back to work, there was some difference of opinion between them whether work should be resumed or not, and on what terms, and so forth. A new union was, accordingly, formed called the Greenside All Grades Union, of which Mr. Forster was secretary. On Dec. 18, accordingly, a ballot took place. Eighty-four persons balloted for Mr. Clark. At that time there were 217 weight-paid workers in the mine, and, therefore, Mr. Clark's appointment was not an appointment by a majority. That is common ground. On Dec. 30 a statutory declaration was made by Mr. John Robson, who had presided. He said: "A meeting of the persons who are entitled to appoint a checkweigher and employed at the Greenside Colliery in the County of Durham owned by the Stella Coal Co., Ltd., was called by a notice posted at the pithead," and then follows the notice. Then: "I was present at and presiding at a meeting held on the said Dec. 18, 1926, at 12.30 after noon, in the Pit Shelter, when Matthew Richardson Clark, of 9, Meldon Terrace, Greenside, aforesaid, was appointed checkweigher on behalf of the workmen who were members of the Greenside Colliery All Grades Union." Then: "The names and addresses of the persons by whom or on whose behalf the said Matthew Richardson Clark was appointed checkweigher are set out on the list hereunto annexed and marked 'A.' "

B Therefore there was a statutory declaration in accordance with the statute regarding the appointment, and, in that case, the appointment by ballot, of a checkweigher who was not a majority checkweigher. Mr. Clark went into the cabin and began work on Jan. 3, 1927. The cabin was occupied at that time by the two plaintiffs as a matter of convenience. They had been the checkweighers of the mine, I think, for years before the strike. When the strike ended they went back into the cabin by a kind of force of habit, but it is common ground that they had no legal right there. The strike had determined their appointment, and they had not been re-appointed. On Jan. 3 a notice was posted headed: "Weigh Fund Meeting," calling a meeting to get nominations for the post of checkweigher for Jan. 5. The weigh fund is a fund which is not connected with any particular union, but is a fund through which the checkweigher is paid his wages. On Jan. 5, accordingly, the meeting took place, and the two plaintiffs were nominated. On the 7th the ballot was held. Out of 264 at that time entitled to appoint, 176 voted for the plaintiffs, and, therefore, the plaintiffs were appointed by a majority of those entitled to appoint. On Jan. 10 the statutory declaration was made. The plaintiffs, therefore, if that appointment was correct in form, were appointed on Jan. 7 what I have called majority checkweighers. They were, no doubt, appointed as checkweigher and deputy checkweigher. After that, one or other of the plaintiffs, whichever one was on duty, was in the cabin, and Mr. Clark also was in the cabin. They were both there checking the weighing by the employers' agents on behalf of the men or some of the men. On Feb. 2 notice was given of a meeting in reference to the election of Mr. Clark, and a ballot took place on Feb. 5. The ballot paper is headed:

H "All hewers and fillers are entitled to vote. Are you in favour of M. R. Clark representing you as a checkweighman? Yes. No. Put your cross in space beside the word you wish to vote for."

I The result of that ballot was that 63 voted for Mr. Clark remaining and 186 voted for his not remaining. There were at that time 350 weight-paid men in the mine. On Feb. 7 there was another ballot. It is, I think, admitted that, on this occasion at any rate, all the due forms were observed. The plaintiffs were, as far as form is concerned, validly appointed majority checkweighers for that mine. In due course a statutory declaration was made accordingly. The plaintiffs' claim against the defendant begins on that day, Feb. 7. They claim to be paid the sum—there is no question about the sum—which would be payable to them from the defendant if they are entitled to recover from him. Those are the facts of the case. The essential facts, I think, are that there was a purported appointment of Mr. Clark, with which I must deal, on Dec. 18, and, subsequently, on Jan. 5 and 7

there was a purported appointment of the plaintiffs. In the view I take of this case, it is not necessary to consider what was the legal effect, if any, of the ballot which was held concerning the position of Mr. Clark on Feb. 5. The statute contains no provision for the determination of the appointment of a minority checkweigher. My present view is that that ballot had no legal effect at all. It was, no doubt, held, in view of the provision that a majority checkweigher cannot be got rid of except by ballot. Mr. Clark never was a majority checkweigher. My present impression is that that ballot had no legal effect. Further, I need not consider the appointment of the plaintiffs on Feb. 7. In the view I take, that was an unnecessary form, inasmuch as, in my view, they had been duly appointed before. Therefore, the position is a purported appointment of Mr. Clark and after that a purported appointment of the plaintiffs.

The plaintiffs claim under s. 14 (1) of the Act of 1887. [His Lordship read the subsection and continued:] The defendant was a person for the time being employed, and therefore, *prima facie*, the plaintiffs are entitled to recover, if they are duly appointed majority checkweighers. If so appointed they are entitled to be paid by all (s. 14 (1) of the Act of 1887) and deemed to represent all (s. 1 (3) of the Act of 1905). It is said that the plaintiffs were not entitled to payment because the existence of Clark, with a following of 84 miners, who had desired that he should represent them and had appointed him for that purpose, deprives the plaintiffs of their right to a contribution from any of the persons who had appointed Mr. Clark; and it is said further, apart from that point, that it is necessary, to entitle the checkweigher to recover under this section, that he should have acted as such. That is clearly so. It is said that they did not act as such, because, it is alleged, they refused to recognise or to check the weights, where tubs came up to be weighed, which had been got by members of the new union, the Greenside All Grades Union. That allegation was made by Mr. Forster in his evidence. It was not put to the plaintiff, Mr. Bell, when he was in the box, so that he had no opportunity of denying it. We were told that he would have denied it if he had been asked. The learned judge does not deal with it in any way. It appears, I think, that, if that was done by Mr. Bell, it was done by him at the early period before he had any proper legal status in the cabin. I do not think we can deal with this appeal on the footing that the defendant has succeeded in showing any misconduct or non-performance of duty on the part of either of the plaintiffs, which would enable him to resist this claim as against either of them. I wish to say this most emphatically, that the majority checkweigher, in order to entitle him to these contributions, must, of course, act fairly for all the miners whose interests he is charged to represent, quite apart from the union to which they may belong. He is deemed by law to be appointed on behalf of all of them, and all their rights are in his hands. If it could be shown that he had failed to act fairly, or had refused to act at all, in the case of any wage-paid servant, he would certainly not be entitled to contribution from that man, and, in my judgment, he would not be entitled to any payment at all, because that would be a fundamental breach of his duty.

The next point is this. The defendant says: I am not liable to pay the plaintiffs because I paid Mr. Clark; Mr. Clark was duly appointed to represent me, and, therefore, I am not liable to pay the plaintiffs. I am not able to agree with either proposition. I have come to the conclusion that Mr. Clark's due appointment was not proved, first, because I think the notice of Dec. 10 does not comply with s. 3 of the Act of 1905. [His Lordship read the section and continued:] First, I think that that was not a notice which gave proper notice of the intention to appoint a checkweigher to all the persons entitled to appoint. It was addressed to the Greenside All Grades Union. It was signed by the secretary of the All Grades Union. The evidence was that the ballot was attended only by members of the All Grades Union. The chairman's statutory declaration says that Mr. Clark had been appointed on behalf of the 84 men named, who are members of the All Grades Union. I have come to the conclusion that the appointment was not a

A proper one on that ground, and also on the further ground that the right to nominate is essential to an election by ballot. The election of a checkweigher is not necessarily by ballot. There must clearly be, first of all, a meeting at which election may take place, but, if not, then nomination will take place, and after that a ballot. In this case there is no evidence that any opportunity was given to anyone to take part in the nomination of Mr. Golightly and Mr. Clark. The notice states that they had already been nominated, and that all that remains to do is to choose which of those two shall be checkweigher. I have already referred to the Scottish case, and I think, therefore, that the election of Mr. Clark was not valid on this ground also—that due notice was not given to all entitled to record their vote either by ballot or otherwise. They had no opportunity to record any vote except by ballot.

C Then it is said that, if Mr. Clark was duly appointed, he was validly removed. It is not necessary to determine that question. As I have said, my present impression is that, if duly elected, he was not validly removed.

It is further said that, if he was duly elected, his appointment is avoided by the subsequent appointment of the plaintiffs. That raises the question whether it is possible under this machinery to have two checkweighers or more in the cabin at the same time representing different groups of workmen; and, in this case, whether it is possible to have what I have called a majority checkweigher, who is deemed to represent them all, and one or more other checkweighers representing particular groups of workmen. It is not necessary to decide that question in view of the last point which I have to mention, but, as this may be a point of some importance, I will express my own present opinion about it. By s. 1 (3) of the Act of 1905,

E which I have read, the duly appointed majority checkweigher is deemed to have been appointed on behalf of all the men, that is to say, on behalf of all the weight-paid men in the mine at that time, and he is there on behalf of all the weight-paid men from time to time in the mine. It is, therefore, quite clear that he is to be deemed by all persons for all purposes to represent every weight-paid man, and these plaintiffs are deemed to represent the defendant and are bound to protect his interests. I ask myself whether the statute does provide for such a thing as two checkweighers, representing the men, in the cabin at the same time. The checkweighers are concerned with the weight and with the allowance for stones, and so forth. Supposing one of the plaintiffs and Mr. Clark to be in the cabin at the same time and a truck comes forward which has been brought by one of the 84 men who have appointed Mr. Clark, I am perfectly clear that the plaintiff must do his duty with regard to that truck; he represents that miner, whatever his name may be; he must deal with it. It is said that Mr. Clark must deal with it too. Supposing when the allowance for stones comes to be considered, the owners' representative says what allowance he thinks fair, and the plaintiff majority checkweigher agrees, but Mr. Clark does not agree, what is to happen then? What are the owners to do?

H The man who by law is deemed to represent the particular hewer agrees. Another man, whom he has specially appointed, does not agree. It appears to me that a practical question of great difficulty would arise. My general impression is that this Act does not contemplate the existence of a minority checkweigher alongside a majority checkweigher. My present view is that the due appointment of the plaintiffs cancelled and put an end to the appointment of Mr. Clark, even if that appointment had been originally valid. It is not, however, necessary to decide this

I point, because I am quite clear on the last point which remains, that, even if Mr. Clark were duly appointed and if he had remained the duly appointed representative of the 84 miners, that would not have afforded any defence against this claim. The words of s. 14 (1) of the Act of 1887 are, to my mind, perfectly clear. It is impossible to read into it some such words as these: He shall be entitled to a contribution from every workman unless such workman shall be specially represented by some other checkweigher, or words of that sort. The words of the statute are perfectly clear. I think that the existence of a minority checkweigher, even if it were possible, would be no sort of defence to this claim. For these

reasons, I think the learned judge arrived at the right conclusion, and this appeal must be dismissed. A

CHARLES, J.—I agree, and I desire to add very few words. In my view, the appointment of Mr. Clark was invalid, inasmuch as the notice was a bad notice, and inasmuch as no opportunity was given for nomination. I further think that, had his appointment been valid, his manner of removal was invalid. If it be assumed that Mr. Clark's appointment was valid and also that Mr. Clark's removal was invalid, still there would be, in my judgment, no defence to the claim which is made here by these plaintiffs. Once it is admitted and proved that the plaintiffs were properly appointed by a majority on a ballot, they are deemed by law to represent all the wage earners in the mine and they are, as such representatives, entitled by s. 14 (1) of the Coal Mines Regulation Act, 1887, to have their wages paid by contributions from each and every of the wage earners in the mine. I agree in doubting whether the co-existence of minority and majority checkweighers is possible, but it appears to me that the checkweigher appointed by a majority on ballot has a claim, and a definite claim, under s. 14 (1) of the Act of 1887 independently of the existence or non-existence of a checkweigher appointed by a minority. B
C
D

Appeal dismissed.

Solicitors: *King, Wigg & Brightman*, for *Francis J. Lambert*, Gateshead; *Hyman Isaacs, Lewis & Mills*, for *Patrick Bennett & Maddison*, Newcastle-on-Tyne.

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.] E

ENGLISH HOP GROWERS, LTD. v. DERING F

[COURT OF APPEAL (Scrutton and Sankey, L.JJ., and Romer, J.), March 7, 8, 28, 1928]

[Reported [1928] 2 K.B. 174; 97 L.J.K.B. 569; 139 L.T. 76;
44 T.L.R. 448] G

Trade—Covenant in restraint of trade—Association of hop growers—Agreement by member to deliver to association all hops grown on his land—Lease by member of hop growing land to company—Hops pickable at commencement of lease—Liquidated damages—Sum fixed for breach of agreement.

The plaintiff company was formed to organise the marketing of home-grown hops with a view to their sale through a single agency. In 1925 the company entered into an agreement with the defendant, who was a hop grower, under which he undertook to deliver to them all hops grown by him on 63 acres of land in, inter alia, 1926, for sale by them. He further agreed that, if he failed to deliver to the company the hops grown on the land or disposed of them otherwise than through the company, he would pay to the company by way of liquidated damages the sum of £100 per acre. In 1926 the defendant leased the 63 acres to a company controlled by himself to be used for hop gardens only. At the commencement of the lease, the hop vines on the land had grown to the extent that the hops were formed and capable of being picked, although they would not be picked until a few days later unless there was some urgency. The hops on the land not having been delivered to the plaintiff company, they claimed to recover damages at £100 per acre from the defendant. H
I

Held: (i) since the hops were in a pickable condition at the commencement of the lease granted by the defendant, they had been grown or produced by

him, and, therefore, there had been a breach of his agreement with the plaintiff company; (ii) the agreement between the plaintiff company and the defendant was not unreasonable as being in restraint of trade since it was not injurious either to the public interest or to the defendant; (iii) the sum claimed as damages was not a penalty but liquidated damages which the plaintiff company were entitled to recover, since it would be difficult to ascertain beforehand the exact value of damage caused by breach of the agreement between the plaintiff company and the defendant.

Per SCRUTTON, L.J.: The courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining.

Notes. Considered: *Imperial Tobacco Co. (of Great Britain and Ireland), Ltd. v. Parslay*, [1936] 2 All E.R. 515.

As to restrictive covenants in particular trades, etc., see 32 HALSBURY'S LAWS (2nd Edn.) 439-447; and for cases see 43 DIGEST 57 et seq. As to liquidated damages or penalty, see 11 HALSBURY'S LAWS (3rd Edn.) 298-302; and for cases see 17 DIGEST (Repl.) 148 et seq.

Cases referred to:

- (1) *Evans v. Roberts* (1826), 5 B. & C. 829; 8 Dow. & Ry.K.B. 611; 4 L.J.O.S.K.B. 313; 108 E.R. 309; 2 Digest (Repl.) 36, 171.
- (2) *Rodwell v. Phillips* (1842), 9 M. & W. 501; 1 Dowl.N.S. 885; 11 L.J.Ex. 217; 152 E.R. 212; 2 Digest (Repl.) 35, 163.
- (3) *Latham v. Atwood* (1638), Cro. Car. 515; 79 E.R. 1045; 2 Digest (Repl.) 40, 196.
- (4) *Falcon v. Famous Players Co., Ltd.*, [1926] 2 K.B. 474; 96 L.J.K.B. 88; 135 L.T. 650; 42 T.L.R. 666; 70 Sol. Jo. 756, C.A.; 13 Digest (Repl.) 76, 206.
- (5) *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.*, [1914] A.C. 461; 83 L.J.K.B. 530; 110 L.T. 852; 30 T.L.R. 313; 58 Sol. Jo. 338, H.L.; 43 Digest 19, 129.
- (6) *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.*, [1913] A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 12 Asp.M.L.C. 361; sub nom. *R. and A.-G. of Commonwealth of Australia v. Adelaide Steamship Co.*, 29 T.L.R. 743, P.C.; 43 Digest 12, 68.
- (7) *Attwood v. Lamont*, [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 36 T.L.R. 895; 65 Sol. Jo. 25, C.A.; 43 Digest 20, 131.
- (8) *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.*, [1915] A.C. 79; 83 L.J.K.B. 1574; 111 L.T. 862; 30 T.L.R. 625, H.L.; 17 Digest (Repl.) 149, 491.
- (9) *Webster v. Bosanquet*, [1912] A.C. 394; 81 L.J.P.C. 205; 106 L.T. 357; 28 T.L.R. 271, P.C.; 17 Digest (Repl.) 156, 532.
- (10) *Mitchel v. Reynolds* (1711), 1 P.Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 43 Digest 11, 59.
- (11) *Horne v. Graves* (1831), 7 Bing. 735; 5 Moo. & P. 768; 9 L.J.O.S.C.P. 192; 131 E.R. 284; 43 Digest 26, 181.
- (12) *Nordenfellt v. Maxim Nordenfellt Guns and Ammunition Co., Ltd.*, [1894] A.C. 534; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, 139.
- (13) *Printing and Numerical Registering Co., Ltd. v. Sampson* (1875), L.R. 19 Eq. 462; 44 L.J.Ch. 705; 32 L.T. 354; 23 W.R. 463; 43 Digest 67, 705.

Appeal from a decision of ROWLATT, J.

The plaintiff company, who were a society organised for the marketing of home-grown hops, of which the defendant was at all material times a member, claimed £6,300 as liquidated damages against the defendant for breach of a contract in

writing dated Aug. 12, 1925, under which, inter alia, he agreed to deliver to the plaintiff company all hops grown by him to the intent that the same might be sold by the plaintiff company. The defendant denied the breach. Further he said that the contract was unenforceable as being in restraint of trade and that the sum claimed was a penalty. ROWLATT, J., held that the defendant had not grown or produced any hops, and that there was, therefore, no breach. The plaintiffs appealed. The facts are set out in the judgment of SCRUTTON, L.J.

W. A. Jowitt, K.C., and H. L. Murphy for the plaintiff company.

D. N. Pritt, K.C., and Wilfrid Lewis for the defendant.

Cur. adv. vult.

Mar. 28. The following judgments were read.

SCRUTTON, L.J.—This is an appeal from a judgment of ROWLATT, J., in favour of the defendant, Sir E. Dering, who was sued by English Hop Growers, Ltd., for breach of contract. The plaintiff company were incorporated to protect the interests of individual hop growers, members of the company, by pooling their hops produced in the year, in order, by selling through the company "as selling agents for its members," to keep up the price of hops and prevent undue competition. The defendant had three defences: (i) that he had not broken the contract; (ii) that the contract was unenforceable, as in restraint of trade; and (iii) that the sum claimed was a penalty. ROWLATT, J., decided that there was no breach, and did not, therefore, consider the other two defences.

The contract of Aug. 12, 1925, contained a recital:

"The society has been formed to organise the marketing of home-grown hops in Great Britain by their sale through a single agency, and it is agreed by the rules of the society that each of the members of the society who is a grower of hops should enter into a contract with it in the terms hereinafter contained for the mutual advantage of all the members."

Then it contained these clauses:

"2. The grower hereby agrees with the society that so far as the hop crops of the years 1925, 1926, 1927, 1928 and 1929 are concerned he will, subject to the now existing contract (if any) set out in the second part of the second schedule hereto, deliver to the society all hops grown by him to the intent that the same may be sold by the society in the manner set out in the said first schedule."

Clause 5 is:

"The grower hereby agrees with the society that he will not, as regards the crops for the said years 1925 to 1929 inclusive, produce hops upon any greater acreage than that set out in the first part of the said second schedule hereto or upon such larger acreage as the society shall from time to time previously approve and consent to in writing."

By cl. 7:

"The grower hereby agrees that if, as regards the crops for the said years 1925 to 1929 inclusive, he shall fail to deliver to the society any hops produced by him or shall by himself or an agent or factor, or in any way other than through the society, dispose of any hops produced by him, otherwise than in pursuance of a now existing contract (if any), then and in that case he will pay to the society as and for liquidated damages the sum of £100 per acre or proportionately on any less quantity than an acre calculated on the acreage set out in the first part of the second schedule hereto."

It will be seen that the phrases "hop crops," "hops grown by the grower," "hops produced by him," are used apparently as synonymous. Clause 5 of the prospectus uses them all indifferently. The defendant entered into the contract in respect of 53 acres at Sheerland Farm, Pluckley, and 10 acres at Rooting Farm, Pluckley.

A No question now arises with regard to the 1925 crop on these lands, which was marketed by the plaintiff company, though differences of opinion existed as to the results of the marketing.

This action only relates to the 1926 crop. As to this, it was cultivated by the defendant in the usual way. But on July 23, 1926, the defendant leased to a company called "Surrenden Hops, Ltd." (Surrenden being the name of the defendant's residence), for a term of five years from Aug. 10, 1926, certain hop gardens, being the 63 acres the subject-matter of the contract with the plaintiff company, with a covenant by the lessees:

C "To manage cultivate and manure the premises in a good and husbandlike manner in accordance with the most approved methods of hop-growing and husbandry in the district in accordance with the Surrenden traditions and to keep and maintain the whole of the land as hop gardens and hop land only and to keep it clean and free from weeds and not to convert any part into pasture land."

Shares to the extent of £700 were issued in the Surrenden company, of which the defendant held £500, his daughter £100, and a gentleman named Dybell £100.

D The latter's connection with the matter is not explained, except that he was one of the two signatories to the memorandum of association for one share. The defendant had obviously the control of the company, and was its creator. The judge finds as facts that, on Aug. 10, when the lease commenced, the hop vines had grown to such an extent that the hops were formed and pickable hops, though, unless there was some urgency, they would not be picked till a few days later, when their condition would have improved. In these circumstances, the defendant said: "I have not grown any hops or produced any hops on the contract lands; no hops are grown or produced till they are picked, and these hops were picked, and therefore grown or produced, by the Surrenden Estates, Ltd., who have no contract with you." This idea seems to be founded on some mistaken impression that hop clusters are part of the land till they are severed, and only become "hops"

E or personal property when they are severed. This is a mistake. Hops while growing on the vine are fructus industriales, not part of the land while growing, but personal chattels which pass to the executor and not to the heir: see per LITTLEDALE, J., in *Evans v. Roberts* (1), who speaks of "growing crops being produced by the labour of the occupier"; and per PARKE, B., in *Rodwell v. Phillips* (2) and *Latham v. Atwood* (3). ROWLATT, J., very summarily took the view that, if the defendant grew hops, he was under no obligation to pick them; that there were no hops till they were picked; and that what the defendant had done was to lease land with hops still growing on it, which was not disposing of hops produced; in short, that, in 1926, the defendant had not grown or produced any hops. I am quite unable to take this view. It appears to me that, in 1926, the defendant had grown or produced a hop crop up to the point when it was pickable, though it

H would be better to wait a few days, and then dispose of it to persons other than the plaintiff company, so breaking his agreement with them. If the defendant had begun cultivating with hop vines more acres than his contract quantity, I cannot think he would be at liberty to say, if sued for an injunction to prevent him from breaking cl. 5 of his contract, that he was not "producing" hops. This is enough to establish a breach of contract in 1926, but I wish to say (though I do not express a final opinion on it, as the crops of 1927 are not before us) that, when a landlord lets land with a covenant that it shall be used and cultivated as a hop garden according to Surrenden tradition, I think he is causing to be grown and growing hops within the meaning of the present contract, and is preventing himself from keeping his contract to allow the company to dispose of his hops as selling agent, and is disposing of his hops to others than the present plaintiffs. At present I think that, when A. puts B. under a contractual obligation to do a particular act, he causes the act to be done, and breaks any contract which he may have made that he will not do that act: see my judgment in *Falcon v. Famous*

Players Film Co., Ltd. (4). I myself have a strong opinion as to the conduct of the defendant in this matter, but I think it better not to express it, and leave him to be judged by the Societies of Kentish Men and Men of Kent, and others prominent in the county of Kent, a county well known for honesty and good sportsmanship. A

There being then a breach if the contract was enforceable, it was argued that it was not enforceable as in restraint of trade. It was not argued that its terms were unreasonable in the public interest, but that it was an unreasonable restraint on the individual. Oddly enough, one of the complaints was that there were not restraints enough on the conduct of the individual member, as the plaintiff company ought to have taken power to compel its members to reduce their area of cultivation, and so avoid surplus production and lowered prices. It is now well established that the courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties, with more favour than they will regard contracts between master and servant in unequal positions of bargaining. LORD HALDANE states the position thus, in *North Western Salt Co., Ltd. v. Electro-lytic Alkali Co., Ltd.* (5) ([1914] A.C. at p. 471): B C

"When the controversy is as to the validity of an agreement, say for service, by which someone who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves." D E

I may also refer to the well-known judgment, delivered by LORD PARKER in *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.* (6), and to the judgment of YOUNGER, L.J., in *Attwood v. Lamont* (7), which deals particularly with the distinctions between contracts of service and contracts for the sale of goodwill, where much greater freedom of contract is allowed owing to the nature of the subject-matter and the equal position of the contracting parties. I myself have always regarded it as in the public interest that parties who, being in an equal position of bargaining, make contracts, should be compelled to perform them, and not to escape from their liabilities by saying that they had agreed to something which was unreasonable. Here there is no allegation that the public interest is affected, and the defendant, an educated man of full age, was one of the principal promoters of the agreement which he now says is an unreasonable restraint of trade. In view of the fluctuating character of the yearly supply of hops, I see nothing unreasonable in hop-growers combining to secure a steady and profitable price, by eliminating competition amongst themselves, and putting the marketing in the hands of one agent, with full power to fix prices and hold up supplies, the benefit and loss being divided amongst the members. It may be that it would have been better to put more restraints on the individual, but the members have agreed to less restraints, and I cannot say their action was unreasonable. In my opinion, this defence fails. F G H

There remains the defence that the sum claimed is a penalty and not liquidated damages. I act on the rules stated as the result of decided cases by LORD DUNEDIN and explained by LORD PARKER in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.* (8). If in a case where breach of a contract may occasion serious damage, but damage which it is difficult to value exactly, people contracting on equal terms agree beforehand to value or ascertain beforehand a conventional figure which shall represent on an average the probable damage from breaches of the same kind, I see no reason to interfere with their "genuine covenanted pre-estimate of damage," as LORD DUNEDIN describes it. That the damages are difficult I

A to estimate is all the more reason why the parties should make their agreement effective and easy to enforce by previously agreeing a measure of damage. That damages of the same kind, but difficult to value exactly, may be averaged to avoid the difficulty seems to me also reasonable. The object of the present agreement, which is not to operate unless 90 per cent. of the total acreage is a party to it, is to secure in an industry where supply varies with the vagaries of climate, and where B excessive supply and competition lowering prices may ruin people who have been drawn into the industry by the lure of excessive profits from short supply, a steady and regular return for capital. This is to be secured by putting all the produce of the members in the hands of one selling agent, who can keep a steady price, and avoid forcing supplies on the market, the expense and profit of these measures being borne by all the members alike. If any member breaks his contract by not C bringing his produce into the pool controlled by the selling agent, and by offering it for sale through other selling agents at uncontrolled prices, he may cause damage to the association and its members which, while very substantial, will be difficult to value precisely. A member reducing the 90 per cent. acreage by breaking his contract may destroy the whole basis of the association. A member, by forcing his hops on the market, may render it impossible to maintain a controlled price. D When it is known that £100 per acre will be spent on preparing a hop garden, and £100 per acre on annual cultivation; that on good ground you might get a ton of hops an acre; and that the price of a ton might go up to £240, or down to £120 or lower, I cannot see anything unreasonable in fixing the damages against a man who, having become a member, risked breaking up the whole system of the company by refusing to join in the pool and entering into individual competition, at £100 an E acre brought into the scheme.

The strongest way of putting the argument against the contract is to say that, if a grower only sells the produce of one acre independently, he pays the same damages as he would if he sold the produce of all his acreage. But I do not think it is practical politics to invent a man who puts part of his produce in the pool, and sells part outside; and his action in breaking away from the pool may have the F same detrimental effect on the company, whether he breaks away in whole or in part. A similar objection was not considered valid by the Privy Council, when LORD MERSEY gave the judgment in *Webster v. Bosanquet* (9) ([1912] A.C. at pp. 398 and 399), and I refer to his reasons.

In my judgment, this objection to the claim also fails. The appeal must be allowed and judgment entered for the plaintiff company for £6,300, with costs here G and below.

SANKEY, L.J.—The plaintiff company in this case claim the sum of £6,300 as liquidated damages for breach of an agreement entered into between them and the defendant on Aug. 12, 1925. For the defendant, three points were taken: (i) that H there has been no breach of the agreement; (ii) that the agreement was void as being in restraint of trade; (iii) that the sum fixed in the agreement for liquidated damages was a penalty only. The learned judge decided in favour of the defendant on the first point, and from that judgment the present appeal is brought. The facts are as follows: A number of persons in England, desiring to organise the marketing of home-grown hops in Great Britain, by their sale through a single agency, founded the plaintiff company in 1925. The defendant entered into an agreement with the I plaintiffs above-mentioned which provided, among other things, in cl. 2: [His Lordship read cl. 2, and continued:] Then cl. 7 provides what is to happen if the defendant breaks his contract. [His Lordship read cl. 7, and continued:] The schedule attached to the agreement contains the following clauses. Clause 5 deals with membership, and shows the power which it was hoped the plaintiff company would have had. It says:

“Every effort will be made to bring within the society the existing growers of all hops produced in this country (except those grown by brewers) and the

scheme will not finally be proceeded with unless the support is obtained of growers representing 90 per cent. of that total acreage." A

Then cl. 16 provides:

"All hops grown by members will be delivered to the society through the factors to be at its absolute disposal in the same way as they have been at the disposal of the controller." B

Clause 23 provides:

"The society is a selling agency acting for its members. It will not aim at making profits, but at paying all moneys received for hops sold to members less the charges of sale and administration." C

For reasons which are immaterial to this case, the defendant desired to get out of this agreement if he could, and a company was formed on July 22, 1926, under the name of Surrenden Hops, Ltd., the majority of the shares in which are held by the defendant. On July 23 the defendant granted a lease to that company of the two farms on which he grew the hops in question, to come into force on Aug. 10, thus (without begging the question at issue) putting it out of his power to deliver hops to the plaintiff company in 1926. D

The learned judge finds that, on Aug. 10, the defendant had grown hops to a point at which they reached the form of pickable hops, but were not quite ready to pick, although if the threat of disease, or something else, had made it desirable, they might have been picked, and they could have been used. With the hops in this condition, he disposed of his farms to the company just formed. As to (i): Has there been a breach by the defendant of his agreement? It was contended that what the defendant sold (see cl. 1 of his agreement) was hops grown by him, and that that meant "grown and severed by him," and the learned judge has taken this view. He says: E

"Having regard to the fact that the matter of the sale was hops, if and when picked, and possibly dried, I have come to the conclusion that he did not dispose of the hops. What he did was to dispose of his estate by a lease to the newly formed company. He was not disposing of the hops produced, he was disposing of the land which had hops still growing upon it." F

I am of opinion that this is incorrect. It must be remembered that hops are not fructus naturales, but are fructus industriales: see *Rodwell v. Phillips* (2), per PARKE, B. (9 M. & W. at p. 503)—and, having regard to the condition in which the judge found that the hops actually were, and the contract under which the defendant agreed to deliver to the plaintiff company all hops grown by him, I have come to the conclusion that he did break his contract when he disposed of them to the new company, and not to the plaintiff company. G

As to (ii): Was the agreement void as being in restraint of trade? The task of the courts in considering contracts in restraint of trade is always a difficult one, because not only have the interests of the contracting parties to be considered but also the interests of the public, and decisions as to the latter are always susceptible to influences of current views of public policy. What was public policy in the time of LORD MACCLESFIELD, who, as PARKER, C.J., decided *Mitchel v. Reynolds* (10) in 1711, may have been quite different from that which existed in the time of TINDAL, C.J., who decided *Horner v. Graves* (11) in 1831, or from that which existed in the time of LORD MACNAGHTEN, one of the lords who decided *Nordenfelt v. Maxim Nordenfelt Co., Ltd.* (12) in 1894. In *Mitchel's Case* (10) the area was a Holborn parish, in *Horner's Case* (11) it was an area of 100 miles from York, in *Nordenfelt's Case* (12) the area was unlimited. The judgment of LORD BLANESBURGH, then YOUNGER, L.J., in *Attwood v. Lamont* (7) ([1920] 3 K.B. at pp. 589, 590), draws attention to this, and that case must be regarded as an authority that contracts between master and servant in restraint of the servant after leaving the master's employ stand on a different footing from other contracts in restraint of trade. With regard to contracts of the present character, and also contracts H I

A restraining a vendor of the goodwill of a business from canvassing former customers, where the parties enter into an agreement with their eyes open, the court should not, in my view, be astute to assist those who endeavour to break it, as SIR GEORGE JESSEL, M.R., said in *The Printing and Numerical Registering Co., Ltd. v. Sampson* (13) (L.R. 19 Eq. at p. 465). One has this paramount public policy to consider, that one is not lightly to interfere with the freedom of contract. There is still something to be said for the sanctity of contracts, and for the man who keeps his agreement, though it is to his own hindrance: see *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.* (6), where LORD PARKER said ([1913] A.C. at p. 796):

C “The onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and . . . if once the court is satisfied that the restraint is reasonable as between the parties this onus will be no light one.”

In *North Western Salt Co., Ltd. v. Electrolytic Alkali Co., Ltd.* (5) VISCOUNT HALDANE says ([1914] A.C. at p. 471):

D “When the controversy is as to the validity of an agreement, say for service, by which someone who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought the respondents were probably acting in their own best interest. It may well be that such a contract was, in view of the powerful position of the appellants, the respondents’ best way of securing a market and adequate prices. And if this be once conceded I find nothing else in the detailed provisions of the contract excepting machinery for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality.”

F Looking at the position in this case, I am unable to hold that the contract was in restraint of trade, either in reference to the interests of the contracting parties or in reference to the interests of the public. In the schedule to the contract between the parties, it was stated that, after consultation of the growers in the different counties, they reported that, in their opinion, it would be in the interests of hop growers to consider seriously the possibilities of forming a growers’ central selling agency, and the object of the plaintiff company was to organise the marketing of home-grown hops in this country by their sale through a single agency. I can see no evidence that such a selling agency was injurious, either to the interests of the defendant or to the interests of the public, although it might suit the defendant to try to get out of his contract in any particular year, while all those with whom he had been associated were held to be bound by it. The court will always be jealous to protect the public where any question arises as to a monopoly being created by a combination of buyers or sellers, but it regards the parties as the best judges of what is reasonable among themselves. The common law of England is no crystallised code—its adaptability is one of its chief advantages—and it seeks within due bounds to facilitate, not to fetter, trade and industry.

I As to (iii): Is the sum claimed a penalty and not liquidated damages? The learned counsel for the defendant drew our attention to different contingencies under which a claim for liquidated damages arose. He pointed out the result of a breach in which the failure to deliver hops might be in respect of one pocket or a thousand pockets, and of a breach where the grower might dispose of them elsewhere. The law on this subject is most recently discussed by LORD DUNEDIN in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.* (8), where

the learned Law Lord sums up various propositions from decisions which rank as authoritative. He points out that the question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided on the terms and inherent circumstances of each particular contract judged of as at the time of the making of the contract, not at the time of the breach. It is quite reasonable for parties to the contract to estimate damages at a certain figure, and it is no obstacle to the sum stipulated being a genuine pre-estimate of damages that the consequences of the breach are such as to make a precise estimate an impossibility. One of the many tests whether a sum is liquidated damages or a penalty is whether the damages arising from the violation of the contract cannot be exactly estimated beforehand. In the present case, it would be almost impossible to prove the damage caused by the defendant's breach of contract. It cannot be measured by the mere fact that he did not deliver a particular parcel of hops and that the plaintiff company were consequently unable to sell them. As was pointed out by the learned judge and accepted by a witness, the damage is really the undermining of the market and the undermining of the existence of the plaintiff company. It will not be forgotten that, in the first schedule to the agreement, it is stated that the scheme would not finally be proceeded with unless the support of growers representing 90 per cent. of the total acreage of hops in the country was obtained. The failure of the defendant to fulfil his contract may be compared to the throwing of a stone into a pond. The effect extends to a far greater area than the mere spot into which the stone is thrown. The maintenance of an artificial price is a difficult and delicate operation. It may be upset by a trivial or unexpected occurrence—for example, by one important member deserting the combine or a small untied amount being placed on the market. The damages in such a case are impossible to foresee or forecast. In *Webster v. Bosanquet* (9), on not dissimilar facts, the sum in question was held to be liquidated damages. In my view, the sum in question here is also liquidated damages and not a penalty. The judgment of the learned judge should be set aside and judgment entered for the plaintiff company for the sum of £6,300.

ROMER, J.—The first question to be determined on this appeal is whether the hops picked on the defendant's hop gardens at Surrenden in 1926 were hops produced by him within the meaning of cl. 7 of the agreement of Aug. 12, 1925. If they were, it is not disputed that he failed to deliver them to the plaintiff company, and disposed of them otherwise than through the plaintiff company. It is, however, contended on his behalf, and the contention was accepted by ROWLATT, J., that the hops were not produced by him inasmuch as they were picked by his lessees, Surrenden Hops, Ltd., after the commencement of, and under the powers conferred on them by, the lease of July 23, 1926. The learned judge came to the conclusion that the obligation of the defendant under cl. 2 of the agreement, whereby the defendant agreed to deliver to the plaintiff company all the hops grown by him, was merely an obligation to deliver hops if and when picked and possibly dried by him, and that he did not, therefore, dispose of or fail to deliver hops produced by him within the meaning of the agreement. With all respect to the learned judge, I am unable to agree with him as to this. The state of affairs as existing on Aug. 10, 1926, the date of the commencement of the tenancy, was found by him to be this. The defendant

"had grown hops to a point when they were not quite ready to pick; they were formed, they had reached the form of pickable hops, but they were not quite ready to pick, although, if the threat of disease or something else had made it desirable, they might then have been picked and they could have been used, although it would have been a wasteful thing to do."

With this finding I respectfully agree. But it makes it clear that, on Aug. 10, there were hops in a pickable form, and that these hops had been grown or produced (for I draw no distinction between the two words for the present purpose) by the defendant, and when some three weeks later these hops were picked and

A dried they still, in my opinion, were in fact and could properly be described as hops grown or produced by the defendant. It was, however, urged on his behalf that the parties to the contract could not have intended to place him under an obligation to deliver to the society hops grown but not picked by him, inasmuch as the hops might, in certain circumstances, turn out not to be worth the picking. In that case, it was said, the fulfilment of his obligation would merely serve to throw on the defendant a useless expense without any benefit accruing to the plaintiff company. But the contract is one made between business people who, at the time of making it, at any rate, may be supposed to have been trusting one another to behave in a businesslike way. If the hops were not worth picking, it is almost inconceivable that the plaintiff company would not relieve the defendant from his obligation to deliver them as soon as their attention was called to the fact.

C It is, at any rate, much more probable that the parties intended to enter into an arrangement that was capable of working quite satisfactorily on these businesslike lines, than to enter into one that would have been so extraordinarily unbusinesslike as that for which the defendant is contending. If the defendant be right, he could sell his hops the day before they were picked by the purchaser from him and render the agreement entirely useless from the point of view of the plaintiff company.

D There would, indeed, on the defendant's contention, have been no reason for the plaintiff company entering into the contract at all. If the defendant was to be at liberty up to the time of picking the hops to sell them to whom he pleased, the plaintiff company might just as well have saved themselves the trouble of negotiating the contract, and taken the risk of being able from time to time to compete successfully with the rest of the world for the purchase of the defendant's crops. But if this was to be the position of the plaintiff company in relation to the defendant, it would be their position in relation to the rest of their members, and there would be no reason for the existence of the plaintiff company at all.

I must now turn to the question whether the agreement is an illegal one as being in unreasonable restraint of trade. As to this point, on which ROWLATT, J., expressed no opinion, it is conceded by the defendant that the agreement is not unreasonable so far as the public interest is concerned. He contends, however, that the plaintiff company have not shown that it is reasonable as between the parties themselves. In my opinion, this contention cannot be sustained. It was stated in evidence by Mr. Overy on behalf of the plaintiff company that, when the plaintiff company were formed at the end of the period of the Government control of hops, there was a large stock and ruin to the hop-growers was in prospect; that in a year when there was no bigger surplus he had sold hops for less than the price of picking them; and that, in such circumstances, only the biggest men survive and make a profit out of those who are extinguished. The plaintiff company was, accordingly, brought into existence for the purpose, as stated in their prospectus which is scheduled to the contract, of organising the marketing of home-grown hops

H by their sale through a single agency. For this purpose, members were required to enter into a binding contract with the plaintiff company to deliver all hops grown by them for a period of five years for sale through the plaintiff company, and the prospectus states how the money realised by the sales is to be distributed among the members. Shortly stated, the scheme was one by means of which it was hoped that, in a year when there was a surplus of hops, the loss occasioned to the members as a whole would be reduced to a minimum and the loss equitably distributed amongst them. All this is apparent on the face of the agreement itself, which was entered into for the purpose and in pursuance of the scheme. Similar agreements were, so we were told, entered into by some 95 per cent. of the hop growers in this country, excluding brewers. It is they who are the members of the plaintiff company that in each case is the other party to the contract. How, in these circumstances, it can be said that the contracts are unreasonable as between the plaintiff company and the member in question passes my comprehension. It may be safely assumed that this large body of hop growers knew their own business best

and what it was reasonable to do in the circumstances with which they were confronted. But, in any case, given the circumstances and given the object which they had in view, I am unable to see how that object could have been attained by any better or fairer means than those provided by the agreement. In my opinion, the agreement is entirely reasonable as between the parties. A

The only point remaining to be dealt with is whether the £100 mentioned in cl. 7 of the agreement is a penalty or liquidated damages. Here again it became unnecessary for ROWLATT, J., in view of the conclusion at which he arrived on the first point, to express any opinion. I may, therefore, without any want of respect to the learned judge, content myself with saying that, for the reasons already given by SCRUTTON, L.J., I concur with him in thinking that the sum in question is not a penalty but is liquidated damages. I agree that the appeal must be allowed with the consequences stated. B

Appeal allowed. C

Solicitors : *Ellis & Fairbairn; Mackrell, Ward & Knight.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.] D

Re STOKES. BOWEN v. DAVIDSON E

[CHANCERY DIVISION (Tomlin, J.), May 11, 1928]

[Reported [1928] Ch. 716; 97 L.J.Ch. 273; 139 L.T. 331;
72 Sol. Jo. 384]

Will—Legacy—Interest—Trust fund—Annuity charged thereon—Maintenance of infant—Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 43. F

The statutory powers as to the maintenance of infant beneficiaries, contained in the Trustee Act, 1925, s. 31 (formerly the Conveyancing Act, 1881, s. 43), must be read into any settlement to which they apply.

Re Moody, Woodroffe v. Moody (1), [1895] 1 Ch. 101, applied.

Where a legacy given to an infant is clearly indicated by the will to be intended for the support of the infant, interest on such legacy will run from the death of the testator, as the support of the infant must begin immediately upon such death. G

Re Moody, Woodroffe v. Moody (1), [1895] 1 Ch. 101, distinguished.

A testatrix bequeathed three trust funds to her trustees. The terms of each trust were similar, and the will did not provide expressly that the legacies should carry interest from the testatrix's death. The beneficiaries under each trust were different. An annuity was charged on the first trust fund, and the second trust was intended for the support of an infant, but there was nothing special from which, if the legacy of the third trust fund had stood alone, it would have been inferred that it carried interest from the testatrix's death. H

Held: all three legacies of trust funds carried interest from the testatrix's death, the first because the charge of the annuity was a clear indication that the testatrix was treating that fund as yielding an income out of which the annuity could be paid during the first year after her death, the second because it was intended for the support of an infant, and the third because it was one of three legacies all in the same category, given together in one group to the same trustees, and no distinction was to be made between it and the other two. I

Notes. The Conveyancing Act, 1881, was repealed by the Law of Property Act, 1925, except so far as it related to instruments in operation before Jan. 1, 1926.

A Distinguished: *Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716. Referred to: *Dewar v. I.R.Comrs.*, [1935] All E.R.Rep. 568.

As to the statutory powers of maintenance of infant beneficiaries, see 21 HALSBURY'S LAWS (3rd Edn.) 169-172 and 29 HALSBURY'S LAWS (2nd Edn.) 773-776; as to maintenance of an infant out of income of a legacy and as to interest on legacies, see 16 HALSBURY'S LAWS (3rd Edn.) 325-328; and for cases see 28 DIGEST 222

B et seq. For the Conveyancing Act, 1881, and the Trustee Act, 1925, see 20 and 26 HALSBURY'S STATUTES 411, 50, respectively.

Cases referred to:

(1) *Re Moody, Woodroffe v. Moody*, [1895] 1 Ch. 101; 64 L.J.Ch. 174; 72 L.T. 190; 43 W.R. 462; 13 R. 13; 28 Digest 251, 1066.

C (2) *Re Abrahams, Abrahams v. Bendon*, [1911] 1 Ch. 108; 80 L.J.Ch. 83; 103 L.T. 532; 55 Sol. Jo. 46; 23 Digest (Repl.) 463, 5343.

Adjourned Summons.

D By her will, dated Feb. 8, 1915, Frances Jane Stokes, the testatrix, appointed as her trustees and executors Townsend Ince Webb Bowen (the plaintiff on this summons) and Morris Hird Williams (a defendant on this summons). After specific bequests, she bequeathed to her said executors and trustees three legacies, in the will and hereinafter respectively referred to as trust funds A, B and C, and consisting respectively of the sums of £8,000, £8,000 and £2,500, upon trusts, which were declared in the testatrix's said will. As to trust fund A, those trusts were, to invest the same and to pay the income of the investment thereof to the testatrix's daughter, Margaret Ethel Bridget Davidson, for and during her life, and, after her death, to hold the same, as to both capital and income thereof, upon trust for such child, children, or remoter issue of the testatrix's said daughter in such shares and in such manner as her said daughter should by deed or will appoint, and in default of any such appointment as in the testatrix's said will declared. The trusts of trust fund B were similar to those of trust fund A, and were in favour of another daughter of the testatrix; and, lastly, the trusts of trust fund C were to invest that fund and to pay the income of the investment thereof to the grandson of the testatrix, Roger Wilfrid Owen Williams (an infant), for life, and after his death to hold the said fund, as to both capital and income thereof, as in the testatrix's said will mentioned. The testatrix's daughter, Margaret Ethel Bridget Davidson, predeceased the testatrix; and by a codicil dated April 15, 1925, the testatrix gave to Isabel Margaret Munro an annuity of £100 for life, free of duty; and this annuity was charged upon trust fund A. Lastly, by a codicil dated **G** Aug. 19, 1925, trust fund A, subject to the said annuity, was bequeathed to Doris Mary Dean Davidson for life, and after her death to be divided equally between the children of the said Doris Mary Dean Davidson in accordance with the terms of the testatrix's will. The testatrix died on Feb. 28, 1928, and the said Townsend Ince Webb Bowen, as an executor and trustee of her said will and codicils, took out **H** this summons for the determination of the question whether the said trust funds A, B and C created by the said will carried interest from the date of the death of the testatrix or from one year after the date of her death. At the time when the summons came on for hearing the said Roger Wilfrid Owen Williams was an infant.

Section 43 of the Conveyancing Act, 1881 (now s. 31 of the Trustee Act, 1925), provided as follows:

I “(1) Where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may at their sole discretion, pay to the infant's parent or guardian if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not. (2) The trustees shall accumulate all the residue of that income in

the way of compound interest, by investing the same and the resulting income therefrom from time to time in securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time if they think fit apply these accumulations or any part thereof, as if the same were income arising in the then current year. (3) This section applies only if and in so far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained. (4) This section applies whether that instrument comes into operation before or after the commencement of this Act."

The question arose, during the hearing of the argument, whether this provision was to be considered as having been incorporated in the testatrix's will.

W. H. Horsley for the trustee.

W. Barnard for the tenant for life of trust fund A.

C. D. Myles for the tenant for life of trust fund B.

J. V. Nesbitt, for the infant tenant for life of trust fund C, referred to *Re Moody*, *Woodroffe v. Moody* (1) and *Re Abrahams*, *Abrahams v. Bendon* (2).

J. W. F. Beaumont for the residuary legatee.

TOMLIN, J., stated the facts and continued: The question which has to be decided is whether trust funds A, B and C do or do not carry interest as from the date of the death of the testatrix. The ordinary rule makes it plain that a legacy carries interest only from one year after death, save in certain circumstances, as, e.g., where a testator is giving a legacy to an infant child, or to a stranger to whom he stands in loco parentis. It may be, also, that construction of a will, or a proper inference from the language of a will, indicates that interest on a particular legacy is intended to run from the date of the death. In the case of all three legacies in the present will, reliance is placed upon three facts: namely, that all three legacies are in the same category, that they are all three given together in one group to the trustees, and that no distinction is made between them; and I am asked to say that in the case of all three of them, interest runs from the date of the testatrix's death. Thus, it is said, that whatever applies to one of them must apply to all three of them. It is said, also, that two of them, at any rate, i.e., trust funds A and C, are clearly intended to carry interest as from the date of her death. In the case of trust fund A, the charge of the £100 annuity thereon is relied upon as establishing this; and, as to trust fund C, it is claimed that the legacy constituting it is in the same category as the legacy constituting trust fund A.

The tenant for life of trust fund C is an infant grandson of the testatrix. There is no evidence that the testatrix stood in loco parentis to him; nor does the will deal expressly with the question of maintenance. But it is said that there is a statutory provision as to maintenance which applies, and *Re Moody*, *Woodroffe v. Moody* (1) is relied upon as establishing this. At the date of the testatrix's will, s. 43 of the Conveyancing Act, 1881, applied, and its provisions, which are now those of s. 31 of the Trustee Act, 1925, must be read into the testatrix's will. In *Re Moody* (1) **KEKEWICH, J.**, came to the conclusion that the mere fact that there was a provision in the will for maintenance out of residue, in addition to the legacy, did not exclude the rule that a legacy to an infant child does not carry interest from the testator's death. The question now to be considered is whether there is some provision which takes this present case out of the rule. I must follow **KEKEWICH, J.**, and read the will. The will does contain a clause relating to the provisions of s. 31 of the Trustee Act, 1925, and the result of that must be considered. It has been suggested that a provision for maintenance is effective to exclude the rule against carrying interest from death only in those cases where there is an imperative trust, and that it will have that effect in the case of a legacy

A which is intended for the support of an infant. If that be so, interest on trust fund C must, in the present case, run from the date of the testatrix's death. The bequest of the legacy constituting that fund must be treated as an indication that the infant is to be supported out of the legacy, that the testatrix gave the legacy for the support of the infant, and that she intended that such support should commence immediately after her death.

B As to the legacy constituting trust fund A, the charge of the annuity upon it is a clear indication that the testatrix was treating that fund as yielding an income out of which the annuity could be paid during the first year after her death. I cannot believe that her intention was that payment should be made during the first year out of corpus and during subsequent years out of income. The testatrix was treating this legacy as a fund producing income from her death. Therefore

C trust fund A also carries income from the date of her death. As to trust fund B, although there is nothing special from which, if it stood alone, it would be proper to infer that it carries interest from the date of her death, I come to the conclusion that she did so intend. Thus, all three legacies carry interest from the date of the testatrix's death.

D Solicitors: *Peacock & Goddard; Simon, Haynes, Barlas & Ireland; Martineau & Reid.*

[Reported by K. R. A. HART, Esq., Barrister-at-Law.]

E

WAY v. BISHOP

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), May 8, 1928]

F

[Reported [1928] Ch. 647; 97 L.J.Ch. 267; 139 L.T. 246;
44 T.L.R. 571; 72 Sol. Jo. 367]

Solicitor—Partnership—Covenant “not to practise” within specified limit on termination—Employment as managing clerk.

G

“Practising as a solicitor” means acting as a solicitor in such circumstances that the relationship of solicitor and client arises as between the solicitor and the persons whose affairs he is transacting, and so does not include merely acting as the servant of a person who is so practising.

H

By a partnership agreement made between two solicitors one of them undertook “not to practise” within a specified limit after the determination of the partnership. The partnership having been determined, this partner became employed as a managing clerk to a firm of solicitors practising within the limit.

Held: merely acting as a managing clerk was not “practising as a solicitor,” and, therefore, the solicitor was not in breach of the partnership agreement.

Palmer v. Mallet (1) (1887), 36 Ch.D. 411, and *Robertson v. Willmott* (2) (1909), 25 T.L.R. 681, distinguished.

I

Notes. The Solicitors Act, 1843, has been repealed, but the Solicitors Act, 1957, the Act now in force in its stead, contains provisions similar to all those referred to in the judgments.

As to what constitutes a breach of a covenant in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 431-447; and for cases see 43 DIGEST 42-46. For the Solicitors Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 1053.

Cases referred to:

(1) *Palmer v. Mallet* (1887), 36 Ch.D. 411; 57 L.J.Ch. 226; 58 L.T. 64; 36 W.R. 460; 3 T.L.R. 760, C.A.; 43 Digest 52, 542.

- (2) *Robertson v. Willmott* (1909), 25 T.L.R. 681; 53 Sol. Jo. 631; 43 Digest 53, 543.
- (3) *R. v. Oxfordshire County Court Judge*, [1894] 2 Q.B. 440; 58 J.P. 752; 10 R. 381; sub nom. *R. v. Snagge*, 63 L.J.Q.B. 689; 70 L.T. 874; 42 W.R. 603; 10 T.L.R. 547; sub nom. *R. v. Snagge, Ex parte Incorporated Law Society*, 38 Sol. Jo. 565, D.C.; 13 Digest (Repl.) 379, 84.

Interlocutory Appeal by the defendant against an interim injunction until trial granted by CLAUSON, J.

By an indenture dated Feb. 1, 1924, between the plaintiff Leslie Bolitho Way, of 8, Kings' Terrace, Portsmouth, in the county of Hants, solicitor, and the defendant Frederick Edward Bishop, of 104, New Road, Portsmouth, the partners mutually covenanted and agreed (inter alia) as follows:

"1. The said parties will carry on in partnership at Portsmouth aforesaid and at such other places as may be hereafter determined as from the 1st Jan., 1924, the business of solicitors under the style of 'Bolitho Way and Bishop,' in continuation of the like business carried on by the first partner under the style of 'L. Bolitho Way.'

2. The partnership shall continue until its determination in the manner hereinafter provided.

19. It shall be lawful for either of the said partners to retire from the partnership on the 30th day of June, or the 31st day of December, in any year, giving not less than six calendar months' previous notice in writing to the other partner, and the partnership shall determine accordingly on the expiry of such notice.

22. On determination of the partnership by notice as aforesaid the first partner shall have the option of continuing the business at the business premises in his own name (and providing the notice if given by the first partner is based on reasonable grounds) and upon payment of the sums following, namely, the value of the office furniture then belonging jointly to the partners and the sum of £50 at the end of one year, £100 at the end of two years, and £50 for each additional year of the partnership, but not exceeding in the whole three years' purchase of one-half of the business, the second partner will enter into a covenant not to practise in the Borough of Portsmouth or within five miles thereof for a period of ten years from the date of the determination of the partnership. No other sums shall be payable in respect of goodwill."

The plaintiff in accordance with the provision in the partnership deed, on Feb. 24, 1927, gave notice to the defendant of his intention to retire from the partnership on Dec. 31, 1927. As from Jan. 30, 1928, the defendant secured employment as a managing clerk to Henry Harman Wadeson, a solicitor, practising as H. H. Wadeson & Son, in Portsmouth, the office being situated about 800 yards away from the office where the defendant had been in partnership with the plaintiff, and where the plaintiff was continuing to practise since the determination of the partnership. On Mar. 2, 1928, the plaintiff issued the writ in the present action against the defendant and Wadeson, claiming an injunction to restrain the defendant from practising in the city, formerly the borough of Portsmouth, or within five miles thereof for a period of ten years from Dec. 31, 1927, contrary to the terms of cl. 22 of the partnership deed, and from entering into or remaining in the employment of the defendant Wadeson, and to restrain the defendant Wadeson from employing the defendant Bishop in his business in Portsmouth and so enabling the defendant Bishop to practise contrary to the provisions of cl. 22 of the partnership deed.

CLAUSON, J., before whom, on Mar. 20, a motion was heard by the plaintiff, granted an interlocutory injunction in the terms of the writ until the trial. The defendant appealed.

A *F. K. Archer, K.C.*, and *H. Wynn Parry*, for the defendant, cited *R. v. Oxfordshire County Court Judge* (3) and distinguished *Palmer v. Mallet* (1) and *Robertson v. Willmott* (2).

Van den Berg (*Gavin Simonds, K.C.*, with him), for the plaintiff, relied on *Robertson v. Willmott* (2).

B **LORD HANWORTH, M.R.**—This appeal raises what is an important point in regard to the relations of solicitors and their clerks, and we have had the advantage of having the matter fully argued. I say that, not because I would wish at all to discard the assistance that Mr. Gavin Simonds might give us, but we have had the argument fully presented to us by Mr. Van den Berg, who was able to go through all the affidavits and the correspondence which compose the facts of this case, and at the same time we have had a careful examination of the cases bearing on the matter.

C We have to determine whether or not CLAUSON, J., was right in granting the injunction. It is an interim injunction, but in effect I think it will be the conclusion of the whole case. I have come to the conclusion that I must disagree with CLAUSON, J. The terms of the covenant are those which I have read. It is to be observed that the covenant is found in an indenture made between these two partners, the plaintiff and the defendant, and it is said in cl. 1 :

“The said partners will carry on in partnership at Portsmouth aforesaid and at such other places as may be hereafter determined . . . the business of solicitors under the style of Bolitho Way and Bishop.”

E Then we come to cl. 22, which provides that on the determination of the partnership certain payments are to be made which are stated to be “not exceeding in the whole three years’ purchase of one-half of the business,” and in an earlier part of the clause it says that on the determination of the partnership the first partner shall have the option of continuing the business. Thus it is made plain by the use of that term in the same sense as I think it was used in cl. 1 that what is referred

F to is the business of solicitors. Then we come to these words, that the second partner, the defendant, is “not to practise in the borough of Portsmouth or within five miles thereof.” Counsel for the plaintiff has said with force that if you take the whole of the partnership articles together you ought to read that word “practise” not in a narrow sense, but in a broad sense, taking note that it was entered into for the purpose of preserving to the plaintiff the business which was his own

G business, and into which he admitted his clerk, the defendant, after long service, to be a partner. I do not think that we can take note of the reasons which determined the plaintiff to take the defendant into partnership; I think it must be assumed that it was to the advantage of the business as a whole and by mutual agreement between the parties. We have to construe this covenant, not to try to give it such a meaning as may safeguard the rights of one or the other, but

H according to its true meaning as we find it in cl. 22. The words used in this restrictive covenant are few, and we do not find in it any other words such as “either directly or indirectly be engaged in the business of a solicitor or as a managing clerk” or any other words that are not uncommon in such documents. All that we have is that the defendant is to enter into a covenant not to practise.

I I cannot fail to note that the parties have used there a word which is significant in the profession of a solicitor. As was pointed out by RUSSELL, L.J., there are provisions in the Stamp Act, 1891, which provide for penalties being imposed on persons who practise as solicitors without a certificate. “Every person who, in any part of the United Kingdom,” so runs s. 43, “directly or indirectly acts or practises as a solicitor,” and so on. Then we have the Solicitors Act, 1843, under which the distinction is made between qualified and unqualified persons, and the right to practise as a solicitor is one which is restricted to those who are qualified after passing their full examinations, who are admitted by an admission certificate which is always signed by the Master of the Rolls after they have fulfilled the

condition that is imposed on them of taking out a certificate year by year in order to justify them and entitle them to practise. A

It is said that the defendant will do much harm to the business of the plaintiff if he is to be found in Portsmouth, and that his association with another business will attract business to that firm to the disadvantage of the plaintiff. All these matters are matters for consideration between the parties when they come to an agreement. They are very obvious matters, and if the plaintiff was minded to safeguard himself in the manner in which his counsel asks us to construe the agreement I think he ought to have done so in plain terms. I think the argument of counsel for the plaintiff is really this, that we ought to re-write the agreement made between the parties and embrace within the single word "practise" a number of operations which are not necessarily included within it. Our attention has been called to *Palmer v. Mallet* (1), which seems to me not germane to the present case. There were words there which had to be construed which do not obtain in the present covenant. With regard to *Robertson v. Willmott* (2), which was decided before WARRINGTON, J., as he then was, on the authority of *Palmer v. Mallet* (1), it would appear to be an application of the doctrine of *Palmer v. Mallet* (1) which might have been reached if it had been argued at greater length. It was an interlocutory injunction as it stood, but I cannot myself accept that as an authority which would in any way restrict the interpretation which we ought to place on these words. If it is necessary for the defendant to resign his position at Wadson's it would, I think, involve, as has already been said by RUSSELL, L.J., the view that every managing clerk to a solicitor ought to be qualified and take out a certificate because he would be practising as a solicitor, and if he practises as a solicitor s. 43 of the Stamp Act would apply to him. It does not appear to me that that difficulty need arise in the present case. I think that there is quite a full appreciation of the difference between practising as a solicitor and acting as a clerk to a solicitor. I do not think that what the defendant is doing falls within the restriction which is placed on practising solicitors as to their taking out certificates and the like, and I do not think that the covenant is wide enough to justify the restriction being placed upon the conduct of the defendant. For these reasons I find it necessary to disagree with the judgment, and the appeal must be allowed with costs. D E F

LAWRENCE, L.J.—I agree. The point which arises on this appeal is as to the meaning of the single word "practise" in cl. 22 of the articles of partnership. The business of the partnership regulated by the articles is that of solicitors. It is plain, therefore, that the word "practise" denotes "practising as a solicitor." CLAUSON, J., has held that this expression is wide enough to include acting in the capacity of a managing clerk in the employ of another solicitor at a fixed salary. With the greatest respect for the conclusion so arrived at by the learned judge, I am unable to agree with it. The profession of a solicitor is different from that of any other profession in that a solicitor after admission cannot practise as a solicitor without taking out a stamped certificate authorising him to practise as such and, as appears from s. 22 of the Solicitors Act, 1843, such a stamped certificate can only be granted on the production of the registrar's certificate mentioned in s. 21, certifying that such person is an attorney or solicitor and entitled to take out such a stamped certificate. It appears from these provisions that the term "practise as a solicitor" bears a somewhat technical and limited meaning, which is well known to solicitors but which does not include the doing of such legal work as can properly be done without taking out a certificate even although the person doing such work happens to be a solicitor and qualified to take out such a certificate and may have in fact taken out a certificate. G H I

The articles, having been entered into between two practising solicitors, must, I think, be construed as giving to the word "practise" that limited meaning to which I have referred, a meaning which the parties must be presumed to have had in mind. It is not for the court to extend the meaning of the language used by the

A parties to express their contract, especially when dealing with a covenant in restraint of exercising a profession. The contracting parties have not thought fit to enlarge the scope of the covenant (as is not infrequently done in similar cases) by prohibiting the covenantee from acting as a clerk or assistant to another solicitor, and it is not the function of the court so to enlarge it solely on the ground that the covenant as it stands does not afford that full protection to the covenantee which

B he would like to have. It is quite true that the omission of a prohibition against acting as a managing clerk to a solicitor within the prohibited area to a great extent lessens the value of the restrictive covenant in cl. 22. No doubt the object of that covenant was to protect the goodwill of the business which the defendant was leaving in the hands of the plaintiff, and it may very well be that had the plaintiff realised that the defendant could lessen the value of the goodwill by acting as a

C managing clerk to another solicitor in Portsmouth the plaintiff would have sought to extend the covenant in the direction in which he now asks the court to extend it. Whether the defendant would have agreed to such an extension is another matter. However that may be, our duty is to construe the contract as the parties have framed it, and I have come to the clear conclusion that on the construction of that contract it is confined strictly to the practice of a solicitor, and, further, that by

D merely acting as a managing clerk to another solicitor the defendant, although he is himself a solicitor, and although he is in a position to practise as such, is not in fact himself practising as a solicitor within the meaning of the covenant. If a managing clerk holds a certificate which entitles him to practise, it may be difficult under certain circumstances to ascertain whether he is himself practising as a solicitor or not, but I think the test in every case must be whether in the work

E he is doing the relationship of solicitor and client is constituted between him and the client for whom he is acting. Applying that test to the present case the evidence shows that the defendant has not hitherto practised as a solicitor, and I do not find any evidence that he threatens or intends so to practise in the future. He is now acting merely in the capacity of managing clerk to a practising solicitor, and as such the legal work which he is doing is work done for and on behalf of his

F employer. So long as he conducts himself in the way in which he has been conducting himself hitherto, I am of opinion that there is no ground for granting an injunction to restrain him from infringing the covenant, first, because there has been no breach of the covenant in fact, and, secondly, because there is no evidence that there is any threat or intention on the part of the defendant to commit a breach of the covenant in the future.

G Counsel for the plaintiff has relied on two decisions dealing with covenants in a different form and entered into under different circumstances. As regards *Palmer v. Mallett* (1), it is quite plain to me that the court laid much stress upon the particular words of the covenant, which were "not to set up or carry on the profession or business of a surgeon." The expression "carry on" is wider than the expression "set up," and the court held that acting as an assistant to a surgeon

H came within the covenant, regard being had to the tenor of the agreement as a whole. That case seems to me to afford no support to the proposition that the word "practise" here has the extended meaning contended for. The other case is *Robertson v. Willmott* (2), where WARRINGTON, J., held that the terms of the agreement which the court had to construe were to the same effect as those in *Mallett's Case* (1), and that *Mallett's Case* (1) governed the construction of the agree-

I ment. Whether the learned judge was right or wrong in coming to this conclusion is a question on which I do not propose to express any opinion; it is quite enough to say that that case does not bind this court in construing the agreement in the present case. For the reasons I have stated I am of opinion that the appeal succeeds and ought to be allowed.

RUSSELL, L.J.—Inasmuch as we are differing from the learned judge in the court below, I desire, with respect to him, to add a few words. The sole relevant fact in this case appears to me to be this, that the defendant's partnership with

the plaintiff having come to an end, he has entered the employ of a solicitor, Mr. Wadeson, who has an office in Portsmouth, as his managing clerk at a fixed salary; and the question for decision is whether in so doing he has committed a breach of cl. 22 of the partnership articles under which he has bound himself not to practise in the borough of Portsmouth for a particular time. "Not to practise" in that clause must mean and can only mean not to practise as a solicitor. The wording of a clause such as cl. 22, being a clause in restraint of trade, should not, in my opinion, be unduly stretched so as to be generous to the person in whose favour the covenant is entered into. It is a clause which should be looked at, if anything, narrowly. In my opinion, the natural meaning of the words "practising as a solicitor" is that the man will act as a solicitor in such circumstances that the relationship of solicitor and client will arise as between himself and the persons whose affairs he is transacting. In my opinion, the phrase "practising as a solicitor" connotes a person who is a principal; it connotes a person who has clients; it connotes a person, in short, who has a practice, and the words are not apt words to describe the position of a person who is acting as the servant of another who is practising as a solicitor. In *Robertson v. Willmott* (2), a decision of WARRINGTON, J., which has been referred to, the report of the case is very unsatisfactory; it is somewhat meagre, and it has not found its way into the LAW REPORTS; but, taking the report as it stands, it is clear that the learned judge based his decision simply on the grounds of COTTON, L.J.'s judgment in *Palmer v. Mallet* (1), and in no way did he base his decision on the grounds of the other three learned judges who decided *Palmer v. Mallet* (1); viz., CHITTY, J., BOWEN and FRY, L.JJ. It is sufficient to say that *Robertson v. Willmott* (2) can be distinguished from the present case inasmuch as the profession there being dealt with was that of an architect and not the profession of a solicitor, the peculiarities and specialities of which have been pointed out by LAWRENCE, L.J., in his judgment. I am in agreement with the other members of the court, and, in my opinion, the appeal should be allowed. The undertaking as to damages usually given by the plaintiff to whom an injunction has been granted in the event of the injunction being discharged on appeal, was by mistake not included in the order made by CLAUSON, J., granting an injunction, but as the slip order—Ord. 28, r. 3—provided for this, the Court of Appeal, on the plaintiff agreeing to treat the order of CLAUSON, J., as including such an undertaking, decided to discharge the order as to the injunction and costs, leaving the defendant, the appellant, to his right to an inquiry as to damages suffered by him from the injunction granted. The costs of the defendant, of the motion, and of the appeal to be costs in the action.

Solicitors: *Samuel, Price, Sons & Robertson*, for *R. H. Wadeson & Son*, Portsmouth; *Cardew-Smith & Ross*.

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

ELLERMAN LINES, LTD. *v.* READ

[COURT OF APPEAL (Scrutton and Atkin, L.JJ., and Eve, J.), January 27, 30, 31, 1928]

[Reported [1928] 2 K.B. 144; 97 L.J.K.B. 366; 138 L.T. 625;
44 T.L.R. 285; 17 Asp.M.L.C. 421; 33 Com. Cas. 219]

Foreign Judgment—Injunction to restrain enforcement—Judgment obtained by British subject by breach of contract and fraud—Seizure of ship under process of foreign court.

English courts have jurisdiction to restrain by injunction a British subject from enforcing a judgment obtained by him in a foreign court by breach of contract and by fraud.

Observations by ATKIN, L.J., and EVE, J., as to the drawing up of orders.

Notes. As to foreign judgments improperly obtained, see 7 HALSBURY'S LAWS (3rd Edn.) 147–149, paras. 261–264; and for cases see 11 DIGEST (Repl.) 515–517, 1300–1313.

Cases referred to:

- (1) *Lord Portarlington v. Soulby* (1834), 3 My. & K. 104; 40 E.R. 40, L.C.; 11 Digest (Repl.) 546, 1535.
- (2) *Love v. Baker* (1665), 1 Cas. in Ch. 67; Nels. 103; 22 E.R. 698; sub nom. *Lowe v. Baker*, Freem. Ch. 125, L.C.; 11 Digest (Repl.) 546, 1533.
- (3) *Carron Iron Co. v. Maclaren* (1885), 5 H.L.Cas. 416; 24 L.J.Ch. 620; 26 L.T.O.S. 42; 3 W.R. 597; 10 E.R. 961, H.L.; 11 Digest (Repl.) 547, 1543.
- (4) *Bushby v. Munday* (1821), 5 Madd. 297; 56 E.R. 908; 11 Digest (Repl.) 547, 1548.

Appeal from a decision of MACKINNON, J., in an action tried by him without a jury; **Cross-appeal** as to costs.

The plaintiffs were the owners of the steamship *Falernian*. The defendants, Mr. Read and Mr. Grech, were joint owners of, and the defendant, Count Zanardi Landi, a naturalised British subject, was master of, the salvage vessel *Semper Paratus*. In November, 1924, the *Falernian*, which was stranded in the Black Sea off the Rumanian coast, was salvaged by the defendants' vessel on the terms of a salvage agreement dated Nov. 24, 1924. That agreement, which was in the standard form approved by Lloyd's on the terms of "No cure, no pay," provided that the remuneration for the salvage services would be settled by arbitration in London, that security for the payment of that remuneration should be given in London. By cl. 5:

"The contractor engages not to arrest or detain the property salvaged except in the event of any attempt being made to remove the same . . . without his consent before security as aforesaid has been given to the committee of Lloyd's."

The deposit of an open guarantee was, accordingly, made in London. In March, 1925, the *Falernian* was refloated and taken to Constanza. After having had some £2,000 spent on her by way of temporary repairs, she was taken on to Constantinople where she was placed in dry dock for purposes of further repairs, after which she was to be towed to England or Holland in order to have more extensive repairs carried out. Before she left, however, the defendant Landi caused her to be arrested at Constantinople and proceedings were instituted in the Turkish courts against the master of the *Falernian* on the ground that the vessel was about to be removed without security having been given. On an oath falsely given by the defendant Landi that security had not been given, and the master of the vessel taking no further part in the proceedings, judgment was given in November, 1925, by the Turkish court for the amount claimed by the defendant Landi for salvage services in respect of the vessel and cargo.

Landi from taking the fruits of the judgment which he has obtained by fraud, and that such an injunction ought to have been granted.

The remaining questions were as to damages. The plaintiffs asked for damages under four heads. They asked for the hire of the tug they had had to send out to tow the *Falernian* from Constantinople to Marseilles, the value of which was lost by reason of the arrest. The learned judge gave them that and there is no appeal. They also asked for the legal expenses incurred for the purpose of obtaining the release of the *Falernian*. The learned judge gave them those, and there is no appeal. The two questions, however, in respect of which the appeal arises are these: The plaintiffs asked for the wages and expenses of the master and crew of the *Falernian* from the date of the arrest of the ship. The learned judge said that they were entitled to reasonable expenses (because the point was taken that many of these expenses and detentions were unnecessary because they ought not to have detained the master and crew as they did until the sale of the ship) and gave them expenses up to a reasonable time. But when the judgment came to be settled, although the learned judge said that he did not know much about the facts, for some reason he felt able to decide the fact, and he gave the expenses of detaining the master and crew up to the time when the judgment was pronounced—namely, on Nov. 3. The ship had not yet been parted with or sold, and there were considerable doubts as to what might happen; and I am not able to say on the material before me, and I do not think the learned judge had any material before him for saying, that directly the Turkish judgment had been given, the master and crew ought to have come away. If they were to leave Constantinople on Nov. 3 they had to be brought home, so that the figures after that date would have to be investigated; and we propose to alter that fixed date of Nov. 3 and to say that they are entitled to the wages and expenses of the master and crew for a reasonable time, having regard to all the circumstances, and the tribunal which assesses the damage will have itself to go more closely into the facts and negotiations than the learned judge did, or than we have been able to do, and will have to say up till what date they think it reasonable, in view of all the circumstances, to detain the master and crew.

The last claim for damages was this: the plaintiffs claimed either the value of the *Falernian*, or, alternatively, the loss of use of the *Falernian*, from Nov. 15, 1925, at £25 per day. What ultimately happened to the *Falernian* was that the defendant Landi's brother appeared. The defendant Landi, unfortunately, said he owed his brother a debt, and the latter desired to have the claim that the defendant Landi had against the *Falernian* handed over to him, so that he could make good his debt against his brother, who would not pay him. That was done, and it formed part of the Landi procedure in this matter. The ship was ultimately sold for the benefit of the brother Landi for £3,750, which obviously was very inadequate to satisfy a judgment for £25,000. The question is whether the plaintiffs are entitled to say that the breach of contract of the defendant Landi, and the fraud by which he obtained the judgment, have caused them the loss of the *Falernian*, because what the defendant Landi says, in effect, is this: "Assume that I was fraudulent; assume that I was breaking my contract; if you had acted with sufficient vigour, you would have defeated my fraud, and so you cannot say that the loss of the ship is the result of my fraud. It is the result of your gross and culpable negligence in not taking sufficiently ingenious measures to defeat my fraud." I am bound to say that I have no sympathy with that line of argument. When a man commits fraud, it does not do to say: "You ought to have found me out, and you were contributorily negligent in not finding me out, and in not being able to defeat my fraud." In my view, the plaintiffs are entitled to have the value of the ship. On the question as to the date, following the analogy of the cases on capture, which I have looked into, the date should be the date when the plaintiffs were first deprived of their property in the ship by the arrest. The tribunal which is assessing the damages must determine the value of the ship on that date, which will include

A whatever value had been added by the money that the plaintiffs have spent on the ship to get her to that point where she was arrested.

B The appeal will, therefore, be allowed; the injunction granted will be in the terms of the statement of claim against all three defendants, and the matter must go to a special referee to be agreed on by the parties. If they cannot agree, they must come to the court, and the court will then decide what tribunal shall assess the damages. The damages will be, varying the judgment of the court below, in the case of the second item, the wages and expenses of the master and crew, from the date of the arrest of the ship to a reasonable time after, having regard to all the circumstances, and will include the value of the *Falernian* at the time when she was arrested in the Turkish courts.

C **ATKIN, L.J.**—I agree. This is a case in which the judge gave judgment for the plaintiffs, and granted certain relief. The plaintiffs appeal against the judgment, saying that they are entitled to further relief than that given to them by the learned judge. The defendant has a notice of cross-appeal, but he does not appeal against the judgment for the plaintiffs; he only appeals in respect of a question of costs, which, in the view that we take of the case, does not arise.

D There is an undisputed finding of fact by the learned judge, that the defendant Landi did commit a breach of contract, and that all the defendants, who were the partners in that transaction, are liable for the consequences of that breach of contract. There is a further finding by the learned judge that the defendant Landi procured a judgment of the Turkish courts by a fraudulent misrepresentation. As I say, that is not disputed, and it would appear from the facts that the findings
E could not reasonably be disputed. What is the consequence of that? It seems clear that the defendant Landi committed a plain breach of the salvage agreement by arresting the *Falernian* in Constantinople; and there is no doubt at all that he arrested the ship for the purpose of founding proceedings in the courts at Constantinople, and in order that he might obtain from those courts a salvage award, and have a remedy against the ship and also against the master. He pursued the
F action, and claimed his salvage award.

As far as my own judgment is concerned, in allowing this appeal and taking the course that we do take, I, for my part, have no criticism at all to pass on the Turkish courts or on their procedure. [His Lordship dealt with the proceedings in the Turkish courts and continued:] The plaintiffs now say: "Here is a judgment which has been obtained by reason of a breach of contract, obtained further by fraud on the Turkish court, and we are entitled to a declaration that that judgment
G is not to be treated as valid, at any rate in England, and to an injunction to restrain the person who so obtained it from enforcing it. They have got the declaration, and there is no complaint made about that. The question is whether they are entitled to an injunction. It is said that the court has no power, no jurisdiction, to grant such an injunction. True it is—it is said—that the court
H from time to time has granted injunctions against persons commencing or continuing proceedings in foreign courts, but that power ceases once a judgment has been obtained. Once a party has obtained a judgment it is sacrosanct, and the party cannot be restrained from taking advantage of it. That appears to me to be a most remarkable contention. I put the case in argument of a person who had obtained a judgment against a third person, and assigned it to a judgment
I creditor, assuming, for the purpose of argument, that an Englishman resident in this country assigned a judgment for value to another Englishman, and for further assurance covenanted not to enforce the judgment abroad except for the benefit and with the consent of the assignee. It is said, apparently, that in such a case the English court could not restrain the vendor from violating his contract. Or assume that an agent conducting a case, and having powers of management, obtained a judgment on behalf of his principal abroad, and then sought to enforce it for his own benefit and contrary to the instructions of his principal. In such a case it is said that that agent could not be restrained from acting in breach of his

fiduciary duty to his principal. In my view, the English courts are not so bankrupt of resources as to be incapable of granting a remedy in cases such as these. There is no principle on which the remedies granted by the English courts should be so restricted. The principle on which an injunction is granted in such a case is not that the English court assumes to itself some jurisdiction over the foreign court, and that it arrogates to itself some superiority which entitles it to dictate to the foreign court, and say that the procedure of the foreign court is inferior to its own, or that their means of arriving at the truth are inferior to its own; the principle has nothing to do with a criticism of the foreign jurisdiction. It is directed to the personal attitude of the person who has obtained the foreign judgment. If the English court finds that a person subject to its jurisdiction has committed a breach of covenant, or that he has acted in breach of some fiduciary duty, or in any other respect which is recognised by a court of equity has violated the principles of equity and conscience, so that it is inequitable that he should enforce that remedy, then this court will restrain him, not by issuing an edict to the foreign court, but by saying that he is in conscience bound not to enforce that judgment. It was everyday procedure in the old days of equity to grant an injunction against a person from proceeding on a judgment obtained in a common law court, where it was necessary to do so. Therefore, I think that the criticism that has been addressed to the claim for an injunction in this case, which, indeed, has been accepted by the learned judge, is unfounded. It appears to me to be essential in the interests of justice in this case that the injunction should be granted restraining the defendants from reaping any advantage from the judgment which has been obtained in Turkey, first of all in breach of an express contract, and, secondly, by reason of a gross fraud.

The other matter that arises is on the question of damages. As to that I have nothing to add to what has been said by my Lord. It appears to me that it was unfortunate that the learned judge should have fixed the date up to which the wages of the master and crew were to be paid, because it obviously is a question for consideration what was reasonable, and what was a reasonable time; and I cannot think that the date of the Turkish judgment was or can be, without further consideration of the whole of the circumstances, fixed as being a reasonable time at which the master and crew ought to be withdrawn from the ship. The circumstance that they had to be brought home afterwards, and their wages would still be running, is, I think, a cogent circumstance to indicate that that date in itself cannot be the correct date.

The only other question as to damages is as to the value of the ship. The learned judge has held that the plaintiffs have not lost the ship by reason of the Turkish proceedings, but have lost the ship by reason of their not taking any further part in the proceedings than they did. In other words, he has held that they ought to mitigate their damages, and that, if they had continued to appear before the foreign court, non constat but that the foreign court would have made an award which was equivalent to an award which might have been made by the British court, and if such an award had been made against them, then, in some way or other, they would have taken it up, and would have been exposed to no further liability, and would not have lost their ship. That appears to me not to give effect to the paramount consideration in this case, which was that the proceedings themselves were in direct breach of contract, and that the defendant Landi was pursuing them in fraud. The plaintiffs say: "It is not reasonable to have expected us to have gone on with the proceedings in Turkey. It is true that we might, if we had gone on, have diminished the large award of £22,000, but, if we had gone on, we should obviously have submitted to the jurisdiction, and would have taken the risk of such an award as the Turkish courts should choose to make, which might, it is true, have been smaller than the award that an arbitrator might give us under the contract, or might have been much larger, but it was unreasonable for us to take that risk, and why should we be compelled to take that risk, when the whole proceedings initiate with a direct breach of the contract which the plaintiff in those proceedings had entered into with us, that it was to be decided by an arbitration? And by

A compelling us to go on in that way he is really taking advantage of his own wrong." I think that that is a cogent consideration in this case. It appears to me, on considering the facts—and this is a question of fact for us, as it was for the learned judge—that the learned judge ought to have held that it was not reasonable to expect the plaintiffs to have continued the proceedings in Turkey, and that they acted reasonably in taking the course that they did. That being so, it appears to me that the loss of the vessel follows directly from the initial breach of contract, the arrest of the ship, followed up as it was by the fraud of the defendant Landi. I think, therefore, that the plaintiffs are entitled to recover damages based on the value of the ship at the date when the breach of contract was committed, which resulted in the loss—namely, at the date of the arrest.

C I would also say that I consider it unfortunate that there has been a series of irregularities in this case in connection with the claim for an injunction. The injunction that was eventually granted—the interim injunction—was granted before the statement of claim was delivered, and it was in wider form than that which was, as I have no doubt deliberately, adopted by the pleader in the statement of claim. I think that it would have been extremely doubtful whether the judge below ought to have granted any other injunction than that asked for in the statement of claim, without an amendment of the statement of claim, which was never asked for. However, the learned judge came to the conclusion that he could not grant an injunction, but nevertheless he granted an interim injunction until the hearing of the appeal, which is very difficult to explain. When that judgment was drawn up, instead of reciting what the order of the court was, and what the defendants were restrained from doing, it only refers to continuing an injunction granted by ROWLATT, J., varied by ROCHE, J., and continued by GREER, J., without stating what it is that the court was ordering the defendants to abstain from doing. That seems to me to be very bad practice, and if such a judgment as that were brought to the attention of any foreign critic familiar with the careful way in which judgments are drawn up, I think it would be likely to expose the English courts to contempt. I cannot help saying that this is a matter of great importance, that the orders of the court should be drawn up in accordance with what has been the established practice, and should make clear what it is that the court is actually ordering should be done. There is considerable laxity in these matters, especially in judgments drawn up in the King's Bench Division. The attention of practitioners and of the officers of the court should be drawn to the fact that orders should not be passed unless they are in accordance with the usual and proper forms.

G I agree that the appeal should be allowed, and the judgment when it is drawn up will contain the terms of the precise order of the injunction which is being granted; and, inasmuch as no question arises as to the costs below, it is sufficient to say that the order below will be varied in the way which has been directed.

EYE, J.—I agree, and particularly in the concluding observations of ATKIN, L.J., with regard to the form which has been adopted in the various orders made in the course of this case. I am not sufficiently conversant with the practice of the King's Bench Division to express an opinion whether or not this is an exceptional case; but, assuming, as I do, that one could hardly find in many cases so many matters for criticism, I would desire to say that, in the exercise of the judicial discretion in granting injunctions, and in framing orders which are to restrain the liberty of the subject, the judges in that division, of which I am more competent to speak, exercise the greatest care, not only in determining whether an order should be made, but as to the ultimate form that the order assumes; and I agree with my learned brother that, if the orders in this case were produced to a foreign tribunal, acquainted with the practice of the Chancery Division, I think there would be good ground for saying that they would regard them as something little short of astonishing.

So far as the jurisdiction is concerned, the jurisdiction of the court to make an order granting an injunction such as is claimed in this case, is established by a

fiduciary duty to his principal. In my view, the English courts are not so bankrupt of resources as to be incapable of granting a remedy in cases such as these. There is no principle on which the remedies granted by the English courts should be so restricted. The principle on which an injunction is granted in such a case is not that the English court assumes to itself some jurisdiction over the foreign court, and that it arrogates to itself some superiority which entitles it to dictate to the foreign court, and say that the procedure of the foreign court is inferior to its own, or that their means of arriving at the truth are inferior to its own; the principle has nothing to do with a criticism of the foreign jurisdiction. It is directed to the personal attitude of the person who has obtained the foreign judgment. If the English court finds that a person subject to its jurisdiction has committed a breach of covenant, or that he has acted in breach of some fiduciary duty, or in any other respect which is recognised by a court of equity has violated the principles of equity and conscience, so that it is inequitable that he should enforce that remedy, then this court will restrain him, not by issuing an edict to the foreign court, but by saying that he is in conscience bound not to enforce that judgment. It was everyday procedure in the old days of equity to grant an injunction against a person from proceeding on a judgment obtained in a common law court, where it was necessary to do so. Therefore, I think that the criticism that has been addressed to the claim for an injunction in this case, which, indeed, has been accepted by the learned judge, is unfounded. It appears to me to be essential in the interests of justice in this case that the injunction should be granted restraining the defendants from reaping any advantage from the judgment which has been obtained in Turkey, first of all in breach of an express contract, and, secondly, by reason of a gross fraud.

The other matter that arises is on the question of damages. As to that I have nothing to add to what has been said by my Lord. It appears to me that it was unfortunate that the learned judge should have fixed the date up to which the wages of the master and crew were to be paid, because it obviously is a question for consideration what was reasonable, and what was a reasonable time; and I cannot think that the date of the Turkish judgment was or can be, without further consideration of the whole of the circumstances, fixed as being a reasonable time at which the master and crew ought to be withdrawn from the ship. The circumstance that they had to be brought home afterwards, and their wages would still be running, is, I think, a cogent circumstance to indicate that that date in itself cannot be the correct date.

The only other question as to damages is as to the value of the ship. The learned judge has held that the plaintiffs have not lost the ship by reason of the Turkish proceedings, but have lost the ship by reason of their not taking any further part in the proceedings than they did. In other words, he has held that they ought to mitigate their damages, and that, if they had continued to appear before the foreign court, non constat but that the foreign court would have made an award which was equivalent to an award which might have been made by the British court, and if such an award had been made against them, then, in some way or other, they would have taken it up, and would have been exposed to no further liability, and would not have lost their ship. That appears to me not to give effect to the paramount consideration in this case, which was that the proceedings themselves were in direct breach of contract, and that the defendant Landi was pursuing them in fraud. The plaintiffs say: "It is not reasonable to have expected us to have gone on with the proceedings in Turkey. It is true that we might, if we had gone on, have diminished the large award of £22,000, but, if we had gone on, we should obviously have submitted to the jurisdiction, and would have taken the risk of such an award as the Turkish courts should choose to make, which might, it is true, have been smaller than the award that an arbitrator might give us under the contract, or might have been much larger, but it was unreasonable for us to take that risk, and why should we be compelled to take that risk, when the whole proceedings initiate with a direct breach of the contract which the plaintiff in those proceedings had entered into with us, that it was to be decided by an arbitration? And by

A compelling us to go on in that way he is really taking advantage of his own wrong." I think that that is a cogent consideration in this case. It appears to me, on considering the facts—and this is a question of fact for us, as it was for the learned judge—that the learned judge ought to have held that it was not reasonable to expect the plaintiffs to have continued the proceedings in Turkey, and that they acted reasonably in taking the course that they did. That being so, it appears to me that the loss of the vessel follows directly from the initial breach of contract, the arrest of the ship, followed up as it was by the fraud of the defendant Landi. **B** I think, therefore, that the plaintiffs are entitled to recover damages based on the value of the ship at the date when the breach of contract was committed, which resulted in the loss—namely, at the date of the arrest.

C I would also say that I consider it unfortunate that there has been a series of irregularities in this case in connection with the claim for an injunction. The injunction that was eventually granted—the interim injunction—was granted before the statement of claim was delivered, and it was in wider form than that which was, as I have no doubt deliberately, adopted by the pleader in the statement of claim. I think that it would have been extremely doubtful whether the judge below ought to have granted any other injunction than that asked for in the statement of claim, without an amendment of the statement of claim, which was never asked for. However, the learned judge came to the conclusion that he could not grant an injunction, but nevertheless he granted an interim injunction until the hearing of the appeal, which is very difficult to explain. When that judgment was drawn up, instead of reciting what the order of the court was, and what the defendants were restrained from doing, it only refers to continuing an injunction granted **E** by ROWLATT, J., varied by ROCHE, J., and continued by GREER, J., without stating what it is that the court was ordering the defendants to abstain from doing. That seems to me to be very bad practice, and if such a judgment as that were brought to the attention of any foreign critic familiar with the careful way in which judgments are drawn up, I think it would be likely to expose the English courts to contempt. I cannot help saying that this is a matter of great importance, that the **F** orders of the court should be drawn up in accordance with what has been the established practice, and should make clear what it is that the court is actually ordering should be done. There is considerable laxity in these matters, especially in judgments drawn up in the King's Bench Division. The attention of practitioners and of the officers of the court should be drawn to the fact that orders should not be passed unless they are in accordance with the usual and proper forms.

G I agree that the appeal should be allowed, and the judgment when it is drawn up will contain the terms of the precise order of the injunction which is being granted; and, inasmuch as no question arises as to the costs below, it is sufficient to say that the order below will be varied in the way which has been directed.

H **EYE, J.**—I agree, and particularly in the concluding observations of ATKIN, L.J., with regard to the form which has been adopted in the various orders made in the course of this case. I am not sufficiently conversant with the practice of the King's Bench Division to express an opinion whether or not this is an exceptional case; but, assuming, as I do, that one could hardly find in many cases so many matters for criticism, I would desire to say that, in the exercise of the judicial discretion in granting injunctions, and in framing orders which are to restrain the **I** liberty of the subject, the judges in that division, of which I am more competent to speak, exercise the greatest care, not only in determining whether an order should be made, but as to the ultimate form that the order assumes; and I agree with my learned brother that, if the orders in this case were produced to a foreign tribunal, acquainted with the practice of the Chancery Division, I think there would be good ground for saying that they would regard them as something little short of astonishing.

So far as the jurisdiction is concerned, the jurisdiction of the court to make an order granting an injunction such as is claimed in this case, is established by a

long line of authorities, commencing with *Bushby v. Munday* (4) and *Carron Iron Co. v. Maclaren* (3), and coming down to quite recent dates. I myself can see no logical reason to support the argument that it ceases to be exercisable so soon as a judgment has been pronounced by the foreign tribunal. No doubt it is a jurisdiction to be exercised with caution, but if ever there was a case calling for its exercise, surely this is the one. The foreign proceedings here were instituted and prosecuted in clear breach of the contract, the judgment was ultimately obtained by a deliberate and flagrant misrepresentation, and the plaintiffs are, in those circumstances, entitled to all the protection which this court can extend to them.

I have nothing to add to what has been said as to the extension of the inquiry to ascertain the damages inflicted on the plaintiffs, and I agree in thinking that they are entitled to an injunction against each of the three defendants in the terms claimed in the statement of claim.

Appeal allowed.

Solicitors: *Parker, Garrett & Co.; Amery, Parkes & Co.; Leader, Plunkett & Leader.*

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

TYRRELL v. TYRRELL

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Bateson, J.), January 12, 1928]

[Reported 138 L.T. 624; 92 J.P. 45; 26 L.G.R. 188;
28 Cox, C.C. 485]

Husband and Wife—Summary proceedings—Complaint based on two grounds—Election by wife on which ground to proceed—No right in magistrates to require—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), s. 4—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 Geo. 5, c. 51), s. 1 (1).

By a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, a wife claimed against her husband an order for maintenance, non-cohabitation, and custody of the child of the marriage on two of the grounds specified in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, namely, persistent cruelty and wilful neglect to provide reasonable maintenance. When the summons came on for hearing the justices held that the wife was not entitled to make her complaint on more than one of the statutory grounds and required her solicitor to elect on which ground he would proceed. Under protest the solicitor elected to proceed on the allegation of persistent cruelty, and in the result the summons was dismissed.

Held: the justices had no right to put the wife to her election on which ground she would proceed; her allegation of wilful neglect to maintain had not been dealt with; and the summons must be remitted to the justices for that matter to be heard.

Notes. The amount of maintenance which a husband can now be ordered to pay is a sum not exceeding £5 a week for the wife and one not exceeding 30s. a week for each child of the marriage: see Married Women (Maintenance) Act, 1949, s. 1 (1).

As to procedure on matrimonial complaints before justices, see 12 HALSBURY'S LAWS (3rd Edn.) 493 et seq.; and for cases see 27 DIGEST (Repl.) 693 et seq. For

A Summary Jurisdiction (Separation and Maintenance) Acts, see 11 HALSBURY'S STATUTES (2nd Edn.) 849 et seq.

Appeal from justices of King's Lynn.

B On Oct. 27, 1927, the complainant, Hilda Mary Tyrrell, took out a summons alleging that her husband, Albert George Tyrrell, had been guilty of persistent cruelty to her, and also of wilful neglect to provide reasonable maintenance for her and her infant child, and asking for an order that she be no longer bound to cohabit with her husband, that the legal custody of the child of the marriage, namely, Alfred George Tyrrell, aged eight years, while under the age of sixteen years, be committed to her, and that the defendant should pay to her such weekly sum not exceeding £2 as the court should consider reasonable together with a weekly sum not exceeding 10s. for the maintenance of such child until such child should attain the age of sixteen years. The summons came on for hearing on Oct. 31, 1927. From the affidavit of the solicitor appearing for the complainant, which was before the Divisional Court on the present appeal, it appeared that objection was taken by the clerk to the justices that the complaint was out of order, it not being competent to the complainant to make an application on more than one of the statutory grounds, and he, therefore, called upon him (the solicitor) to elect upon which of the two grounds given he desired to proceed. The solicitor argued at some length that the application was perfectly correct, and that it was open to the complainant to make use of and to produce evidence in support of her case on all the statutory grounds contained in the Acts, if they were applicable and if she had evidence in support. The justices, however, decided against that contention, the solicitor was compelled to elect to proceed on one ground only, that of persistent cruelty, and on that evidence the case was decided, the justices dismissing the summons. The solicitor stated that he only proceeded with the case under protest that the justices' ruling was wrong in law. The complainant, the wife, appealed on the grounds that (i) the justices were wrong in law in refusing to hear evidence of lack of maintenance; (ii) that the justices were wrong in law in holding that there was not sufficient evidence of persistent cruelty; (iii) that the applicant was entitled to the order aforesaid.

F By the Summary Jurisdiction (Married Women) Act, 1895, s. 4 :

G "Any married woman whose husband . . . shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain . . . may apply to any court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act. . . ."

S. Cope Morgan for the wife.

H The respondent did not appear.

I **LORD MERRIVALE, P.**—The appellant in the present case, the wife, issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, by which she claimed an order for maintenance against her husband. She alleged divers grounds for making the claim. One of the grounds was persistent cruelty, and the other was wilfully neglecting to provide reasonable maintenance for her. Collectively or separately, they were grounds upon which the justices would have authority to grant the order for maintenance which she sought and upon which they would be entitled to make an order with regard to the continued non-cohabitation which she sought. The justices appear to have been advised that only one cause of complaint could be included in one summons, and thereupon they called upon the solicitor who represented the wife to make his election as to the ground of complaint upon which he would proceed. Protesting that there was no obligation upon the wife to elect as between the causes of complaint, he elected to prove the case of persistent cruelty, and tendered some strong evidence of cruelty.

I am not expressing any opinion as to the view at which the justices arrived. They heard the complainant, and they heard what was to be said in support of her case, and they came to the conclusion that the charge of persistent cruelty was not made out, and thereupon they dismissed the summons. In the summons there was still a claim to have an order for maintenance on the ground of wilfully neglecting to provide reasonable maintenance, and that has not been disposed of. The election to proceed with the charge of persistent cruelty does not seem to have disposed of it. It exists in the summons. The summons, so far as I know, has never been amended. Upon a summons which alleged two statutory grounds of claim for an order, all that has been disposed of is one of them, and the other remains. I am not expressing any opinion whether the justices in their discretion might elect to hear these grounds of complaint separately. It is not the common practice. The common practice is to hear them together, but I am not expressing any opinion about that. It is a technical matter which might need to be argued. It is clear, I think, that the justices have not disposed of the complaint of the wife that her husband had wilfully neglected to provide reasonable maintenance for her and her child whom he was legally liable to maintain, and, that being so, the summons must go back to the justices to be further heard.

BATESON, J.—I agree.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.*, for *Sadler & Lemmon*, King's Lynn.

[*Reported by C. G. MORAN, Esq., Barrister-at-Law.*]

C. SIMEONS & CO., LTD. v. DURAND'S TRUSTEE IN BANKRUPTCY

[KING'S BENCH DIVISION (Finlay, J.), February 6, 9, 1928]

[Reported [1928] 2 K.B. 66; 97 L.J.K.B. 537; 138 L.T. 612;
44 T.L.R. 310; [1928] B. & C.R. 19]

Bankruptcy—Property available for distribution—Goods in reputed ownership of bankrupt—Test—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38 (c).

Goods were held by a wharfinger to the orders of the agent of a bankrupt and the delivery orders were in the possession of the plaintiffs, who had bought them from the bankrupt before the bankruptcy. The agent, on learning of the bankruptcy of his principal, directed the wharfinger not to part with the goods. On the question whether the goods were in the possession, order or disposition of the bankrupt by permission of the true owners (the plaintiffs) in such circumstances that he was the reputed owner thereof, within s. 38 (c) of the Bankruptcy Act, 1914,

Held: the test was whether the result of what had happened would be that persons having dealings with the parties must draw the inference that the goods were the property of the bankrupt with the result that he would be enabled by reason of such reputed ownership to obtain false credit; applying that test, the circumstances were such that the plaintiffs had by their conduct in no way induced a belief that these goods were in the possession, order or disposition of the bankrupt under such circumstances that he was the reputed owner thereof; and, therefore, the goods were not property of the bankrupt divisible among his creditors within s. 38.

A Notes. As to property available among creditors in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 404 et seq.; and for cases see 5 DIGEST 630 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to :

- (1) *Jones v. Dwyer* (1812), 15 East, 21; 1 Rose, 339; 104 E.R. 752; 5 Digest 765, 6577.
- B** (2) *Re Couston, Thomson & Co., Ex parte Bolland* (1873), 28 L.T. 43; 5 Digest 755, 6504.
- (3) *Re Florence, Ex parte Wingfield* (1879), 10 Ch.D. 591; 40 L.T. 15; 27 W.R. 346, C.A.; 5 Digest 806, 6885.
- (4) *Re Watson & Co., Ex parte Atkin Bros.*, [1904] 2 K.B. 753; 73 L.J.K.B. 854; 91 L.T. 709; 20 T.L.R. 727; 48 Sol. Jo. 673; 11 Mans. 256, C.A.; 5 Digest 798, 6819.
- C** (5) *Joy v. Campbell* (1804), 1 Sch. & Lef. 328; 3 Bli.N.S. 110, n.; 5 Digest 795, 6795 i.
- (6) *Belcher v. Bellamy* (1848), 2 Exch. 303; 17 L.J.Ex. 219; 154 E.R. 508; 5 Digest 781, 6706.
- D** (7) *Hamilton v. Bell* (1854), 10 Exch. 545; 24 L.T.O.S. 118; 18 Jur. 1109; 3 W.R. 62; 3 C.L.R. 308; 156 E.R. 554; sub nom. *Bell v. Hamilton*, 24 L.J.Ex. 45; 5 Digest 798, 6824.
- (8) *Gibson v. Bray* (1817), 8 Taunt. 76; 1 Moore, C.P. 519; 129 E.R. 311; 5 Digest 798, 6821.
- (9) *Re Smith, Ex parte Bright* (1879), 10 Ch.D. 566; 48 L.J.Bey. 81; 39 L.T. 649; 27 W.R. 385, C.A.; 5 Digest 798, 6818.
- E**

Issue framed by the master whether 200 cases of vacuum flasks were the property of the plaintiffs or in the possession, order or disposition of the bankrupt.

Eugene Durand, trading as C. Melin & Co., had done considerable business supplying the plaintiffs with vacuum flasks which came in cases from Germany and were sold to the plaintiffs sometimes before and sometimes after their arrival

F in this country. The cases were cleared by a shipping agent, Leslie Smith, on behalf of Durand. The shipping agent stored the cases at the wharf in his own name and on his own account. When Durand had negotiated a sale to the plaintiffs, he obtained a delivery order from Leslie Smith and handed it to the plaintiffs against payment for the goods. The plaintiffs used to allow the goods to remain at the wharf sometimes for lengthy periods, and charges for rent, insurance and

G carriage were borne by Durand. On Sept. 27, 1927, Durand was made a bankrupt on his own petition, and on learning this Leslie Smith directed the wharfinger not to part with certain cases of flasks lying at the wharf on which he claimed a lien for his charges. The plaintiffs held delivery orders for 200 cases purchased by them between Aug. 3 and Sept. 7, 1927. At the hearing before the master the name of Leslie Smith was struck out and an issue framed for trial by a judge

H whether the 200 cases were the property of the plaintiffs or of the bankrupt. At the trial it was admitted that the property in the goods had passed to the plaintiffs and the question for decision was whether on Sept. 24, 1927, the goods were in the possession, order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner in such circumstances that he was the reputed owner thereof.

I *Clayton, K.C.* (*Phineas Quass* with him), for the trustee in the bankruptcy, referred to 2 HALSBURY'S LAWS OF ENGLAND (1st Edn.), para. 283; *Jones v. Dwyer* (1), *Re Couston, Thomson & Co.* (2).

Tindale Davis, for the plaintiffs, referred to *Ex parte Wingfield* (3); *Re Watson & Co.* (4).

Cur. adv. vult.

Feb. 9. **FINLAY, J.**, read the following judgment.—This case, which is an issue directed by a master, raises a question on s. 38 (c), the subsection relating to

reputed ownership, of the Bankruptcy Act, 1914. By that section the property of the bankrupt is to comprise, among other things, A

"all goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof."

Evidence, both oral and documentary, was laid before me, and the facts as to which there was little, if any, dispute are as follows. The bankrupt was Mr. Eugene Durand, who had for a good many years carried on business as a merchant under the name of C. Melin & Co. On Sept. 24, 1927, a receiving order was made against him on his own petition, and his bankruptcy, accordingly, dates from that day. He had for some time done a considerable business with the plaintiffs in vacuum flasks. These flasks were forwarded in cases from Germany, forty cases a week, and it was the practice of Mr. Durand to sell these cases to the plaintiffs sometimes before and sometimes after their arrival in this country. The cases were shipped from Hamburg, and the method of business was this. The bill of lading was made out to order and the charges were paid by Mr. Leslie Smith, who is, it appears, a forwarding agent and was employed by Mr. Durand for the purpose of dealing with these goods. The goods on arrival were stored at the wharf in the name of and for the account of Mr. Leslie Smith. When Mr. Durand had negotiated a sale to the plaintiffs he either in writing or by word of mouth asked Mr. Leslie Smith for a delivery order. Having got the delivery order, he would hand it over to the plaintiffs against payment for the goods. Payment was made in one or two instances by cheque, but more usually by acceptances at four months' date. It was the practice of the plaintiffs to leave the goods sometimes for considerable periods in store at the wharf, and the charges for rent, for insurance and for carriage on delivery were borne by the bankrupt. A schedule showing details of a long series of transactions between Mr. Durand, the bankrupt, and the plaintiffs was put in before me. C D E

The question before me relates to the first five items on this schedule. With regard to all these five consignments the goods duly identified had been bought by the plaintiffs, and payment had been made by acceptance or cheque prior to the date of the bankruptcy. It was thus in the power of the plaintiffs at any time to obtain delivery of the goods to them by presenting the delivery order, but, in fact, delivery orders had not been presented at the wharf in respect of these consignments at the time of the bankruptcy. The result was that the goods were still lying at the wharf to the order of Mr. Leslie Smith. After the bankruptcy the plaintiffs endeavoured to obtain the goods, but the wharfinger, acting on Mr. Leslie Smith's instructions, refused to part with them. It was admitted before me that the property in the cases had passed to the plaintiffs, with the result that s. 38 (a) has no application, but it was contended that the trustee in bankruptcy was entitled to claim the cases by virtue of s. 38 (c). A considerable number of authorities were cited to me upon the proper construction of this subsection. I desire to quote only two passages. In *Re Florence, Ex parte Wingfield* (3) (10 Ch.D. at p. 594) JAMES, L.J., said this: F G H

"The section must, however, be read as the similar provision in the bankruptcy statutes from the time of James I has always been read, with some attention to common sense. It has always been construed as meaning this: that if goods are in a man's possession, order or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit. But, if no such credit has been given, then the maxim applies, *Cessante ratione cessat ipsa lex*."

In *Re Watson & Co., Ex parte Atkin Bros* (4) VAUGHAN WILLIAMS, L.J., delivering the judgment of the Court of Appeal, said this ([1904] 2 K.B. at p. 756): I

A "The doctrine of reputed ownership was first embodied in the Bankruptcy Act, 21 Jac. 1. It has been couched in various words in the successive bankruptcy statutes, but this principle has run through them all, and the statement of LORD REDESDALE in *Joy v. Campbell* (5) (a case which has been approved and acted on again and again: see *Belcher v. Bellamy* (6), *Hamilton v. Bell* (7), and many other cases), that the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt, justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise: see *Hamilton v. Bell* (7), *Gibson v. Bray* (8), *Ex parte Bright* (9). The question for us then is: Did Messrs. Atkin consent to the possession of the bankrupts, Messrs. Watson, under such circumstances that customers were entitled to assume that Messrs. Watson were the owners of the goods in their trade or business?"

D These passages lay down the general principles applicable, and it is necessary, applying those principles, to decide upon the facts of each particular case as it arises whether the reputed ownership section applies. In this case I have come to the conclusion that I ought not to hold that these goods of the plaintiffs' were in the possession or disposition of the bankrupt in such circumstances that he was the reputed owner thereof. I do not doubt that Mr. Leslie Smith must, as between himself and the bankrupt, be regarded as an agent of the bankrupt, nor do I doubt that, for the purpose of the matters I have to consider, goods may be in the reputed ownership of a principal, although physically in the possession of an agent, but the essential point seems to be this, whether the result of what has happened would be that persons having dealings with the parties must draw the inference that the goods were the property of the bankrupt, with the result that the bankrupt would be enabled by reason of such reputed ownership to obtain false credit. Here the goods were physically in the possession of the wharfinger, and they were held by him to the orders of Mr. Leslie Smith. The delivery order, which is, of course, a document of title, was in the hands of the plaintiffs. In these facts it would, I think, be wrong to hold that the plaintiffs have by their conduct in any way induced a belief that these goods were in the possession, order or disposition of the bankrupt in such circumstances that he was the reputed owner thereof. Many variations in the facts may be put and some were suggested in the course of the argument before me. My decision must necessarily be limited, as every decision on a question of this sort must be limited, to the facts of the case before me, and on those facts, applying the principles of law as I understand them, I decide in favour of the plaintiffs.

H *Judgment for plaintiffs.*

Solicitors: *William A. Crump & Son; De la Chappelle, Thirlby & Co.*

[*Reported by R. A. YULE, Esq., Barrister-at-Law.*]

PADDINGTON BOROUGH COUNCIL *v.* FINUCANE

[CHANCERY DIVISION (Russell, J.), March 23, 1928]

[Reported [1928] Ch. 567; 97 L.J.Ch. 219; 139 L.T. 368;
92 J.P. 68; 26 L.G.R. 283]

Housing—House unfit for habitation—Notice to execute works—Non-compliance—Work done by local authority—Expenses a charge on the premises—Enforcement of charge—Housing and Town Planning Act, 1919 (9 & 10 Geo. 5, c. 35), s. 28 (3).

A local authority, acting under s. 28 (2) of the Housing, Town Planning, &c., Act, 1919, did the work required to be done to make a house fit for human habitation, the rack-rent owner of the house not having complied with a notice requiring him to do the work.

Held: under s. 28 (3) of the Act, that until the expenses so incurred by the local authority had been recovered from the rack-rent owner, those expenses were a charge on the premises, which overrode all the proprietary interests therein and were not merely a charge on the interest of the person entitled to the rack-rent, for the amount of the expenses with interest at 5 per cent. from the date of demand for the expenses, the local authority also being granted an order for the sale of the premises.

Held, further: where the local authority wished to enforce a charge under s. 28 (3) it was sufficient if, in the first instance, they brought before the court the person entitled to the rack-rent. When the claim for enforcement was before the court, the court could, if necessary, inquire what other persons were interested and entitled to be represented. Persons thus brought in could not take objections which the rack-rent owner might have taken, but did not take.

Notes. Section 28 (3) of the Housing, Town Planning, &c., Act, 1919, has been replaced by s. 10 (7) of the Housing Act, 1957, for which see 37 HALSBURY'S STATUTES (2nd Edn.) 314.

Followed: *Bristol Corpn. v. Virgin*, [1928] 2 K.B. 622. Applied: *Bromley R.D.C. v. Brooker*, *Orpington U.D.C. v. Brooker*, [1934] W.N. 237.

As to demanding fit unfit houses, see 19 HALSBURY'S LAWS (3rd Edn.) 605 et seq.; and for cases see 38 DIGEST 214, 215.

Cases referred to:

- (1) *Birmingham Corpn. v. Baker* (1881), 17 Ch.D. 782; 46 J.P. 52; 26 Digest 536, 2357.
- (2) *Tottenham Local Board of Health v. Rowell* (1880), 15 Ch.D. 378; 50 L.J.Ch. 99; 43 L.T. 616; 29 W.R. 36, C.A.; 26 Digest 536, 2353.
- (3) *Tending Union Guardians v. Downton* (1890), 45 Ch.D. 583; 59 L.J.Ch. 528; 62 L.T. 805; 38 W.R. 653; reversed, [1891] 3 Ch. 265; 61 L.J.Ch. 82; 65 L.T. 434; 40 W.R. 145, C.A.; 26 Digest 537, 2364.
- (4) *West Ham Corpn. v. Sharp*, [1907] 1 K.B. 445; 76 L.J.K.B. 307; 96 L.T. 230; 71 J.P. 100; 5 L.G.R. 694, D.C.; 26 Digest 546, 2439.

Adjourned Summons.

By this summons the plaintiff local authority asked for (i) a declaration that they were entitled under s. 28 (3) of the Housing and Town Planning, &c., Act, 1919, as amended by s. 3 (3) of the Housing Act, 1925, to a charge on the premises, No. 29, Clarendon Street, Paddington, for the sum of £251 2s. 7d., the expenses incurred in executing certain works necessary to make them reasonably fit for human habitation, with interest at £5 per cent. from Nov. 10, 1921, the date of demand for payment, and that such charge was entitled to priority over any other charge or mortgage thereon, if any; (ii) an inquiry, if necessary, whether there were any, and if so what, incumbrances thereon, and who were entitled thereto;

- A** (iii) for the purpose of enforcing the charge, sale of the premises which consisted of a basement, ground and first and second floors, and were suitable for occupation by people of the working class. In 1920 the plaintiffs, having ascertained that the rent was received by an agent of the defendant's mortgagee who had since gone out of possession, gave him notice that they required certain work to be done thereon within twenty-eight days. Copies were at the same time served on the
- B** mortgage and the defendant's immediate lessor. There was no appeal from this notice, as provided by the said Acts, and, it not being complied with, the council themselves did the work. The mortgagee having handed the property back to the defendant, the plaintiffs made their claim on him in 1921, without effect. A summons was then taken out at the Marylebone Police Court, and the defendant was ordered to pay. The amount still remaining unsatisfied, these proceedings were
- C** instituted. It was subsequently discovered that the Ecclesiastical Commissioners, the Paddington Estate Trustees, and the Grand Junction Canal Co. also had interests in the premises, and these, with the defendant's immediate lessor, were added as defendants. The two first-named were represented at the hearing. By s. 28 of the Housing and Town Planning, &c., Act, 1919, as amended by the Housing Act, 1925, s. 3, the local authority might serve a notice on an owner of
- D** a house not reasonably fit for human habitation, and if that were not attended to might execute the work themselves, and any expenses thereby incurred, together with interest as approved by the Minister, might be recovered in a court of summary jurisdiction, and until such recovery should be a charge on the premises. The owner may appeal to the Minister against any such notice or order within twenty-one days. The word "owner" has the same meaning as in the Public Health Acts.
- E** *Cripps, K.C.*, for the plaintiffs, referred to *Birmingham Corp'n. v. Baker* (1); *Tottenham Local Board of Health v. Rowell* (2); *Tendring Union Guardians v. Downton* (3); and *West Ham Corp'n. v. Sharp* (4).

The defendant did not appear.

P. M. Walters for the Ecclesiastical Commissioners and the Paddington Estate Trustees.

F **RUSSELL, J.**—Although the proceedings in this case were initiated under the Housing, Town Planning, &c., Act, 1919, there is no substantial difference between that Act and the Housing Act, 1925.

There was a house in Paddington, No. 29, Clarendon Street, and apparently it got into a very disreputable condition of repair. The local authority, the Paddington Borough Council, served a notice, under s. 28 of the Housing, Town Planning, &c., Act, 1919, upon the owner within the meaning of that section. The corresponding section in the Housing Act, 1925, is s. 3, and I will read the first part of the first subsection of that section:

H "If the owner of any dwelling-house suitable for occupation by persons of the working classes fails to make or keep the house in all respects reasonably fit for human habitation, then, without prejudice to any other powers, the local authority may serve a notice upon the owner of the house requiring him within a reasonable time, not being less than twenty-one days, specified in the notice, to execute the works specified in the notice as being necessary to make the house in all respects reasonably fit for human habitation. . . ."

I Under s. 1 (10) "owner" in the section has the same meaning as in the Public Acts, and the phrase "Public Health Acts" is defined in s. 135 as meaning, as regards London, the Public Health (London) Act, 1891. Turning to that statute, the definition of "owner" given in s. 141 is as follows:

"The expression 'owner' means the person for the time being receiving the rack-rent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack-rent."

At the date when the notice was served the leaseholder was a Mr. Finucane. He

had mortgaged his interest in the house to a gentleman named Fairbridge, and the mortgagee was collecting the rents by means of an agent named Weston. Accordingly, the notice was served under s. 28 of the Housing, Town Planning, &c., Act, 1919, upon Mr. Weston as coming within the definition of "owner." The notice required that certain work should be done, and that notice was not complied with. The works were ultimately executed by the local authority, and on Dec. 8, 1921, they obtained an order from the magistrate under the provisions of the Act ordering that Mr. Finucane, he having failed to comply with the notice and the works having been done at an expense amounting to the sum of £251 2s. 7d., should pay that sum to the borough council of Paddington. A
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Section 3 of the Housing Act, 1925, goes on to provide :

"(2) If the notice of the local authority is not complied with, then—(a) at the expiration of the time specified in that notice if no such counter notice as aforesaid has been given by the owner; and (b) at the expiration of twenty-one days from the determination by the Minister if such counter notice has been given by the owner, and the Minister has determined that the house is capable without reconstruction of being made in all respects reasonably fit for human habitation, the local authority may themselves do the work required to be done." C
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Then comes the important sub-s. (3) :

"Any expenses incurred by the local authority under this section, together with interest . . . may be recovered in a court of summary jurisdiction and until recovery of such expenses and interest the same shall be a charge on the premises. In all summary proceedings by the local authority for the recovery of any such expenses, the time within which the proceedings may be taken shall be reckoned from the date of the service of notice of demand." E

On Aug. 18, 1926, the local authority having failed in the meanwhile to obtain payment of the sum of £251 2s. 7d. from Mr. Finucane, the present summons was issued, Mr. Finucane being made the sole defendant. What the summons asks for is a declaration that the plaintiffs are entitled to a charge upon the premises, No. 29, Clarendon Street, Paddington, for the sum of £251 2s. 7d., together with interest. It also asks for a declaration that that charge is entitled to priority over any other mortgage or charge, if any, on the premises, and an inquiry whether there are any other incumbrances, an order for sale, and a receiver for the rent. The summons came before TOMLIN, J., in March, 1927, when he gave liberty to amend by adding other defendants. To understand who the other defendants are, I must state what is the position of the property which comprises No. 39, Clarendon Street, as regards the various proprietary interests in it. The freehold is vested in the Ecclesiastical Commissioners. Next to them the Paddington Estate Trustees, who are a statutory body, were, when the recent legislation came into force, lessees under a perpetually renewable lease, and under the recent legislation they now hold for a term of 2,000 years from May 21, 1895, at a rent of £43 6s. 8d. plus an interest of one-third in the profit rental. Under them and next to them come the Grand Junction Canal Co., who are lessees under the Paddington Estate Trustees of various portions of the Paddington Estate, about fifty acres. They now hold the same under a term of 2,000 years less one day from the same date at a rent of £573, and No. 29, Clarendon Street is charged in that part of the Paddington estate which is in the lease of the Grand Junction Canal Co. Under the Grand Junction Canal Co. there next comes Lieut.-Col. Winstanley, who derives under them for some term the length of which I do not know, and as respects his interest there is a mortgage. Neither he nor his mortgagees appear before the court. Then come Mr. Finucane and his mortgagee, and, again, Mr. Finucane does not appear although he is a defendant, and his mortgagee claims no relief. But the effective respondents to the summons, who have come here to-day to argue the points before me as against the corporation of Paddington, are the Ecclesiastical Commissioners and the Paddington Estate Trustees. F
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A The first point I have to determine is what is the effect of s. 3 (3) of the Housing Act, 1925, as regards the charge which it purports to give. Is it a charge upon all the proprietary interests in the house in question, or is it, as has been contended on behalf of the Ecclesiastical Commissioners and the Paddington Estate Trustees, only a charge upon the interest of the rack-rent owner? There has been no decision upon this actual section, but there have been decisions upon very similar provisions in the Public Health Act, 1875, and, notwithstanding the careful and able argument of counsel for the commissioners, in which he directed my attention to various provisions in the Act of 1925, I have no doubt that the charge which the section purports to give is a charge of such a nature that it overrides all other proprietary interests which exist in the house. Certain authorities have been cited, but I only propose to refer to one of them, because in that case the Court of Appeal

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C lays down quite specifically the position under a statutory provision very similar to this. The question was as to the effect of the charge under s. 257 of the Public Health Act, 1875, which provides that :

“Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest, the same shall be a charge on the premises in respect of which they were incurred. . . .”

E By s. 4 of the Act “owner” meant

“the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent.”

F “Premises” include “messuages, buildings, lands, easements and hereditaments of any tenure.” In *Tendring Union Guardians v. Downton* (3) the question was whether a sale for the purpose of enforcing such a charge would free the land sold from the burden of a restrictive covenant to which the land was subject and which was enforceable against the owner. Stirling, J., had come to the conclusion that a sale would free the land from such restrictive covenant, but the Court of Appeal

G took a different view. In the course of their judgments they make it clear what in their view a charge under the Public Health Act, 1875, operated to effect. LORD HALSBURY says ([1891] 3 Ch. at p. 267) :

“I am not able to agree with the decision arrived at by STIRLING, J. It is clear that the plaintiffs have no right to any charge on the premises, except so far as it is given by the provisions of the statute; and both the language of s. 257 and the frame of the statute appear to me irreconcilable with the contention of the plaintiffs.”

H Then he refers to the words of the section “the same shall be a charge upon the premises”—and he asks what is the meaning of those words. He refers to s. 150 of the Public Health Act, 1875, and comes to this conclusion :

I “Therefore it is clear that the person against whom the judgment is to stand is the owner. Indeed, the whole machinery of the Act shows that the owners and occupiers are the persons against whom the proceedings are to be taken.”

Then follows a passage which I think is a slip on his part and which I need not pause to consider, and after that he deals with *Birmingham Corp'n. v. Baker* (1) and says :

“That case has been relied on by STIRLING, J.; but, with great respect for the learned judge, I think that the very language which SIR GEORGE JESSEL, M.R.,

used in that case shows that he would have repudiated the contention of the plaintiffs in the present case."

LORD HALSBURY proceeded to quote the language of the Master of the Rolls, which was as follows:

"The works in question are an improvement to the property, not to the interest of any particular owner of the property, but of every owner of the houses; and consequently there is no good reason in the world why there should not be a charge on the property, that is on the respective interest of every owner of the property according to the value of his ownership. If there be a charge on the houses it is a charge on the total ownership—if I may call it so, on the proprietorship; not on any particular section or portion of the proprietorship, but on the whole. In an ordinary case, in the absence of any covenants, it should be borne by every proprietor in proportion to his interest in the house."

LORD HALSBURY went on:

"And that is intelligible, for they all have the benefit of the money expended. But here we are asked to include in the proprietorship persons who have no interest in the property in a legal sense but who have an interest in other premises"

—and so on.

So LORD HALSBURY was clearly of opinion that in the ordinary case a sale for the purpose of giving effect to a charge under s. 257 of the Public Health Act, 1875, would clear the land of all other proprietary interests. In *Tendring Union Guardians v. Downton* (3) LINDLEY, L.J., takes the same view, and quotes in the same way the language of SIR GEORGE JESSEL, M.R., in *Birmingham Corp'n. v. Baker* (1). FRY, L.J., puts it quite plainly. He says:

"I am of the same opinion. I think there is nothing to justify a declaration that the charge overrides the restrictive covenant. All the Act does is to create a charge on the premises, that is, on the land—that is, on all the interests of the owners of the land."

Those are the important words. Upon that authority, citing, as it does, with approval, the language used by SIR GEORGE JESSEL, M.R., in *Birmingham Corp'n. v. Baker* (1), I have no difficulty in saying that when s. 3 of the Housing Act, 1925, confers a charge on the premises, it means not a charge on the interest of the rack-rent owner in the premises, but a charge upon the entirety of the interests of the premises—the whole of the proprietary interests of the premises. That view, I think, is borne out when one looks at sub-s. (8), where it is quite clear that the legislature, when it wishes to use the expression "an estate or interest in the premises," uses it and makes it quite plain. Accordingly, as regards the first point raised before me, I declare that the plaintiffs are entitled under s. 3 (3) of the Housing Act, 1925, to a charge upon the premises No. 29, Clarendon Street, Paddington, for the sum of £251 2s. 7d., together with interest at 5 per cent. from Nov. 10, 1921, that being the date on which in point of fact the demand for that sum was made, and the rate of interest provided for by sub-s. (3) having been fixed at 5 per cent., and that such charge is entitled to priority over any other interest in the premises. I will follow that up by making an order for the sale of the premises.

The rest of the summons—which asks for an inquiry as to other incumbrances, which ought, of course, to be an inquiry as to other estates and interests in the property—really is only relevant in the event of the house on the sale fetching more than the amount of the charge thereon. As I am told it is highly unlikely that that will be so, that part of the summons had better stand over until the sale has been effected and we know what the sum is that we have to deal with.

There are two other matters which are not directly raised before me but which I was asked to refer to. The first of them is this. Who shall be named parties in respect of obligations similar to that here, where the local authority desire to

A enforce a charge? Should the local authority go out of their way to ascertain fully the state of the title of the property, or would it be enough if they brought before the court in the first instance the rack-rent owner, the owner living in the property? In my opinion, I think it would be sufficient for the local authority to bring before the court in the first instance the owner within the definition of the Public Health Acts, but at the same time, when the matter comes before the court and the local authority ask the court to enforce the charge, the court would be fully at liberty to direct further steps, if necessary, to be taken to ascertain who are the persons really entitled to be represented; and, if necessary, the court will give directions for such persons to be served to be heard upon the application, because it may very well be that a case would arise in which the amount of the costs and the expenses incurred would bear only a small relation to the real value of the property, and a person with a remoter interest in the property might be desirous of saving the property by paying off the charge. In a simpler case I think the court would insist upon such person being represented before it, but beyond that I do not propose to lay down hard and fast rules, and I only say that in the first instance it would be sufficient to bring the rack-renter before the court.

D A second point was raised whether, if such a person were brought before the court under the Act, it would be open to that person to take objections which the rack-rent owner might have taken when served with the original notice, but did not take. In my opinion, after giving s. 3 of the Housing Act, 1925, the best consideration I can, once the rack-rent owner has been served and the matter has gone through—without any appeal by him—to this court, under sub-s. (7), the notice has become binding and conclusive for all purposes against everybody. It may seem a hard result that a person is bound by a notice affecting his property when he has not heard anything about it, but it appears to me the policy of the Act is to enable the local authority quickly to get into touch with the person who is actually receiving the rack-rent of the premises, to restore the premises to a fit state for human habitation, and, if necessary, to make the expenditure for that purpose and charge the expenditure upon the property so that it would fall upon the person or persons for whose interest or in whose interest the expenditure has been incurred. But when I look at the section I find no provision naming anybody to appeal except the owner within the meaning of the Public Health Acts. Although, as counsel for the commissioners has pointed out, his clients have had no opportunity of contesting or considering either whether the specified works were necessary, or whether the notice served is valid, or whether the time given to the execution of the works was reasonable, and, further, whether the price of the works was a reasonable price. The rack-rent owner is the first person whose duty it is to consider those things, and if he does not choose to appeal the notice, demand, or any order made under sub-s. (4) of s. 3 becomes binding and conclusive upon the world at large.

H [Solicitor and client costs as respects both the plaintiffs and the defendants were ordered to be paid out of and to be the first charge on the proceeds of sale.]

Solicitors : *J. H. Horton & Nash; Trower, Still & Keeling.*

[*Reported by A. W. CHASTER, Esq., Barrister-at-Law.*]

A

HOWSON v. BUXTON

[COURT OF APPEAL (Scrutton, Greer and Sankey, L.JJ.), June 13, 14, 1928]

[Reported 97 L.J.K.B. 749; 139 L.T. 504]

Agriculture—Agricultural holding—Compensation for disturbance—Joint tenancy—Notice of claim given by one joint tenant—Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), s. 12 (7).

B

Section 12 of the Agricultural Holdings Act, 1923, which provided for the payment by a landlord to a tenant to whom he had given notice to quit of compensation for the disturbance, provided by sub-s. (7) (b) that compensation should not be payable unless the tenant had, not less than one month before the termination of the tenancy, given notice in writing to the landlord of his intention to make a claim for compensation.

C

W., who had been tenant of a farm for many years, entered into negotiations with his landlord to have his tenancy agreement, upon the termination thereof, transferred to B., and as the result of these negotiations W. became joint tenant of the farm with B. at the request of and for the protection of the landlord. Upon the termination of W.'s tenancy B. paid W. for the tenant right and also provided the whole of the finance necessary for carrying on the farm. Thereafter B. resided at the farmhouse and W. in a cottage near, but not part of, the farm, for which he paid rent direct to the landlord. On Feb. 21, 1924, W. alone gave notice to quit. On Mar. 21, 1924, the landlord served notice to quit upon both tenants upon the ground that the farm was not being cultivated according to the rules of good husbandry. Thereupon B. alone gave notice to the landlord of his intention to claim compensation.

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Held (GREER, L.J., dubitante): the object of the statute was to give a right to compensation to a tenant who had suffered damage by being disturbed in his tenancy, and, as B. was the only one of the joint tenants who had suffered damage, he could give a valid notice under s. 12 (7) of his intention to claim compensation for disturbance without the concurrence of W. who had suffered no damage.

F

Estoppel—Joint tenants—Agricultural holding—Notice to quit given by one tenant—Subsequent notice by landlord and claim for compensation for disturbance by other tenant.

The giving of the notice to quit by W. on Feb. 21, 1924, did not result in B. being estopped from making the claim for compensation.

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Notes. Section 12 (7) of the Agricultural Holdings Act, 1923, has been replaced by s. 34 (2) (c) of the Agricultural Holdings Act, 1948, for which see 28 HALSBURY'S STATUTES (2nd Edn.) 2.

Considered: *Woodward v. Earl of Dudley*, [1954] 1 All E.R. 559.

H

As to compensation for disturbance, see 1 HALSBURY'S LAWS (3rd Edn.) 320-322; and for cases see 2 DIGEST (Repl.) 76-82.

Case referred to:

- (1) *Salomon v. Salomon & Co., Ltd., Salomon & Co., Ltd. v. Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 42 Digest 622, 225.

I

Appeal from an order made by Chesterfield county court on a Case Stated by an arbitrator under the Agricultural Holdings Act, 1923.

By an agreement in writing, dated Sept. 29, 1917, made between the landlord, of the one part, and William Walker and Horace Bernard Buxton, of the other part, all those farmlands with the house, buildings, cottages, and premises known as Tupton Hall Farm, in the county of Derby, were let by the landlord to the tenants for the term of one year from Mar. 25, 1918, and so on, from year to year, deter-

- A** minable at the end of the first or any other year by either party giving to the other six calendar months' notice in writing to quit on or before Sept. 29 in any year at a yearly rent of £145. The tenant, William Walker, had for a period of twenty-seven years prior to Mar. 25, 1918, been tenant of the said farm. As the result of negotiations between William Walker and his nephew, the said Horace Bernard Buxton, to have the tenancy agreement of the farm transferred to Buxton on the termination
- B** of the tenancy of Walker, Buxton paid him the sum of £288 7s. 10d. in respect of tenant right compensation, and the whole of the finance required for carrying on the farm was provided by Buxton. Walker was made a joint tenant of the farm with Buxton at the request of and for the protection of the landlord. Buxton resided at the farmhouse and Walker resided in a cottage belonging to the landlord contiguous to but not forming part of the farm, and paid rent in respect of the
- C** cottage direct to the landlord. On Feb. 21, 1924, Walker alone gave notice to quit and deliver up possession of the farm on Mar. 25, 1925. By notice dated Mar. 21, 1924, the agent for the landlord served on both tenants a notice to quit and deliver up possession of the farm on Mar. 25, 1925, and it was stated that the notice to quit was given for the reason that at the date thereof the tenants were not cultivating the farm according to the rules of good husbandry. The joint tenants duly
- D** quitted the farm in pursuance of such notice. On Jan. 3, 1925, a notice in writing claiming compensation for disturbance under s. 12 of the Agricultural Holdings Act, 1923, by Buxton, on behalf of himself and Walker, was served upon the landlord's agent. The matter having been referred to arbitration the arbitrator appointed by the Minister of Agriculture and Fisheries stated a Special Case for the opinion of the court on the following questions of law: (i) whether the notice
- E** in writing of Jan. 3, 1925, by Buxton, making a claim on behalf of himself and co-tenant Walker for compensation for disturbance under s. 12 (7) (b) of the Agricultural Holdings Act, 1923, was valid, and (ii) whether the notice to quit dated Feb. 21, 1924, given by Walker, and letter of same date enclosing the same, amounted to an estoppel of Buxton's claim for disturbance. The county court judge answered the first question in the affirmative and the second in the negative.
- F** The landlord appealed.

By Agricultural Holdings Act, 1923:

- "Section 12 (1): Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then unless the tenant—(a) was not at the date of the notice cultivating the holding according to the rules of good husbandry . . . and unless the notice to quit states that it is given for one or more of the reasons aforesaid, compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section. . . . (6): The compensation payable under this section shall be a sum representing such loss or expense, directly attributable to the quitting of the holding as the tenant
- G** may unavoidably incur upon or in connection with the sale or removal of his household goods, implements of husbandry, fixtures, farm produce or farm stock on or used in connection with the holding. . . . (7): Compensation shall not be payable under this section . . . (b) unless the tenant has, not less than one month before the termination of the tenancy, given notice in writing to the landlord of his intention to make a claim for compensation under this section.
- H**

- I** Section 57: 'Tenant' means the holder of land under a contract of tenancy, and includes the executors, administrators, assigns, guardian, committee of the estate, or trustee in bankruptcy, of a tenant, or other person deriving title from a tenant."

H. H. Joy, K.C., and T. N. Winning for the landlord.

J. E. Singleton, K.C., and A. J. Spencer for the tenant, Buxton.

SCRUTTON, L.J.—This is an appeal from the decision of the learned county court judge on a Case stated by an arbitrator under the Agricultural Holdings Act. William Walker had been a tenant of the landlord for some twenty-seven years.

He desired to have his tenancy terminated and gave notice to terminate it. Upon the expiration of that tenancy a joint tenancy commenced, granted by the landlord to Buxton and Walker, the latter being made a joint tenant of the farm at the request and for the protection of the landlord. Although Walker was made a joint tenant for that purpose, it appears that Buxton, on entering on the joint tenancy, paid Walker a substantial sum in respect of the tenant right to compensation, and that the whole of the finance required for carrying on the farm was provided by Buxton. Buxton resided at the farmhouse on the farm, and Walker resided in a cottage belonging to the landlord not on the demised premises. Obviously, therefore, the person interested in the tenancy was Buxton, and Walker was there as a surety for the protection of the landlord. In those circumstances, Walker appears to have had some grievance which it is not necessary to go into and gave notice to terminate the tenancy. I personally take the view that one joint tenant cannot give a notice to terminate the tenancy unless he does so with the authority of the other joint tenant, and Walker had not the authority of Buxton to terminate the tenancy. Thereupon the landlord stepped in and gave a notice to terminate the tenancy on the ground that the farm was being cultivated badly. If that was true, the tenant would have no right to compensation. The arbitrator found that it was not so cultivated, and the landlord, when challenged to go before the tribunal, did not elect to take that course. So that the finding of the arbitrator was that the landlord was wrong in his view of the way in which the farm was being cultivated. Thereupon Buxton alone gave a notice asking for compensation, and what has been argued on behalf of the landlord throughout, and what is the question before us, is whether one joint tenant, who is the only person who has in fact suffered damage, can give a notice claiming arbitration and compensation under the Agricultural Holdings Act without the concurrence of the other joint tenant, who has suffered no damage.

That turns on the construction of the Agricultural Holdings Act. I take it that in construing an Act of Parliament, besides looking at the words used, one is entitled to know the mischief which the Act was intended to remedy and to construe the words used, if possible, in such a way as shall suppress the mischief and advance the remedy. There is no doubt that one of the objects of the Agricultural Holdings Act was to give to tenants who were turned out of the tenancy of their farm, except for some certain specific reasons, compensation for disturbance, and to award as damages compensation to the person who had actually suffered. That principle of suppressing the mischief and advancing the remedy has been carried to a very considerable extent by the courts, whether rightly or wrongly. I will take only one instance. The Bastardy Laws Amendment Act, 1872, by s. 3, gave a single woman who had a bastard child the right to sue the putative father, and the court construed the expression "single woman" to include a married woman living apart from her husband, because the object of the Act is to give to women who have by men illegitimate children, a claim on the putative father to support them, and the mischief is as applicable in the case of a married woman living apart from her husband as it is in the case of an unmarried woman. They, therefore, construed the expression "single woman" to include a married woman. If that is the extent to which the courts may go, I do not feel any difficulty about what we are asked to do in this case, for when we look at the Agricultural Holdings Act, we find among the new rights given to a tenant a new form of compensation, which includes compensation for damage done and various other matters which previously the tenant had no right to. One of the matters given by s. 12 is compensation for disturbance when the landlord terminates the tenancy, except where he does so for certain well-defined matters, such as the tenant not cultivating the holding in accordance with the rules of good husbandry, and when we look to see what compensation is to be given, we find in sub-s. (6) of s. 12, and again in sub-s. (2) of s. 13, which also deals with compensation for disturbance and other matters, that the compensation is for such disturbance as the tenant "may unavoidably incur upon or in connection with the sale or removal of his household goods, implements

A of husbandry, fixtures, farm produce, or farm stock on or used in connection with the holding." Section 13 uses the same phrase.

What is now said is that when the Act uses the word "tenant," and says that the tenant must give notice, if the tenancy is a joint tenancy, the notice must be given by all the tenants, and that notice by one joint tenant will not do. I have looked through the Act carefully, and I think there is a good deal to be said for the view that the legislature had not definitely present to its mind the fact that there might be joint tenants, and that it has continually used the phrase "tenant" without any nice consideration of what would happen if there were more than one tenant. It did, apparently, on one occasion realise in s. 18 that there might be more than one landlord, i.e., when there had been one letting of a whole piece of land and the holding became divided into different parcels by different people, but it does not show any particular appreciation of the fact that there might be two joint tenants. I can quite see that on future occasions on other sections of the Act, difficult questions might arise. For instance, s. 12 does not apply where the tenant who gave the notice is a person who has become bankrupt. I am not at all clear what is to happen in the case of two joint tenants, one of whom becomes bankrupt: see s. 12 (1) (d). There is another clause about the death of the tenant (see s. 12 (7) (c)), and I am not quite sure whether Parliament had present to its mind what would happen in the case when one joint tenant died and the other joint tenant did not. But the provisions in sub-s. (6) of s. 12, and sub-s. (2) of s. 13, do show that Parliament had present to its mind that the compensation to be given was to a person who had household goods or implements which he had to remove owing to the termination of the tenancy, and by the removal or sale of which he suffered damage. It is clear that one object which it was intended to effect was to give compensation to people who had removed their household goods or sold their agricultural implements at the termination of the tenancy, and it would be an extremely common thing that one tenant might own the household goods and the agricultural implements and might suffer loss by having to remove them, and that a joint tenant might suffer no loss at all. That is the mischief which Parliament intended to deal with and to provide a remedy for, and I think I am justified in adopting the construction that where a tenant suffers damage by having to move his household furniture and his agricultural implements, that tenant—though one of two or more joint tenants—can recover by giving a notice for arbitration and proving damage caused to him. I can conceive that cases might arise where a tenant is claiming in respect of damage which he suffers in conjunction with other tenants, and it appears to me that he is entitled to go on with the arbitration, subject to this, that the arbitrator may say: "You are claiming a joint damage as part of the damage, and I will not proceed with the arbitration until the other joint tenant is before me, either as claimant or as defendant." In such a case I think that the courts would support the arbitrator in that action, and would allow him to proceed to give a joint tenant, who had given notice of his intention to claim, the damage which he, the joint tenant, alone had suffered, being damage of the nature expressly mentioned in the Act. The argument of counsel for the landlord would, I think, logically be that when the Act talks about the tenant and his household goods, that, in the case of a joint tenancy, must mean the goods of the joint tenants, and that the goods of one joint tenant would not be sufficient to support a claim. That argument seems to me so contrary to the mischief which the Act intends to remedy that I am justified in considering, as I do, that the Act avoids it. I think, therefore, the notice given by the one joint tenant who appears on the facts stated to have owned the household goods and the agricultural implements, and to have suffered loss by their removal or sale on the expiration of the tenancy, is sufficient to give the arbitrator jurisdiction.

There was another point which was somewhat faintly argued, that was that when the landlord gave to Mr. Walker notice to quit because the farm was being cultivated badly, it in some way estopped the other joint tenant from proving that the farm was not cultivated badly. I am quite unable to follow that position. Estoppel

is by people claiming under the person making the statement or doing the act which constitutes the estoppel. One joint tenant does not claim under the other, and I am not aware of any estoppel arising by one joint tenant making a statement about another joint tenant's property or involving another joint tenant's property. In these circumstances it appears to me that the statement made by one joint tenant, though it may possibly be evidence—in this case apparently wrong evidence—certainly does not result in an estoppel of the other joint tenant from proving, as he did before the arbitrator, that the farm had been properly cultivated. For these reasons, which I give as my own reasons, I think the appeal should be dismissed with costs.

GREER, L.J.—I agree, but upon grounds which make it unnecessary for me to consider whether I agree or disagree with the reasons given by my Lord. The question that we are asked in the question for the court as stated by the arbitrator is whether the notice in writing dated the 3rd day of January, 1925, given by the tenant, Buxton, to the landlord of his intention to make a claim for compensation under s. 12 (7) (b) of the Agricultural Holdings Act, 1923, complied with the requirements of that section. The notice in form was not a notice merely by Buxton; it was a notice by Buxton on behalf of himself and Walker, and I have no doubt whatever that a notice by two tenants may be lawfully given by one tenant on behalf of himself and the other tenant, if he has in fact authority to give that notice. Reading the facts which are stated by the arbitrator I think it is clearly established that the whole management of the farm was left in the hands of Buxton, who was managing the farm and giving any necessary notices to his landlord, and was acting, and was authorised to act, and did act, on behalf of the tenants, who were himself and Walker. I think that he had, certainly by implication, the right, and the sole right to decide whether such notice should or should not be given. I doubt, although it is not necessary to decide it, whether Walker could at any time have withdrawn that authority. A withdrawal would have been a breach of the terms implied between the two tenants. Whether that be so or not, I think it is quite clear that there was no evidence on which the arbitrator could find, and he has not found, that that authority was ever withdrawn. Therefore, in my judgment, we are dealing with a case where there was a notice by the two tenants.

On the question which has been mainly argued and has been dealt with by my Lord, I desire to say that my own state of mind is one of great doubt whether the argument advanced on behalf of the landlord ought not to succeed. This is an Act of Parliament which interferes with the rights and obligations of two contracting parties to put upon the landlord great burdens which are inconsistent with the contract that he has made with his tenant. A landlord who, by his agreement, is entitled to give notice to quit without paying any compensation for the damage arising to his tenant by reason of the lawful termination of his contract, is made by Act of Parliament liable to pay him some compensation to this extent, that if any item of damage is proved, the landlord must pay a year's rent, and cases are easily conceivable where, on damage proved to the extent of 20s. he might have to pay £300 damages. It is in a sense punitive as regards the landlord and ought, in my judgment, to be strictly construed. I consider that if it appears that the position of things, such as exists in this case, has not been provided for by the Act, the landlord is entitled to say that it is a *casus omissus* in the Act, and "therefore I am not liable to pay compensation which otherwise I would be liable to pay." I feel very great difficulty in construing sub-s. (7) (b) of s. 12 as meaning that any one of joint tenants may give notice and make a claim. Could it be said, it has been asked, that where there are two tenants, and one of them has died, the other tenant, who has not died, loses his compensation? I should think not, but "the tenant" would then be the executors of the deceased tenant and the tenant who still remains alive, and para. (c) of s. 12 (7) would not apply because it would not be right to say that the contracting tenant was dead when only one was dead

A of the contracting parties. I have indicated that this case necessarily turns upon the interpretation of the section, and I have difficulty in agreeing with the judgment that my Lord has given, but fortunately I am not troubled with that question. I am not deciding that the view of my Lord is one that I would not ultimately be persuaded to accept, but I should require time to consider my judgment before I agreed with the reasoning of his judgment. On the other point, which seems to me conclusive, I agree.

B **SANKEY, L.J.**—I agree. The learned county court judge has stated a Special Case under the Agricultural Holdings Act, 1923, in which he has desired an opinion on a number of questions. There were two joint tenants of the farm in question—Buxton and Walker. Walker had been in possession of the farm for many years and had farmed it, Buxton was his nephew and had only been there for a few years. We are asked to determine whether a certain notice, which we must say now was given by Buxton only, was a proper notice within s. 12 (7) (b) of the Agricultural Holdings Act, 1923, which provides that compensation shall not be payable unless the tenant has not less than one month before the termination of the tenancy given notice in writing to the landlord of his intention to make a claim for compensation under this section. The notice in the present case was given by Mr. Buxton on Jan. 3, 1925, and it is said that that was not a proper or valid notice because he was not the tenant but only one of two joint tenants and, therefore, that, as it was not a proper notice, compensation was not payable by the landlord under the section. Another question is whether the notice to quit, dated Feb. 21, 1924, given by Walker, was a valid notice, and estopped Buxton from claiming compensation for unreasonable disturbance. On that question I desire to add nothing; I agree with what has been said with regard to it.

E Was the notice given by Buxton a good notice, or is it a bad notice, because "the tenant" in question was two "persons," and only one of them gave the notice? That depends upon the meaning of the word "tenant" in s. 12 (7) (b), and, although it is important to consider the words of the Act of Parliament, in my view it is also even more important, before one endeavours to apply an Act of Parliament to any case, to ascertain quite accurately what the facts of the case are. We are not here to answer hypothetical questions on the meaning of a word in an Act of Parliament standing by itself. What are the facts? As far as they are material for this purpose they are as follows:

G "The said Horace Bernard Buxton [who alone gave the notice] at the termination of the tenancy of the said William Walker paid the said William Walker the sum of £288 7s. 10d. in respect of tenant right compensation and the whole of the finance required for carrying on the said farm was provided by the said Horace Bernard Buxton. The tenant, the said William Walker, was made a joint tenant of the said farm with the said Horace Bernard Buxton by the tenancy agreement at the request of and for the protection of the landlord. The said Horace Bernard Buxton resided at the farmhouse, forming part of the said farm, and the said William Walker during the tenancy resided in a cottage belonging to the landlord contiguous to but not forming part of the said farm and paid rent in respect of the said cottage direct to the landlord."

H It appears to me upon those findings that Walker was not in any different position than that of surety for the tenant who has joined as co-tenant in the lease or in the agreement for a lease. Mr. Walker upon that hypothesis was not in a position to make a claim, neither could he make a claim for the loss of his own household goods. He was not in a position to make a claim in respect of his household goods or the implements of husbandry, or the fixtures, farm produce or farm stock on or used in connection with the holding, for the simple reason that he had not any of those things, nor had he been disturbed in the possession of them by anything that the landlord had done or anything that might happen afterwards consequent upon the landlord giving notice to quit.

Bearing in mind those facts, how are we to construe the Act of Parliament? The law with regard to that has been laid down so often that there can be no possible mistake about it. LORD COKE laid it down that in order to get at the scope and object of an Act, one should consider (i) what the law was before the Act was passed; (ii) what was the mischief or defect for which the law had not provided; (iii) what remedy Parliament has provided; and (iv) the reason for the remedy. Although those are rather general words, they have been interpreted by the judgment of LORD WATSON in *Salomon v. Salomon & Co., Ltd.* (1). It is the familiar desire of many persons to try to get at the intention and object of the legislature, but in doing so great care has to be exercised, and, as LORD WATSON says ([1897] A.C. at p. 38):

“ ‘Intention of the legislature’ is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.”

I do not think it is possible in this case to say that there is anything in the legislation which in express words deals with the position of joint tenants, and, therefore, I confine myself to the consideration of whether it is possible to give effect to the argument advanced on behalf of Mr. Buxton by reasonable and necessary implication to be derived from the Act of Parliament itself.

In my view, the object of this part of the Act of Parliament was to give to a tenant who had suffered loss from being disturbed by his landlord, compensation for such disturbance. That appears clearly in the section which is under discussion. As I have already pointed out, Mr. Buxton had clearly suffered loss from the disturbance of his tenancy by the landlord. On the other hand, Mr. Walker had not suffered any such loss, because, as already pointed out also, he had not any household goods, implements of husbandry, fixtures, farm produce or farm stock, to use the words of s. 12 (6), and he could not make a claim. The words are “his household goods and implements of husbandry,” and it would be a strange result of the Act of Parliament that, because Mr. Walker could not make a claim and would not have been justified in making a claim, therefore a just claim for disturbance by Mr. Buxton should be defeated, when the object of the Act is that the tenant who has suffered loss from disturbance should be compensated. That not only appears from the section itself, but appears from other sections in the Act of Parliament which have been referred to—s. 13 (2) referred to by my Lord, and s. 22, the fourth proviso of which was referred to by counsel for the tenant in argument, and one, therefore, would be anxious that the Act of Parliament should not be defeated unless it is impossible to deduce either from the express words, or, in the words of LORD WATSON, the necessary implication, that a proper and just claim by a tenant who had suffered damage should be defeated because a joint tenant who has suffered no damage could not now claim as joint tenant.

The matter does not end there, because one has to consider the object of the section which provides that the tenant shall give notice. Section 12 (7) provides that:

“Compensation shall not be payable under this section . . . unless the tenant has, not less than one month before the termination of the tenancy, given notice in writing to the landlord of his intention to make a claim for compensation under this section.”

What is the object and what is the purpose of Parliament enacting that particular subsection? In my view, the object is that the landlord should get notice of what compensation is claimed against him. If he gets a notice of what compensation is claimed against him, he can deal with the matter. As long as he knows what is being claimed he is in no way prejudiced: he can take the necessary steps to

A defend himself, and to protect his own interests. Therefore, I cannot see that construing this section in a way which makes this notice valid inflicts any injustice, prejudice, or any hardship upon the landlord. He, when once he gets the notice, knows his position and can protect himself under the Act. On the other hand, if it is not construed in that way, it appears to me that great injustice is worked on the tenant, who has a proper and valid claim for compensation which is to be defeated because his joint tenant, who has no such claim, does not join in a notice claiming something on behalf of somebody else. I agree, for the reasons given by SCRUTTON, L.J., that the proper construction of the section as applicable to the facts in this case, is the one contended for by the tenant. I do not propose to pre-judge any question, or to speculate upon what the word "tenant" may mean in different sections and under different circumstances. Construing the Act of Parliament as applicable to the facts of this case, I am of opinion that the notice given by Mr. Buxton alone was a valid notice, that the judgment of the learned judge, or rather, the answer which he gave to the question put to him, was correct, and that this appeal should be dismissed.

Appeal dismissed.

D Solicitors: W. W. Wynne & Sons, for Shipton, Hallewell & Co., Chesterfield; Ellis & Fairbairn, for Jones & Middleton, Chesterfield.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

E

F ENGLISH INSURANCE CO., LTD. v. OFFICIAL RECEIVER OF
NATIONAL BENEFIT ASSURANCE CO., LTD.

[HOUSE OF LORDS (Lord Hailsham, L.C., Viscount Sumner and Lord Atkin),
July 26, 27, 1928]

[Reported [1929] A.C. 114; 98 L.J.Ch. 1; 140 L.T. 76;
44 T.L.R. 801; [1928] B. & C.R. 67]

G

Insurance—Marine insurance—Embodiment of contract in policy—Re-insurance—“Participation agreement”—No contractual liability of re-insurer to original assured—Stamp Act, 1891 (54 & 55 Vict., c. 39), s. 93 (1)—Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 22.

H

By a contract entered into between the E. and N. insurance companies, which was described as a “participation agreement,” the N. company agreed to accept a liability equal to a specified proportion of the marine insurance risks underwritten by the E. company in consideration of their receiving an equivalent share of the premiums, less commission. The E. company retained the right to settle all claims under the policies made between them and their assured. No stamped policy was ever issued to the E. company by the N. company in respect of risks accepted by the N. company under the agreement. The E. company claimed to be entitled to prove in the winding-up of the N. company for a balance due to them under the agreement.

I

Held: the test whether the participation agreement was an agreement for a partnership or one for re-insurance was whether or not the N. company had assumed any contractual liability to the original assured; on the construction of the agreement it was plain that the parties had not intended that the N. company should assume any such liability; and, therefore, the agreement was a “contract for sea insurance” within s. 93 (1) of the Stamp Act, 1891, and a

"contract of marine insurance" within s. 22 of the Marine Insurance Act, 1906, and, the transactions under it not having been embodied in any marine policy, was invalid and inadmissible in evidence, so that the claim of the E. company failed. A

Decision of Court of Appeal, [1928] Ch. 74, affirmed.

Notes. Applied: *Motor Union Insurance Co., Ltd. v. Mannheimer Versicherungs-Gesellschaft*, [1933] 1 K.B. 812. Referred to: *Re Norske Lloyd Insurance Co., Ltd.*, [1928] W.N. 99; *Re Home and Colonial Insurance Co., Ltd.*, [1929] All E.R.Rep. 231; *Re National Benefit Assurance Co.*, [1931] 1 Ch. 46; *American, Foreign, Insurance Association v. Davies*, *Same v. I.R.Comrs.*, *Davies v. Home Assurance Co.*, *Davies v. St. Paul Fire and Marine Insurance Co.* (1950), 32 Tax. Cas. 1. B

As to the form of marine policies, see 22 HALSBURY'S LAWS (3rd Edn.) 11 et seq.; and for cases see 29 DIGEST 63 et seq. For Stamp Act, 1891, see 21 HALSBURY'S STATUTES (2nd Edn.) 610; and for Marine Insurance Act, 1906, see *ibid.*, vol. 13, p. 14. C

Case referred to:

(1) *Brett v. Beckwith* (1856), 26 L.J.Ch. 130; 28 L.T.O.S. 214; 3 Jur.N.S. 31; 5 W.R. 112; 29 Digest 66, 247. D

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., SARGANT and LAWRENCE, L.JJ.) on a summons in the winding-up of the National Assurance Co., Ltd.

The only question to be decided was whether the English Insurance Co., Ltd. (hereinafter called the English company), was disentitled from proving in the liquidation of the National Assurance Co., Ltd. (hereinafter called the National company), by reason of the fact that no stamped policies of marine insurance were issued by the English company to the National company as regards any matters coming within the agreement hereinafter referred to. The two companies, on Jan. 27, 1922, entered into an agreement described as a "participation" agreement, to be effective as from Jan. 1, 1920. An addendum to the agreement was to be operative only from Jan. 1, 1922. By art. 1 of the agreement the National company was to be entitled to and accept a one-eighth quota participation in all and every risk, whether written direct or by way of re-insurance from other companies or underwriters, upon any marine insurances or any war risks accepted by the English company. By art. 4 the English company was not obliged to furnish the National company with any particulars in regard to risks accepted. By art. 5 the National company was to be entitled to a proportionate part of the net premiums, salvages, and other benefits received by the English company, and was to bear a proportionate share of all losses. The addendum altered the share in risks accepted after Jan. 1, 1922, from one-eighth to two-ninths. The English company accepted many risks during the currency of the agreement, but furnished no particulars thereof to the National company. It rendered a statement of premiums received and losses incurred quarterly, and the balances were paid in cash from time to time, usually shortly after the quarterly account. No policy of re-insurance was ever demanded by the English company or issued by the English company to the National company in respect of any risk coming within the terms of the agreement. An order was made on July 25, 1922, for the winding-up of the National company, and the official receiver was appointed liquidator. The English company claimed that an account should be taken on the terms of the agreement, and that the appropriate shares of losses or risks accepted by them should be debited to the National company. The liquidator rejected the proof. On a summons in the winding-up the Court of Appeal, affirming a decision of EVE, J., held that as no stamped policies were ever issued by the English company to the National company to cover the risks undertaken by the National company, containing the particulars required by ss. 92 and 93 of the Stamp Act, 1891, and ss. 22 and 23 of the Marine Insurance Act, 1906, the contract, being one for "sea E
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A insurance" was invalid, and the liquidator in the winding-up had rightly rejected the proof tendered. The English company appealed.

S. L. Porter, K.C., and Andrewes-Uthwatt for the appellants.

Dunlop, K.C., and L. W. Byrne for the respondents.

LORD HAILSHAM, L.C.—This is an appeal against an order of the Court of Appeal affirming an order of EVE, J., which upheld the decision of the Senior Official Receiver that the appellant company was not entitled to prove in the liquidation of the National Benefit Assurance Co., Ltd., in respect of claims arising under an agreement in writing made between the appellant company and the National Benefit company and dated Jan. 27, 1922. That agreement, which was described as a participation agreement, provided that the National company should be entitled to and should accept a quota participation equal to a one-eighth share of all and every risk underwritten by the appellant company. By art. 2 it was provided that the participation should be equal to 50 per cent. of the share retained by the appellant company at their own risk of all marine assurances accepted on and after Jan. 1, 1920, with a limit of £1,875 on any one ship. The agreement went on to make provision that the appellant company should alone settle all claims which might arise under its policies, and that the National company should have no right to interfere with settlements, but should be bound thereby. The appellant company was to have commissions on the net premiums and on the profits derived by the National company from the business under the agreement. Accounts were to be settled and paid quarterly. By art. 9 the appellant company was given a right, upon default in punctual payment, to give seven days' notice in writing to the National company requiring payment of the amount due, and if the National company did not pay within seven days the appellant company was entitled to cancel the agreement immediately by giving written notice to that effect. It was further provided that at any time after the termination of notice under the agreement, the appellant company had the right to cancel the participation of the National company in the whole or any part of the then current or outstanding marine business. The National company was ordered to be wound-up by the court on July 25, 1922, and the official receiver became its liquidator. No insurance policies were ever issued to the appellant company by the National company in respect of risks accepted by the latter under the terms of the agreement and the official receiver refused to accept liability for losses or risks falling within the terms of the agreement, upon the ground that there was no stamped policy ever issued and that the contract was therefore void under the provisions of the Stamp Act, 1891, and of the Marine Insurance Act, 1906.

It was conceded by the appellant company that if the participation agreement of Jan. 27, 1922, was a contract for sea insurance within the meaning of the Stamp Act, 1891, or a contract of marine insurance within the meaning of s. 1 of the Marine Insurance Act, 1906, they must fail in their present claim, but it was argued on their behalf that upon its true construction the agreement was not a contract for sea or marine insurance, but was a partnership agreement under which the National company became the insurer jointly with the appellant company of all persons who took out marine insurance policies with the appellant company. In my opinion, this contention fails. I regard the participation agreement as an ordinary re-insurance agreement under which the National company agreed to indemnify the appellant company against the risks assumed by the latter on the marine policies issued during the currency of the agreement. If the appellant company's contention is correct it follows that privity of contract was created between the insured and the National company in respect of policies issued by the appellant company during the period covered by the participation agreement. It is to be observed that the agreement dated back for over two years, so that many of the risks in which the National company participated had actually expired before the agreement was entered into, and it is further to be observed that under art. 9 of the agreement the appellant company had the right in certain events to

cancel the participation of the National company in the then outstanding marine business. It seems to me very improbable that an agreement couched in such language could have been intended by the parties to create any contractual liability between the persons insured by the appellant company and the National company. It is common ground that no intimation was ever given to persons taking policies from the appellant company that the National company had any interest therein, and in none of the policies issued by the appellant company was there any reference to the National company as an insurer. I think the true effect of the participation agreement is correctly stated in the judgment of SARGANT, L.J., in the Court of Appeal. In my view, the meaning of the document is that the appellant company was to carry on its business as principals and that the National company were, as between themselves and the appellant company, to receive a proportion of the premiums paid to the appellant company, less commission, and were, in consideration of such receipt, to indemnify the appellant company against a proportion of the losses suffered by the appellant company as principals. The agreement seems to me to have all the elements of re-insurance and to contain the stipulations which are normally to be found in a contract of re-insurance. It follows that, in my judgment, the decision of the courts below was correct, and that the absence of a duly stamped policy is fatal to the appellant's claim. I move your Lordships accordingly.

VISCOUNT SUMNER.—I agree that the appeal must fail. The whole question turns upon the construction of a singular document and, unless it can be shown that this document is not a treaty of re-insurance, the appellants, as has been conceded from the first, are in the wrong.

The pivot of the argument is the word "participation" and the word "participator"—words which are sprinkled with a liberal hand all over the agreement—but it is obvious that the word itself is neutral and indefinite, and until one has made up one's mind in what the parties are to participate and how, I do not think that any definite conclusion can be arrived at to affect the present issue. It is quite true that nowhere throughout the agreement is it said that the National company is to re-insure the English company, although the words "re-insurance" and "re-insured" are used in other connections; nor is it ever said that this is a contract of indemnity by which the participator indemnifies the participatee, but in every other respect the features of a re-insurance treaty appear upon the face of the document. By art. 1 the participator is "entitled to and shall accept a quota participation equal to a one-eighth share of all and every risk." There is no occasion to bind the participator to accept a share in all and every risk, unless the agreement means that, as and where an original risk is taken by the English company, the National company is entitled and bound to stand behind it and to accept a part of that risk. Then there is in art. 2 a singular arrangement for relation back which, as the noble and learned Lord on the Woolsack has pointed out, is quite inconsistent with any partnership arrangement existing as from the year 1920, and in the latter part of art. 2 the words "any special re-insurances" are apparently used in contradiction to the arrangement with this participator, which I should, therefore, assume to be a general re-insurance, all the more so, because the participator has a maximum limit to his participation in respect of any one ship, which is different from participating simply by a proportion of the risk originally taken, and appears to me to be appropriate only to the participator's taking a re-insurance line of his own with a limit of £1,875 on any one ship re-insured. Then twice in art. 5 reference is made to the amount "ceded" and the risks "ceded under this agreement," words which have their place in a re-insurance treaty and not, as it seems to me, in a partnership or a joint-adventure agreement. In art. 6 the English company retains the right to settle all claims under its policies which, of course, really are its policies if this is a re-insurance, but are not truly its policies but the common policies of the two companies, if they have entered into some kind of joint account transaction. In art. 9 there is again a reference to "current or unexpired risks accepted hereunder until the expiry

A thereof," which seems to me to show a different basis for winding-up the accounts from that which would arise under any kind of partnership transaction. Finally, under art. 10 there is a provision that "the participator is absolutely bound in every case to follow the fortunes of the company," which is re-insurance practice pure and simple, expressed in rather artless words, and is quite unnecessary if it relates to some obligation between partners, as to which, of course, this would be implied. Then it says:

"It shall not prejudice the company if it should accidentally happen that it has incorrectly advised or omitted to advise the participator of any particulars relative to this agreement,"

C which, I think, is a clause wide enough to include, among other things, the obligation of the English company as the re-assured, to make disclosure to the re-insuring company of matters material to the risk and known to it, and under this clause it is excused from failure to make that disclosure before the insurance is effected, but I do not see that there is any appropriateness in the words in connection with a partnership. On the other side it is contended that this agreement effects some sort of common relation between the parties, the only really definite thing about which is that it is not re-insurance, and one is left to take one's choice of any relationship that the words can describe short of re-insurance. Though it is not an impossible thing, it is a novel idea to me that two insurance companies should become partners in a regular partnership. The Lord Chancellor has pointed out the singular results that would happen, if they were both engaged in writing the original risks as partners, the National company being an undisclosed partner liable at the option of the assured to pay the whole of the loss, and having to get back its share of the loss from the English company as it can, supposing the English company were to fall on the same evil days as the National company has fallen upon.

E I do not think that the provisions that I have referred to would have any place in any kind of partnership agreement. They would most of them be implied, and I certainly cannot construe the contract as a partnership or joint-adventure agreement merely because it uses the word "participation." It was skillfully argued that the agreement, if it was not a partnership and not a joint adventure, was at least an agreement to share the risks as between the two parties. If it is an agreement to share the risks, it still appears to me that it must operate by way of re-insurance. Nothing else would explain the provisions of the contract. There might be an agreement to share the results over a given period, an agreement that G profits and losses should be ascertained, and if the account was one way, the participator should pay, and if it were the other way he should receive, but why then put in any provision for following settlements or receiving a share in salvages? In that view the result of the contract is what the participation is to apply to. I have, therefore, come to the conclusion, as a matter of construction, that the decisions in the courts below were right. I only wish to add that, had it been otherwise, I think there might have been some difficulty in seeing how the establishment of a partnership agreement would have saved the parties from the application of the Stamp Act. I express no opinion upon the subject, except that I wish to say that, if it were necessary to draw from *Brett v. Beckwith* (1), the proposition that counsel for the appellants extracted from that not very clearly reported case, I should wish to hear the case argued very fully before I could come to the conclusion that LORD ROMILLY either purported to hold or could justifiably have held, that if there was a partnership, the Act of George III would be given the go-by.

I LORD ATKIN.—I agree that this appeal fails. The question that has been propounded to us is whether or not the agreement in this case amounts to a re-insurance. If it does amount to a re-insurance it is admitted that the appellants must fail. The test whether it is a re-insurance or not has been, in my view, quite correctly stated to be the question whether or not the re-insurers or the alleged re-insurers have assumed a contractual liability to the original assured, for

such an original contractual liability is not an incident of re-insurance, and if such an original liability had been assumed, then there would have been a contract of insurance upon which a stamp had already been paid on the policy issued by the English company who, it is said, for their purpose were the partners or the agents, apart from a partnership, of the National company. Accepting that test it seems to me quite plain that the parties here, by their agreement, did not intend the National company to assume any liability towards the original assured. The liability is a liability which is limited in the original agreement to one-eighth of the risk in consideration of a receipt of one-eighth of the premium—it was varied afterwards to making it two-ninths. There are provisions by which the agreement is to relate back to insurances which were made within two years before the agreement in question, and there are provisions by which the interest, such as it is, of the National company may be limited by the action of the English company either in re-insuring or in granting similar participations to other companies. If, in fact, it was a partnership or an agency, then the National company became bound, in the full sum, to the original assured, for there would be no limit known to him, and he could have asserted, as against the partner of the English company, the full liability. I cannot help thinking that the last legal result that the National company ever contemplated was that they would, or might, have to assume the full and complete liability on the risks to the original assured with no prospect of ever receiving, or no right in any case to receive, more than the particular share of the premium which the agreement gave them. For the reasons that have been given by the noble Lord on the Woolsack, and by the noble Viscount, I am satisfied that this was in fact a policy of re-insurance. No liability was intended to be assumed by the National company to the assured, and, that being so, the effect of the agreement is that for a definite portion of the premium which the English company received the National company undertook to indemnify the English company against the specific proportion of the risk to be ascertained in accordance with the agreement.

The result is, it appears to me, that on the contention put before us, this appeal must fail. I should like to add one other word, for I feel that this result is unfortunate in some respects from the business point of view. After all, re-insurance of marine risks is a perfectly legitimate business, and the result, as appears from the discussion before your Lordships, is that it is impossible to conduct this form of business, by which a company that engages in marine insurance tries to secure in advance that its risks shall be fairly distributed by re-insurance policies, by any contract which can be enforced in courts of law. As I say, I think that is a matter which might reasonably be considered. If it is the considered policy of the Exchequer that such business as this should go untaxed then it seems to me that it would be right that the fiscal legislation should make that clear so that parties might embark on business of this kind. On the other hand, if it is desirable, as it well may be desirable, that the Exchequer should take its share by taxing this business which goes on, as we all know, to a considerable extent, then it seems to me that it would be right that provision should be made by which the present rules relating to the taxing of marine insurance should be altered, so that it would be possible for persons who desire to engage in business of this kind—as I say, in my opinion, legitimate business—to be entitled to come to the courts if necessary to enforce their rights. At present they are outlaws moving outside the pale, and it is difficult to see why that should be the position. But that has no effect upon the legal relations of the present parties, and on the matter which has been put before us I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co.; William A. Crump & Son.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

A

LIND v. MITCHELL

[COURT OF APPEAL (Scrutton, Lawrence and Sankey, L.JJ.), November 2, 6, 7, 1928] .

B

[Reported 98 L.J.K.B. 120; 140 L.T. 261; 17 Asp.M.L.C. 562;
34 Com. Cas. 81; 45 T.L.R. 54]

Insurance—Marine insurance—Loss of insured ship—Negligence of master—Loss “proximately caused by peril insured against”—Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 55 (2) (a)—s. 60 (1).

C

A ship, of which the plaintiff was the mortgagee, was insured by the defendant under a policy which covered loss by perils of the sea or fire and also, under cl. 8 of the Institute Time Clauses, “loss . . . caused through the negligence of master, mariners, engineers or pilots.” On a voyage to Newfoundland in bad weather she was driven against heavy ice, with the result that she was holed and began to leak. The master, being of opinion that a gale was imminent and that the vessel would sink, decided to abandon her, and, to prevent her from being an obstruction to navigation, set her on fire. In an action by the assured on the policy,

D

Held: although on the evidence the master had not “reasonably abandoned” the ship within s. 60 (1) of the Marine Insurance Act, 1906, and thus had been guilty of negligence, (i) the loss was proximately caused by a previously existing peril of the sea insured against, and, therefore, under s. 55 (2) (a) of the Act the defendant was liable even though the loss would not have happened but for the master’s negligence; (ii) the case was also covered by cl. 8 of the Institute Time Clauses which referred to loss “caused,” not “directly caused,” through the negligence of the master.

E

P. Samuel & Co., Ltd. v. Dumas (1), [1924] A.C. 431, distinguished.

F

Notes. As to proximate cause of loss, see 22 HALSBURY’S LAWS (3rd Edn.) 90 et seq.; and for cases see 29 DIGEST 205 et seq. For Marine Insurance Act, 1906, see 13 HALSBURY’S STATUTES (2nd Edn.) 14.

Cases referred to:

G

(1) *P. Samuel & Co., Ltd. v. Dumas, Graham Joint Stock Shipping Co., Ltd. v. Merchants Marine Insurance Co., Ltd. (No. 2), [1923] 1 K.B. 592; 92 L.J.K.B. 465; 128 L.T. 706; 39 T.L.R. 154; 67 Sol. Jo. 336, C.A.; affirmed sub nom. P. Samuel & Co., Ltd. v. Dumas, [1924] A.C. 431; 93 L.J.K.B. 415; 130 L.T. 771; 40 T.L.R. 375; 68 Sol. Jo. 439; 16 Asp.M.L.C. 305; 29 Com. Cas. 239, H.L.; 29 Digest 112, 666.*

H

(2) *British and Foreign Marine Insurance Co. v. Gaunt, [1921] 2 A.C. 41; 90 L.J.K.B. 801; 125 L.T. 491; 37 T.L.R. 632; 65 Sol. Jo. 551; 15 Asp.M.L.C. 305; 26 Com. Cas. 247, H.L.; 26 Digest 95, 527.*

Appeal from an order of WRIGHT, J.

The plaintiff, G. J. Lind, a broker of Oporto, claimed to recover against the defendant, an underwriter, under a policy of marine insurance effected on the wooden schooner *Gordon E. Moulton*, of which he was the mortgagee. That policy was a time policy on hull and/or materials subject to the Institute Time Clauses, free of particular average, with leave to carry liquor, and the period of the insurance was for twelve calendar months from Feb. 25, 1924, to Feb. 25, 1925, both days inclusive. By cl. 8 the policy also covered “loss of or damage to hull or machinery . . . caused through the negligence of master, mariners, engineers or pilots.” The claim was for a total loss of the vessel on Mar. 1, 1924, by perils insured against. The vessel, when proceeding to Newfoundland, encountered a heavy gale in the Bay of Fundy as the result of which she was driven against ice and seriously damaged, causing her to leak. After the crew had been working at the

I

pumps for a considerable time the master decided that he could not save her, and as she was bound to sink he decided to abandon her, but before doing so set fire to her in order that she might not be a danger to other vessels. By his defence the defendant pleaded that the vessel was not lost by perils of the sea or fire within the meaning of the policy, but that she was abandoned and set fire to and burnt by the master wilfully and wrongfully and/or without lawful excuse. WRIGHT, J., held that there had been no fraudulent throwing away of the ship, but that the master had prematurely abandoned her, and that, even if the abandonment was fraudulent, the plaintiff, who was an innocent mortgagee and no party to the fraud, would not be debarred from recovering from the defendant under the policy because he would be entitled to show that the loss was due to an actual peril of the sea. He, therefore, gave judgment for the plaintiff, and the defendant appealed.

By Marine Insurance Act, 1906:

"Section 55 (1). Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against. (2) In particular—(a) the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew. . . . Section 60 (1). Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable. . . . Section 78 (4). It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss."

Clement Davies, K.C., and *Van den Berg* for the defendant.
Dunlop, K.C., and *James Dickinson* for the plaintiff.

SCRUTTON, L.J.—The very careful and thorough argument of counsel for the defendant has satisfied me that we cannot interfere with the equally careful and exhaustive judgment of the learned judge below, though, no doubt, the case raises some questions of interest.

I do not propose to repeat all the facts which appear in that judgment, but, shortly, the position is this. The ship in question is a three-masted schooner of the type specially identified with Newfoundland, a wood vessel, and, at the time in question, was four or five years old—not an old ship. The ship was owned by a number of small shareholders in Newfoundland, but the managing owner was a member of the Moulton family, who appear to give their name to a large number of these small schooners. When, owing to Spanish competition, the salt fish trade became precarious, an excellent substitute was found by the managing owner in the direction of running spirits into the United States. It appears from the correspondence that a large number of Moulton schooners were chartered to various philanthropists, who were providing the United States with whisky, on the very satisfactory terms of \$2,000 a month, the charterer finding all the crew's wages and provisions and doing the repairs. This particular ship was not in that fortunate position because, apparently, owing to the lack of business ability of the master, the charter had only been made for \$750 a month, as compared with \$2,000 which some of the other Moulton schooners had been getting. The vessel had spent a considerable portion of time in 1923 and 1924 lying at "Rum Row," that being part of the open sea more than twelve miles from the coast of the United States, where ships with spirits do congregate, hoping that somebody will be able to get their whisky ashore in the United States. This ship had lain in the open sea for some considerable number of months, including the winter, and no doubt had got rather knocked about. In February, 1924, she was returning to a place called

A Burgeo, on the coast of Newfoundland, which apparently has some connection with Mr. Moulton, the managing owner, and with a company through which the plaintiff supplied schooners with various requisites. She had some bad weather; she lost her mainsail coming across the mouth of the Bay of Fundy; and when she came along Nova Scotia and Cape Breton there was a good deal of ice. For some days she went through what is called slob ice, that is to say, comparatively soft, small ice. On Thursday, Feb. 28, 1924, she encountered a gale, in which she had to lower all her sails and run with bare poles. There was a line of big packers to leeward; she apparently bumped along this ice, and it is quite clear that she strained herself or damaged her side in such a way that she began to leak very considerably. [His Lordship said that two or three days later the master formed the opinion that a gale was imminent which might blow the ship out to sea in a condition in which she would probably sink. He, therefore, decided to abandon the ship and the crew took to the boats. Before leaving the ship they set her on fire to avoid damage to other shipping.] The insurers of the ship became suspicious. There had been too many ships which had disappeared in calm weather sufficiently near the land for the crew to row ashore, and there had been a number of cases in which this court had found that the ship was scuttled, there D having at the time been a heavy drop in the value of shipping, and it being of great pecuniary benefit to the assured that the vessel should go to the bottom. The insurers refused to pay and the plaintiff brought an action claiming that the ship had been lost, and the whole matter was investigated before WRIGHT, J.

The policy was a time policy beginning on Feb. 25, 1924, about five or six days before the vessel was lost. She was insured against perils of the sea and fire, and E by the Institute Time Clauses, under cl. 8 of which she was also insured to cover loss of vessel directly caused by accidents in loading, discharging or handling cargo or "caused through the negligence of master, mariners, engineers or pilots." The underwriters resist the claim on the ground that there is no evidence that the proximate or direct cause of her loss was any of these matters. The law is clearly stated in the Marine Insurance Act, 1906, and it is, therefore, unnecessary to go F into the cases which the Act replaced. Section 55 of the Marine Insurance Act, 1906, says:

"(1) . . . the insurer is liable for any loss proximately caused by a peril insured against, but, subject [to the provisions of the Act] he is not liable for any loss which is not proximately caused by a peril insured against. (2) In particular—(a) the insurer is not liable for any loss attributable to the wilful G misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew. . . ."

In most of the scuttling cases one has had to consider the provision that the insurer is not liable for any loss attributable to the wilful misconduct of the H assured. That disappears from this case, because a shorthand note has been read to us in which counsel for the defendant began his case before the learned judge below by saying that he did not allege any misconduct in either the assured, the mortgagee, or in the managing owner, and this case can only be conducted in this court on the basis on which it was conducted in the court below. That part of the section, therefore, disappears; the loss was not "attributable to the wilful I misconduct of the assured." Then we come to the next part of the section: The insured

"is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew."

A vessel named the *Glencoe* saw the ship the morning after she had been abandoned. She has never been seen again, and when the *Glencoe* saw this vessel and for some two days before I have no doubt that she was making water

in considerable quantities owing to stranding on or collision with ice; I have no doubt that she went to the bottom ultimately through the incursion of water through a strained hole which was originally caused by a peril of the sea, namely, collision with ice.

But the argument which is presented to us is that the loss must be proximately, that is, directly, caused by a peril insured against, and that in this case the direct cause of the loss was (i) the abandonment by the master and not the fact that water which had been entering before the abandonment continued to enter after the abandonment, and (ii) that no proper steps were taken to prevent the water from entering, or to take the vessel to a port where she would have been safe while the leak was repaired. That argument is grounded upon the decision of the House of Lords confirming the decision of this court in *P. Samuel & Co., Ltd. v. Dumas* (1). In that case the entry of the water which ultimately sank the ship began with and had no existence before the deliberate act of the master in opening taps and valves connected with the sea. In this case the position is obviously different, for before the act which is complained of—namely, the abandonment—took place, there had been the peril of the sea which was causing the water to enter, and what is complained of is that the entry of water was not stopped and no steps were taken to stop it by continuing the voyage to port. The argument for the defendant endeavours to appropriate the term “wilful misconduct of the assured” where it appears in the first part of s. 55 (2) (a) and say that, if he proves wilful misconduct, as distinct from negligence, of the master, that will relieve him from any question of perils of the sea caused by negligence of the master. I do not find any distinction made in the subsection between “misconduct” and “negligence.” The subsection is to apply if “the loss would not have happened but for the misconduct or negligence of the master.” But in case this matter goes higher, I desire to say that I entirely agree with the view of the learned judge below that, suspicious as the case may be, there is no evidence on which one would be justified in finding intentional casting away of the ship, wilful and deliberate misconduct, conduct akin to scuttling by the master. Wilful casting away is a criminal offence and the man who alleges it must prove it as if he were alleging a criminal offence. Having read the evidence carefully, I can find no evidence on which a jury would be entitled to convict this master of wilfully and deliberately abandoning the ship, not from any consideration of the existing danger from her leaks, but simply because he wanted to get rid of her.

Next one comes to the question of fact: Was this, in the language of s. 60 (1) of the Act, which deals with constructive total loss, a reasonable abandonment of the ship “on account of its actual total loss appearing to be unavoidable,” that is to say, total loss probable from the leak appearing, and judged to be unavoidable, and, therefore, a reasonable abandonment of the vessel which it is reasonably thought will anyhow be lost by perils of the sea? I am satisfied that the abandonment was unreasonable. The vessel was within fifteen miles of her home port. The lifeboat, into which the crew got, according to the evidence was able to sail and row in with a north-east wind. If the lifeboat could sail, the schooner could equally have sailed with the north-east wind. The schooner was still floating high in the water seven or eight hours after she was abandoned. I assume in my judgment that the abandonment by the master was unreasonable.

I desire to put out of the way one matter which is suggested in some of the text-books with reference to s. 78 (4) of the Act, by which:

“It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.”

It has been argued that, if the agents of the assured do not take all measures that are reasonable, the underwriter is not liable. I agree on that point, and, therefore, exclude it from the case, with the view taken by LORD SUMNER in *British and Foreign Marine Insurance Co. v. Gaunt* (2), where he says ([1921] 2 A.C. at p. 65):

A "There remains an argument based on a reading of s. 78 (4) of the Act which is very novel. It is one of the disadvantages of codification that new terms used or even unfamiliar sequences of propositions suggest that the law has been changed, where those familiar with the old decisions would not have suspected it. The argument affords a striking instance of this. The section obviously refers to suing and labouring. It cannot possibly be read as meaning that if the agents of the assured are not reasonably careful throughout the transit he cannot recover for anything to which their want of care contributes. The point therefore fails."

I agree with that view, and, therefore, I shut out any argument based upon s. 78.

C We have this. There has been negligence of the master, not negligence of the assured. There has been negligence of the master which has resulted in the continuing action of a previously existing peril of the sea. In my view, that is covered by cl. 8 of the Institute Time Clauses. The word "directly" is left out where reference is being made to the negligence of the master; the underwriter insures against loss of the vessel "caused through the negligence of master, mariners, engineers or pilots." Even if it were true—and I do not think it is—that under the existing law but for that clause you would treat the direct cause of the loss as being the premature abandonment and not the entry of sea water from a previously existing peril, in my view that clause requires the underwriters to pay where the negligence of the master has caused the loss of the ship. I do not think that without that clause there would be any answer to the claim against the underwriters. I think that s. 55 (2) (a) shows there would not be, and that for the reasons which I have given in the previous part of the judgment, the judgment in *P. Samuel & Co., Ltd. v. Dumas* (1) does not apply to a case like this, where a peril of the sea has endangered the ship and the negligence of the master afterwards results in proper measures not being taken to save the ship. For these reasons I agree with the conclusion at which the learned judge has arrived that the plaintiff makes out his case and that the underwriter has not shown any sufficient defence to the claim. The appeal, therefore, must be dismissed with costs.

LAWRENCE, L.J.—I agree.

SANKEY, L.J.—I agree. I hold the same opinion as that expressed by the learned judge where he says,

G "Under all the circumstances I do not feel—much as I am affected by suspicion—that I can find that there was a fraudulent throwing away of the ship in this case."

H It appears to me, therefore, that the correct inference to be drawn from the evidence is that the perils of the sea had begun to operate before the master abandoned the vessel; she had been exposed to the ice, she had been exposed to heavy storms, and there was evidence that she was already making water, though, not, as I think, to the exaggerated extent that some of the witnesses say, but she had been making water. In my view, therefore, those perils of the sea were the dominant cause, and, having regard to s. 55 (2) (a) of the Marine Insurance Act, 1906, I think the underwriters are liable because there was a loss proximately caused by a peril insured against, although, perhaps, that loss would not have happened but for the misconduct and negligence of the master.

I I do not think it is necessary to go further than that for the purpose of my judgment, but as counsel for the defendant has argued the point with regard to "wilful negligence," I desire to say a few words about that point. I first look at the finding of the learned judge. He says:

"This ship sank, according to the evidence, and everyone is in agreement, because she had been holed in the ice. That was the real and only cause of her loss."

I do not propose to read again cl. 8 of the Institute Time Clauses under which the insurance was to cover loss of the vessel caused through the negligence of the master, but, if I understand counsel's argument, it is that there are three states of mind which he imputes to an event—one which is merely an error of judgment, another which amounts to negligence, and another which amounts to criminality. He says that this is not a case of mere error of judgment, nor, having regard to the facts found by the learned judge, of criminality, and, therefore, it comes within the second category of a state of mind induced by negligence, and there are two degrees of negligence, one of which, he says, is wilful negligence, which is not covered by the clause in question. Whether it is possible to draw that distinction I am not concerned to discuss in this case. As I have already said, s. 55 (2) seems to me to render this discussion unnecessary. I think there is no evidence here which would support the argument of counsel for the defendant. I think the master was undoubtedly negligent. I think he abandoned the ship prematurely and unreasonably, but I cannot think that those findings amount to something which comes between the negligence for which the insurers are responsible, and the criminal negligence for which they are not. It is to be observed that the learned judge finds that there is no evidence, and no suggestion, of any motive for doing it; all the facts seem the other way. Quite apart from s. 55 (2) of the Marine Insurance Act, 1906, I think cl. 8 applies to the facts of this case, but, as I have ventured to say, I do not think that is necessary here for the decision, because I think it is governed by, and provided for, in the section above named. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors: Ballantyne, Clifford & Co.; William A. Crump & Son.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

MERCHANTS' MARINE INSURANCE CO., LTD. v. LIVERPOOL MARINE AND GENERAL INSURANCE CO., LTD.

[COURT OF APPEAL (Scrutton, Greer and Sankey, L.JJ.), April 20, 23, 1928]

[Reported 97 L.J.K.B. 589; 139 L.T. 184; 44 T.L.R. 512;

17 Asp.M.L.C. 475; 33 Com. Cas. 294]

Insurance—Marine insurance—Proximate cause of loss—"Immediate consequences" of previous damage—Grounding of vessel—Temporary repairs—Resumption of voyage—Inability to reach repair port owing to weakened condition.

The plaintiffs, who were reinsurers of a risk under a marine policy on the Norwegian steamship *M.*, reinsured that risk with the defendants. The policies covered the vessel from Jan. 1 to Dec. 31, 1925, and they contained clauses in the following terms: "In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination." "If the insured object is in a damaged condition at the time when the insurance expires . . . the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold." While on a voyage to South African ports the time covered by the policy expired, but the risk continued under the continuation clause. On reaching her first port of destination the *M.* grounded outside the

harbour, but got off the reef and proceeded into the port where she was overhauled and found to be seriously damaged. Temporary repairs having been effected, the vessel proceeded on her voyage, but, as she began to leak again, she was beached in order to prevent sinking and was ultimately sold as a wreck.

Held: the cause of the leaking and subsequent beaching and loss was the inability of the vessel to stand the strain of completing the voyage owing to her having been weakened by the damage caused by the grounding, and, therefore, the loss was an immediate consequence of that damage, and, in the absence of unnecessary delay in effecting such repairs as were possible at the first port of destination, the plaintiffs were entitled to recover.

Notes. As to proximate cause of loss in marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 90-95; and for cases see 29 DIGEST 205 et seq.

Cases referred to:

- (1) *Reischer v. Borwick*, [1894] 2 Q.B. 548; 63 L.J.Q.B. 753; 71 L.T. 238; 10 T.L.R. 568; 7 Asp.M.L.C. 493; 9 R. 558, C.A.; 29 Digest 206, 1650.
- (2) *Leyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.*, [1918] A.C. 350; 87 L.J.K.B. 395; 118 L.T. 120; 34 T.L.R. 221; 62 Sol. Jo. 307; 14 Asp.M.L.C. 258, H.L.; 29 Digest 229, 1858.

Appeal from an order of ROWLATT, J.

A Norwegian steamer, the *Maridal*, was insured in Norway against marine perils for a period from Jan. 1 to Dec. 31, 1925. The insurers reinsured their risk with the plaintiffs, who in their turn reinsured their risk with the defendants. The policies were subject to conditions of which the two following were material:

"In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination."

And:

"If the insured object is in a damaged condition at the time when the insurance expires and the damage comes within the underwriters' responsibility the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold."

In January, 1926, the *Maridal* was on a voyage from Baltic ports to South African ports with a cargo of timber. Her first port of destination was Lüderitz. When entering the bay she ran on the Angra Rocks and bumped considerably, and then came off and proceeded to Lüderitz, when it was found that she was badly damaged. As there were no repair facilities the underwriters' representative at Cape Town sent a diver to the vessel. Temporary repairs were then effected and the vessel proceeded on her voyage to Cape Town. After she had been at sea about twelve hours or so water began to come in again, and in order to prevent sinking the vessel was beached on Possession Island and became a constructive total loss. She was subsequently sold as a wreck. In these circumstances the original Norwegian underwriters paid the owner for a total loss, and the plaintiffs, as reinsurers, paid the original insurers, claiming over against the defendants their reinsurers, who refused to pay. ROWLATT, J., held that the loss was not an "immediate consequence" of the damage caused by the original stranding, as the chain of causation was broken when the vessel reached her first place of destination, which was a place of safety, and that, therefore, the action failed. The plaintiffs appealed.

W. N. Raeburn, K.C., and R. I. Simey for the plaintiffs.

A. T. Miller, K.C., and H. Atkins for the defendants.

SCRUTTON, L.J.—This case raises a comparatively short point and one that is unusual, in this sense, in an English court, that it does not turn on the ordinary rules applied by English law regarding the consequence of perils which can be recovered under a policy, but turns on the application to the facts of the case of a particular clause in Norwegian insurance, which does not exist in English law. It is a fight between two English reinsurers, the subject of insurance being a

Norwegian ship which was insured with the plaintiffs who reinsured their risk with the defendants. The original insurance was a time policy for a year, but there were provisions incorporated in all the policies for a continuation clause in case the ship was at sea at the expiration of the policy, and, therefore, it was not known what had happened to her. The continuation clause in this particular case is :

“In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination.”

In fact, at the date of expiration the vessel was on a voyage from Europe to various ports on the South African coast beginning with Lüderitz Bay and ending with Beira. Lüderitz Bay is on the west coast of Africa, some 500 miles north of Cape Town. There was a further continuation clause, which is incorporated in the reinsurance policies, and is expressed in s. 27 of what is called the “Norwegian plan.” That is something like the Institute clauses in English insurance policies, a set of clauses, which may be included by referring to them as the “Norwegian plan.” That clause, on the applicability of which to the facts in this case the whole question arises, is this :

“If the insured object is in a damaged condition at the time when the insurance expires and the damage comes within the underwriters’ responsibility, the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold.”

That clause assumes that damage has resulted before the insurance expires from a risk insured by the policy. So far, of course, the damage would be recoverable, or the costs of repairing. But something is added. It is assumed that there may be further damage directly resulting from the damage which has already been caused after the date when the insurance expires, i.e., after the date of arrival at the first point of destination. The further damage resulting from the original damage is to be covered by the policy until the object without unnecessary delay has been repaired. So that, unless one can find that the vessel has been repaired or that there has been unnecessary delay in repairing her, further damage directly caused by the original damage which results from the original perils in the policy is covered.

That, of course, is quite a different question from considering the applicability of the maxim *Causa proxima non spectatur* to the damage caused by the insured peril. One begins here with damage caused by a peril; one assumes that that damage may cause further damage before the vessel is repaired; and for that further damage directly caused by the original damage before the damage had been repaired the underwriters undertake to pay. Apply that to the facts in this case. Approaching Lüderitz Bay, this vessel, the *Maridal*, grounded on the Angra Reef, and, grounding, was bumped for some considerable time on a rocky reef, with the result that her No. 5 after-tank was holed very considerably. There were large holes, and I should have thought that it was almost inevitable that a heavy vessel laden with timber bumping on a reef so as to make large holes in the bottom of her double tank would have strained herself and that it was extremely probable that her structure was weakened as well in addition to the damage caused by the specific holes which were made in the double bottom. She gets off and reaches Lüderitz Bay and lies in a situation which is safe to this extent, that the pumps can keep down the water which is leaking through various places, not clearly ascertained, between her double-bottom tank and the holds of the ship. What is she to do? She is on a voyage; she is insured on a voyage which the time covers, a voyage she is making to Beira. She has a lot of cargo in her for other ports. Lüderitz Bay, I am quite clear, has no facilities for the repair of a vessel damaged in this way. Is it to be said : “She is now in a place of safety. If she goes on pumping she will keep safe. Let her stay there”? A place of safety for a ship does not mean a place where she will be shut out for all time from any commercial operations, and, because she can lie safely there, that she shall lie safely there

A without endeavouring to proceed. Obviously the thing everyone has to consider is, how can she be efficiently repaired in order that she may continue her operations as a freight-earning ship; and everybody concerned in the case, which did not include any efficient surveyors at Lüderitz Bay, because there were not any—everyone concerned in the case at Lüderitz Bay and the underwriters' representatives at Cape Town who had been in communication with the original under-

B writers in Norway thought that the proper thing to do after the diver had patched her holes as best he could was to take the chance of her getting through to Cape Town, which is about 500 miles off. This court has not the advantage of being able to look at the log and see the weather in which she started, but she was tried outside Lüderitz Bay under steam, and everybody took the view that she could get through to Cape Town. The diver backed his opinion by proceeding to travel with

C her instead of travelling in a roundabout way by road. Again, not having the log, we do not know whether the weather got worse, and there was a controversy whether the wind she met with was force 8 by the Beaufort scale or force 4 by the Beaufort scale, because it is "4" in the log, and it is not known whether that refers to the Norwegian scale or the English Beaufort scale. She gets part of the way down and then she begins to leak badly. It seems to me quite clear that why she begins

D to leak badly is that she has been damaged by the original grounding and her strength weakened, and that in that weakened condition she was not able to stand the strain of a sea voyage. In consequence she has to be beached at a very desolate island a little bit to the west of Lüderitz Bay, and, there is no doubt, being beached there, she was a constructive total loss.

How does that fit in with the terms of s. 27? When the insurance expired the

E ship was in a damaged condition. That damage came within the underwriters' responsibility because it was occasioned by perils of the sea. The risk is, therefore, to continue until the object without unnecessary delay has been repaired. She has not been repaired and there has been no unnecessary delay. What is the risk which is to continue? The risk which is to continue is for the immediate consequences of such a voyage. Was it an immediate consequence of the damage done by the

F stranding which was continuing and had not been repaired that she was unable to stand weather which any ordinary seaworthy ship undamaged would have stood, and had to be grounded? In my opinion, it was. The learned judge has come to an opposite conclusion because he has imported into the clause a provision which is not there. He has said the clause shall read "till the object is in a place of

G safety." But that is just what the clause does not say. The clause says that the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired, and it assumes that, after the damage has been caused and before the ship has been repaired, further damage may be caused by the original damage. That seems to me just to be intended to meet the case where a ship, having been damaged, has to be brought to another port to be repaired. That provision does not cease to apply because, on the way to be repaired

H efficiently, the vessel is in a place where she can lie in safety so long as she is not repaired, and at a place where there are no facilities for repairing her. For these reasons I think the learned judge came to a wrong conclusion when he thought that the place of safety before the vessel was repaired was a matter to be considered under this clause.

I This view of the question we have to determine, which seems to me to be the obvious and only question having regard to s. 27, turns on considering whether or not the English decisions of *Reischer v. Borwick* (1) and *Leyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.* (2), which do not deal with the same questions at all, but deal with the question whether damage is a proximate result of an insured peril—quite a different question—apply to the facts of this present case or not. I only say that, whatever one may have thought, if one were brought up in the old school of considering proximate cause, was the conclusion which should have been arrived at in *Reischer v. Borwick* (1) and the *Norwich Union Case* (2), since the House of Lords has given its decision, those older views

must be taken as erroneous, and the result of both cases, and particularly of *Reischer v. Borwick* (1), seems to me to support the view I have arrived at as to the meaning of cl. 27, although I think they are not decisions on the same question.

In my opinion, the learned judge's view that the vessel had got to a place of safety, and, therefore, that liability had ceased under s. 27, is erroneous. I think the appeal should be allowed with costs.

GREER, L.J.—I agree. The appellants were the plaintiffs in an action on a marine policy of reinsurance, and they claim against the defendants in the circumstances that the original insurers have paid. ROWLATT, J., in the court below, dismissed this action with costs, holding that they had not brought the case within the words of the policy.

The vessel (during the continuance of the policy by reason of the clause therein) stranded near the entrance to Lüderitz Bay, one of her ports of discharge. Under the terms of the policy the risk continued till she arrived at a port of discharge. There was an additional clause to the effect that:

"If the insured object is in a damaged condition at the time when the insurance expires and the damage comes within the underwriters' responsibility, the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold."

It is clear, as applying to this case, that the words are not "the immediate consequences of the stranding," but "the immediate consequences of the damage." The further facts that seem to me to be material for this case are that there is no finding by the learned judge that the shipowners, by her master, failed to take reasonable steps at Lüderitz to do such temporary repairs as might reasonably be supposed to be sufficient to enable the vessel to get to the nearest place, that is to say, Cape Town, where she could be efficiently repaired. I do not understand it to be seriously suggested that they did in fact fail to take reasonable steps, though it was hinted at once or twice in argument. It seems to me impossible, having regard to the facts proved in this case, to find that they failed to take reasonable steps to do such temporary repairs as would enable them to continue what is for this purpose an insured voyage by going to a place where the vessel could be properly repaired. The clause says that until she is repaired—that means at such a reasonable place as she ought to be repaired at—the responsibility for the immediate consequences of the damage caused by the stranding is to be covered, and she is to go there without unnecessary delay. One wonders whether, if they had waited and had brought up surveyors and more workmen and more divers from Cape Town and had done some more repairs, and then immediately the vessel had stranded at Lüderitz Bay, what the defendants would have said. I can imagine they would have said: "This was unnecessary delay on your part; you ought to have patched her up sufficiently to enable a reasonable navigator to take her to Cape Town, and as you have not done that you have been guilty of unnecessary delay. Therefore, you are not covered by the policy." I think the vessel when she met with this accident was still suffering from the damage caused by the stranding, and the water coming into her and her consequent loss were the immediate consequences of the still existing damage caused by the stranding.

I only wish to refer to one authority, and that is *Reischer v. Borwick* (1), which, though not a direct authority on this question, affords some guidance how we should determine the question we have to decide in this case. LOPES, L.J., in giving his judgment, says ([1894] 2 Q.B. at p. 553):

"It was contended that the towing the tug through the water after the collision was the proximate cause of the loss now sought to be recovered. It was, however, admitted that this was a reasonable and proper act in the circumstances."

It is said that the cause of the damage in the present case was the decision to take the vessel with such repairs as she had had to Cape Town. It appears to me, and

A it is now admitted to be the fact, that this was a reasonable and proper act in the circumstances. I also refer to the words in DAVEY, L.J.'s judgment :

"The failure of the attempt to mitigate or stop the damage arising from the breach in the condenser cannot in my opinion be justly described as the cause of the ultimate damage."

B It seems to me that, applying these words to this case, it cannot be said that the failure of the attempt to mitigate the damage when the vessel was in Lüderitz Bay can justly be described as the cause of the loss of this vessel. I agree that the appeal must be allowed with costs.

C **SANKEY, L.J.**—I agree. The only question which falls for determination in this appeal is whether the plaintiffs, on the facts of the case, have brought themselves within s. 27 of the Norwegian plan of insurance, which reads :

"If the insured object is in a damaged condition at the time when the insurance expires, and the damage comes within the underwriters' responsibility, the risk shall continue for the immediate consequences of such damage until the object, without unnecessary delay, has been repaired or sold."

D No question arises, as there might arise under a clause of this character in certain circumstances, whether there has been any unnecessary delay in repairing her. The vessel was injured by taking the ground somewhat severely, if you look at the general average statement, at Angra Reef when she was making for Lüderitz Bay. Everything was done that could be done to get her to Lüderitz Bay, and when she got there the master immediately communicated with Cape Town, which was about 500 miles distant, and a diver and some four or five men with their equipment arrived and patched the vessel up. Personally, I do not think the question whether the vessel had arrived in a place of safety has very much to do with the case. Personally, I also doubt whether in the circumstances it could be said that the vessel had arrived at a place of safety. The real point for determination is whether the damage which was sustained by the vessel when she took the ground at Angra Reef was the immediate cause of her loss on Possession Island. I think that it was. Fortunately, we have not got to speculate here upon the meaning of the words "proximate cause" or to add anything to the numerous words which have been used to elucidate the meaning of it, such as "efficient" or "effective cause," "real cause," "proximate cause," "direct cause," "decisive cause," "immediate cause," "causa causans," all of which have been used in one or other of the cases to which our attention has been directed. All we have to decide is whether it was the immediate consequence of the damage. I am clearly of opinion that it was.

G I also should like to refer, not because I think the construction of the words is important, but because of the facts, to *Reischer v. Borwick* (1), where LINDLEY, L.J., says ([1894] 2 Q.B. at p. 551) :

H "It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury, i.e., under circumstances which, but for that injury, would not have affected her safety."

Again, DAVEY, L.J., says, in his judgment ([1894] 2 Q.B. at p. 553) :

I "The collision [caused by the ship coming into collision with a snag] made the hole in the condenser, and the broken condenser was a continuing source of risk and danger."

Here, too, I think the damage that was sustained by the tank and in the various parts on the port side to which our attention was directed was a continuous source of danger, and so the damage which she sustained was in fact the immediate cause of the eventual beaching of the vessel.

Appeal allowed.

Solicitors : Waltons & Co.; William A. Crump & Son.

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

GARDNER & CO., LTD. v. CONE AND ANOTHER

[CHANCERY DIVISION (Maugham, J.), July 13, 17, 1928]

[Reported [1928] Ch. 955; 97 L.J.Ch. 491; 140 L.T. 72]

Landlord and Tenant—Lease—Assignment—Covenant not to assign without consent—Landlord's refusal to consent except on payment of "fine"—Wide meaning of "fine"—Benefit to landlords through "free" licensed house becoming "tied" to them—Right of tenant to assign without consent—Proof of definite refusal of landlord to consent except on payment of fine—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 144—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5, c. 36), s. 19 (1).

The word "fine" in s. 144 of the Law of Property Act, 1925, must be given a wide meaning, so as to include, for instance, the benefit conferred on the lessors by a stipulation that their consent to an assignment of the lease under which a "free" licensed house was held should be conditional on the house becoming "tied" to them for malt liquors.

The right of a lessee to assign without consent where the lessor has refused to give his consent except on receipt of a fine can only exist when there has been something in the nature of a definite refusal by the lessor to give his unqualified consent, i.e., where the court is satisfied that he is merely asking for a benefit as a condition of granting a licence which he would not otherwise have refused.

Statute—Retrospective operation—Legalisation of breach of contract committed before statute in operation.

"Retrospective," used with reference to a statute, may mean that the statute affects contracts existing at the date when it comes into operation. A statute may be more properly described as retrospective because it applies to transactions completed, or to rights and remedies accrued, before it came into force. It may apply, again, to such matters as procedure and evidence. But, although a statute may affect an existing contract, it cannot have the effect of making lawful *ex post facto* something which constituted a breach of that contract when it was done. A fortiori is this so when an action for the breach has been committed before the Act came into operation.

Notes. Referred to: *Ward v. British Oak Insurance Co.*, [1932] 1 K.B. 392.

As to covenants against assignment and underletting, see 23 HALSBURY'S LAWS (3rd Edn.) 629 et seq.; and for cases see 31 DIGEST (Repl.) 408 et seq. For retrospective effect of statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 513 et seq.; and for cases see 42 DIGEST 693 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427; and for Landlord and Tenant Act, 1927, see *ibid.*, vol. 13, 883.

Cases referred to:

- (1) *Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214; 77 L.J.Ch. 517; 98 L.T. 712; 72 J.P. 259; 24 T.L.R. 490; 52 Sol. Jo. 443; 6 L.G.R. 594; 31 Digest (Repl.) 418, 5474.
- (2) *Quilter v. Mapleson* (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; 47 J.P. 342; 31 W.R. 75, C.A.; 31 Digest (Repl.) 546, 6678.
- (3) *West v. Gwynne*, [1911] 2 Ch. 1; 80 L.J.Ch. 578; 104 L.T. 759; 27 T.L.R. 444; 55 Sol. Jo. 519, C.A.; 31 Digest (Repl.) 428, 5544.
- (4) *Andrew v. Bridgman*, [1908] 1 K.B. 596; 77 L.J.K.B. 272; 98 L.T. 656; 52 Sol. Jo. 148, C.A.; 31 Digest 428, 5543.
- (5) *Gardner v. Lucas* (1878), 3 App. Cas. 582, H.L.; 42 Digest 697, 1139.
- (6) *Lauri v. Renad*, [1892] 3 Ch. 402; 61 L.J.Ch. 580; 67 L.T. 275; 40 W.R. 678; 8 T.L.R. 637; 36 Sol. Jo. 572, C.A.; 42 Digest 696, 1116.
- (7) *Hitchcock v. Way* (1837), 6 Ad. & El. 943; 2 Nev. & P.K.B. 72; Will. Woll. & Dav. 491; 6 L.J.K.B. 215; 112 E.R. 360; 42 Digest 706, 1235.

- A (8) *Moon v. Durden* (1848), 2 Exch. 22; 12 J.P.Jo. 164; 154 E.R. 389; sub nom. *Moore v. Durden*, 12 Jur. 138; 42 Digest 695, 1102.
- (9) *Re Cosh's Contract*, [1897] 1 Ch. 9; 66 L.J.Ch. 28; 75 L.T. 365; 45 W.R. 117; 41 Sol. Jo. 64, C.A.; 31 Digest (Repl.) 427, 5537.

B **Action** by the plaintiffs, brewers and landlords, for possession of a fully licensed "free" public-house known as the Hotel de Paris, Dover, demised by an underlease, and consequential relief.

The claim was founded on an alleged breach of a covenant against assignment. The defendants, Joseph Cone, the assignee of the underlease, and Thomas Worsdell, the tenant under the underlease, by their defence set up that Worsdell was entitled to make the assignment in question, and they counter-claimed, in the alternative, for relief against a forfeiture under s. 146 of the Law of Property Act, 1925. The underlease was dated Mar. 21, 1919, and was made between one Norman, the lessor, and the defendant Worsdell, and was a demise of the public-house in question from Mar. 25, 1919, for the term of twenty-one years, subject to a rent of £125. In the underlease there was contained a covenant by the lessee for himself and his assignees with the lessor that he would not during the term sell, assign, demise or make over the possession of the premises or any part thereof for all or any part of the term without the consent of the lessor, and there was the usual provision for re-entry in case of breach or non-performance of the agreement. By an assignment dated Jan. 7, 1925, made between Norman, the original lessor, and the plaintiffs, Norman assigned the reversion to the plaintiffs for all the residue of the term for which the premises in question were held under the head lease. Notice of the assignment was given to the defendant Worsdell, and as from then he paid his rent to the plaintiffs. On May 3, 1927, a firm of surveyors and valuers, C. H. Phillips & Son, of Canterbury, wrote to the plaintiffs and offered them what they called "a free lease" expiring in 1940, being the underlease at that time held by Worsdell at a price of £2,500. This offer was declined. Negotiations then took place on a proposal by Messrs. Phillips that the plaintiffs would agree to Worsdell assigning the underlease if the house were "tied" to them for malt liquors, but the plaintiffs were not willing to deal with the matter on that footing, and his Lordship found it had not been established that the plaintiffs definitely refused to give a licence except upon the condition of the payment to them of a fine or a sum of money or concession in the nature of a fine. On July 22, 1927, they wrote to Messrs. Phillips stating that, having carefully considered the matter, they had decided that they could not give their licence to assign the underlease. On Sept. 22, 1927, Worsdell's solicitors wrote to the plaintiffs stating that Worsdell felt justified in assigning to Cone as he considered that the consent to the assignment was being improperly withheld. In fact, he did assign the underlease to Cone. The writ in the present action was issued on Nov. 14, 1927, and some five weeks afterwards the Landlord and Tenant Act, 1927, received the Royal Assent. The Act came into operation on Mar. 25, 1928. It was admitted at the hearing that Cone's respectability and responsibility were not in question, nor his suitability to hold a licence. The reason given for refusing the licence to assign was that the plaintiffs had formed the opinion that the sum, £2,000, which was being asked from Cone was far more than the lease was worth. Worsdell had paid nothing for the lease when he went in, and the plaintiffs thought that, if Cone was made to pay £2,000 or more for an assignment of the lease, he would be crippled with regard to his finances and his capacity to carry on in a satisfactory way.

Sir T. Hughes, K.C., and Wilfrid Hunt, for the plaintiffs, referred to *Metropolitan Water Board v. Solomon* (1).

Alexander Grant, K.C., and J. G. Joseph, for the defendants, referred to *Quilter v. Mapleson* (2), *West v. Gwynne* (3), and *Andrew v. Bridgman* (4).

Sir T. Hughes, K.C., in reply, referred to *Gardner v. Lucas* (5), *Lauri v. Renad* (6), *Hitchcock v. Way* (7), *Moon v. Durden* (8), and *Re Cosh's Contract* (9).

MAUGHAM, J., stated the facts and continued: I think that logically the way to deal with this case is to consider whether there was a breach of contract at the date when the assignment was executed by Worsdell and Cone. I have not seen the assignment, and I do not know the date of it, but I know from the evidence that the public-house licence was transferred on Aug. 12, 1927, and presumably the assignment of the underlease took place a short time before. The underlease contained a provision against the assignment, underletting, or parting with possession, but that, of course, has to be read in conjunction with s. 144 of the Law of Property Act, 1925, which replaces s. 3 of the Conveyancing Act, 1892, and is in these terms:

"In all leases containing a covenant, condition, or an agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent."

I have, therefore, to construe the existing lease for the purpose of this case as if it contained a proviso to that effect. There is a definition clause in s. 205 (1) of the Act of 1925, cl. xxiii, in which "fine" is expressed to be a word which includes "a premium or foregift and any payment, consideration, or benefit in the nature of a fine, premium, or foregift." On the whole, though with some little doubt, I think the view taken by the courts in cases of this kind justifies me in coming to the conclusion that a wide meaning should be given to the word "fine," and that in this case it includes the benefit conferred by a stipulation for the giving of a tie in the case of a public-house. But I do not, having regard to my finding of fact, come to the conclusion that the conduct of the plaintiffs was such as to enable the defendants to say that there has been a refusal by the plaintiffs to consent to the assignment, except upon terms of payment of the fine, including in that term for the present purpose, the giving of the tie with regard to the public-house. It is true that in *West v. Gwynne* (3) the Court of Appeal, following a previous decision of LORD COZENS-HARDY, M.R., approving the decision of JOYCE, J., definitely came to the conclusion that the refusal by the lessor to give his consent to an assignment, except upon payment of a fine, relieved the lessee from the necessity of obtaining the lessor's consent, and enabled him to ignore the restriction on assignment contained in the lease, but, bearing the decision in mind, and doing the best I can to see how far s. 144 of the Act of 1925 justifies the court in coming to the conclusion that in a particular case the assignment may be made without consent, my conclusion is that—under the law as it stood till quite recently—the right to assign without consent in such a case is a right which can only exist when there has been something in the nature of a definite refusal by the lessor to give his consent except on payment of a fine, that is, where the court can be satisfied that he is merely asking for money as a condition of granting a licence which he otherwise would not have refused. Accordingly, I hold that there was, at the date when the assignment without licence was executed in this case, a breach of the covenant in the lease which justified, or, subject to the point I am next going to mention, would have justified, the plaintiffs in recovering possession by proper proceedings.

I have now to deal with the important point which has been argued as to the effect of s. 19 of the Landlord and Tenant Act, 1927. By sub-s. (1) of that section it is provided that:

"In all leases whether made before or after the commencement of this Act containing a covenant, condition, or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof, without licence or consent, such covenant, condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be, subject

A —(a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent."

B It is argued on behalf of the defendants in the present case that that provision, being clearly retrospective to some extent, ought to be made to apply *ex post facto*, so that, although there was at the date of the assignment by Worsdell a breach of covenant, I should now regard the underlease as though this proviso had been inserted at the time, and that I should then come to the conclusion that the consent was unreasonably withheld by the landlord, with the result that the defendant should be taken as having been entitled to disregard the action of the plaintiffs, and to assign the property without their consent.

C It seems to me that the word "retrospective" is used in several different senses, and that this leads to a good deal of confusion. An Act may be called retrospective because it affects existing contracts as from the date of its coming into operation, and this section is an instance of that. It may be more properly described as retrospective because it applies to actual transactions which have been completed, or to rights and remedies which have already accrued; or it may apply, again, to such matters as procedure and evidence; in each of those matters retrospective legislation has a different effect. As I have already said, it is clear that this Act is, in a loose sense, retrospective so far as it alters existing contracts, because, for instance, as from the date of the Act receiving the Royal Assent there is no doubt that I have to read the underlease as containing the proviso in sub-s. (1) (a) of s. 19. On the other hand, bearing in mind the principles applicable for the question of the construction of statutes, I have come to the conclusion that it is impossible for me to hold that that section has the effect of making something which was a breach of contract at the date when it was done a lawful act *ex post facto*. I do not think the principle can be stated more shortly or more simply than it was by LINDLEY, L.J., in *Lauri v. Renad* (6). He says this ([1892] 2 Ch. at p. 420):

F "It certainly requires very clear and unmistakable language in a subsequent Act of Parliament to revive or re-create an expired right. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

G It is that second and subordinate rule that I think applies here. It is clear, as I have said, with regard to altering an existing contract, that the section has this operation. It does not necessarily follow that it has, and I hold that it ought not to be construed as having, the effect of making the section apply to a breach, or to affect the consequences of a breach which had taken place before the Act received the Royal Assent. It would be singular if it had, because it is apparent that the landlord, who is the lessor under a lease which contains a positive provision against assignment, was not bound before the Act to consider at all whether he had a duty to give his licence or to consent to the assignment. When the plaintiffs refused their assent to the proposed assignment to Cone, all they were bound to consider was whether they wanted to have the assignment or not, and it would have been very hard on them if they were to be treated now as having acted unreasonably, because they did not bear in mind the provisions of a statute which was not then on the Statute Book. In my judgment, the section cannot be deemed to apply or to extend to breaches which have already been committed; *a fortiori* I think in a case where, as here, an action had already been commenced based upon the breach in question before the statute received the Royal Assent. I come to the conclusion, therefore, that the section is not retrospective so far as affecting a breach of contract which had taken place before the Act came into force; and the only matter that now remains is the matter of relief.

On the whole, I have no hesitation in saying that, if the matter of discretion is invoked, the court ought to grant relief, and in fact the plaintiffs' counsel did not oppose the granting of relief under s. 146 (2), of the Law of Property Act, 1925. I have to have regard to the proceedings and the conduct of the parties. I do not think on the whole that the plaintiffs were in any way wrong. I think they were entitled to object to the assignment when they did, and were entitled to bring this action. On the other hand, I think Cone, who is the person who has to apply to the court for relief as being the present lessee, has been misled in the matter. I do not regard his conduct as possessing any elements of impropriety, except that, perhaps, he took a risk in a matter in which he has been found to be wrong. I think that the proper order is to grant relief on the terms of the payment of the costs of the action by the defendants. The question has been raised whether the costs should be party and party, or solicitor and client costs. I think in the circumstances of the case I am justified in saying that the costs shall be solicitor and client costs of the action, but at the same time I shall not make any other terms with regard to the expenses, compensation or otherwise, which I am entitled to grant under sub-s. (2) of s. 146. I should add that I think it is reasonable that the landlord should have a copy of the assignment and a copy of it must be given to the landlord.

Solicitors: *Kingsford, Dorman & Co.*, for *Kingsford, Arrowsmith & Wightwick*, Canterbury; *Mowll & Mowll*, for *Mowll & Mowll*, Dover.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

N. v. N.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), February 9, 1928]

[Reported 138 L.T. 693; 44 T.L.R. 324; 72 Sol. Jo. 156]

Divorce—Maintenance of wife—Amount—Husband's ability to pay—Settlement on second wife—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190 (2).

A husband, who had been divorced, by an ante-nuptial settlement settled on his second wife property which included the matrimonial home and the chattels therein, the major part of his capital, and some two-thirds of his earned income. After the decree absolute had been pronounced, when the husband's income was some £1,500, his former wife had obtained an order for permanent maintenance of £400 per annum. Subsequently, when the husband's income had increased to some £4,500, she applied under s. 190 (2) (b) of the Supreme Court of Judicature (Consolidation) Act, 1925, that the amount payable under the maintenance order should be increased. The registrar increased the order for permanent maintenance from £400 to £1,200 a year. It was contended on a summons taken out by the husband to review that order that the husband's means had not increased, as his free income was only about £1,500, the balance of £3,000 being settled upon his second wife.

Held: it being conceded that the settlement on the second wife was valid, the realities of the matter and the husband's ability to have provided for his wife must be regarded and there must be taken into consideration, not only what moneys he had, but also what moneys he would have had if he had not made the settlement on the second wife; the fact that he was sharing with her

A the amenities of the second home must also be taken into consideration; but the practice of the ecclesiastical courts by which a wife who had obtained a divorce a mensa et thoro was granted maintenance amounting to about a third of the husband's income should not be followed, and a proper order would be that the husband should pay maintenance for the wife at the rate of £750 a year.

B **Notes.** Section 190 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, has been replaced by s. 19 (8) of the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388). See also s. 28 of the Act of 1950.

Considered: *J. v. J.*, [1955] 2 All E.R. 617. Referred to: *Howard v. Howard*, [1945] 1 All E.R. 91. Applied: *Donaldson v. Donaldson*, [1958] 2 All E.R. 660.

C As to permanent maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 430 et seq.; and for cases see 27 DIGEST (Repl.) 611 et seq.

Summons, adjourned into court, to review an order of the registrar increasing the amount of permanent maintenance ordered to be paid by the respondent husband to his former wife from £400 per annum to £1,200 per annum, in each case less income tax, and increasing from £100 to £150 per annum free of income tax

D a sum payable in respect of the only child of the former marriage.
The facts appear in the judgment.

Noel Middleton, H. R. Barker, and E. Riviere for the husband.
Vaisey, K.C., and C. L. Beddington for the wife.

By Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (2):

E "... the court may, if it thinks fit, by order . . . direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable. Provided that—(a) If the husband after any such order has been made becomes from any cause unable to make the payments the court may discharge or modify the order or temporarily suspend the order as to the whole or any

F part of the money ordered to be paid, and subsequently revive it wholly or in part as the court thinks fit; and (b) where the court has made any such order as is mentioned in this subsection, and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order."

G **LORD MERRIVALE, P.**—This case is one in some respects of first impression, but it involves those difficult considerations which constantly arise in applying principles derived from the ecclesiastical law as it was administered in the ecclesiastical courts before the passing of the Matrimonial Causes Act, 1857, to the state of things created by that Act—the introduction of the power of dissolution of marriage by order of the court and the changes subsequently made in the relations of man and wife, and in the relations of parties separated and parties divorced. A material consideration here, which must be borne in mind, is that the marital relations between the wife and the husband have been brought to an end. The petitioner is not a wife who has obtained a decree of separation, divorce a mensa et thoro, as it was called in the ecclesiastical courts, and who is still the wife of the man against whom she has obtained a decree. There is no marriage

I tie between these two parties and consequently the obligations as between the parties which existed under the earlier state of the law and which were enforced by decrees of the ecclesiastical courts, are not the same here. I have repeatedly called attention to the fact—and I now do so again, as I regard it of importance, and in this case material—that, in considering what is the statutory right of a petitioner, whose marriage has been dissolved, to maintenance out of the funds of her former husband, the tribunal, making the award, will be misled if they suppose that these facts are the same as those which gave rise to the practice and the inveterate practice in the ecclesiastical courts, whereby a wife who had obtained

a divorce a mensa et thoro was entitled under normal circumstances to an award of something like a third of her husband's available means. A

In this case the petitioner and the respondent had been many years married. There is a child of the marriage who is said to be now in his eighteenth year. The decree of dissolution of marriage was made in 1926, rather less than two years ago, on the ground of the husband's adultery. There had been an order for alimony pendente lite. That is immaterial here. It was founded upon the best view that could be had of the means of the husband, and of the necessities of the wife for her maintenance pending the suit. I put that out of the case. While the cause subsisted and down to the time of the decree absolute the wife was entitled to maintenance upon the terms of that order for alimony pendente lite. In April, 1926, the decree was made absolute. In 1925, three or four weeks before the date of the decree nisi in the case, the husband's position in life underwent a substantial change. He had been the employee of a firm of coal brokers, who had paid him a substantial salary and commission. At that period, three or four weeks, as I say, before the date of the decree nisi, the proprietor in the business, Mr. Fletcher, agreed with the husband to form a joint stock company in which the proprietor of the business should be interested to the extent of two-thirds of the capital of £1,800, issued out of a total of £2,000 nominal. The husband was to be the owner of one-third—£600—of the stock issued. Mr. Fletcher also made an arrangement with the husband whereby he gave him credit for the sum which was to provide him with what was virtually a one-third share in this business. That change in the husband's circumstances has proved highly beneficial to him. As a director he received at once a substantial income—to the amount of £1,000 a year in director's fees, and in the first year's working the business proved to be prosperous, and, in addition to the £1,000, he became entitled in respect of the share which he had obtained on credit in the business to dividends amounting to £612. The £1,000 at any rate was subject to income tax, and as to the £600 odd there is some question, but he was earning that sum in the year 1925-6. It might be said that at that time he had an assured income of probably not less than £1,500 a year available to him. In November, 1926, before the results of the year's working had become known, but when the conditions in the company were ascertained, and it was apparent that this was a company which would do well, the wife applied for an order under s. 190 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, for permanent maintenance. It was not an application for an order for security under the provisions of s. 190 (1). On this application being made, the learned registrar made an order for maintenance at the rate of £400 a year less income tax, and for an allowance of £100 a year free of income tax for the maintenance of the one child of the marriage, then a boy of about sixteen years of age. In the year 1926-7 the company had a very prosperous year. They divided a large sum in dividends, and they made substantial investments, and the result of their trading was that the husband's share in the business—that which had been his purchased share in the business together with his earnings as a director—represented an income of something like £4,500 a year. These are not accurate figures; they are round figures which have been used in the argument. If he had the same proprietary rights in the business in 1926-7 which he had had at the foundation of the company, he would have been a man with an income of £4,500 for that year, but in addition he would have had an interest to the extent of a third in the capital which he and his co-director had carried to reserve, and which was of a gross value of something like £12,000. So that, if the property remained his, he had earnings which appeared at a face value of something like £4,500 and a proprietary interest in the reserve of a third, that is to say a capital of £4,000. The wife, having become aware of the good year which the company had had in the year 1926-7, proceeded under s. 190 (2) (b) of the Supreme Court of Judicature (Consolidation) Act, 1925, to apply that the amount payable under her maintenance order should be increased on the ground that the means of the husband had increased. She said that the prosperous conditions to which I have

A referred were a ground for an increase of the order for her maintenance proportionate to the increase of her husband's share due to the prosperity of the company.

When the facts came to be examined a curious state of things was brought to light. It was known between the parties that immediately after the decree absolute had been made, the husband had re-married, and it is known now that, upon B that marriage, by an ante-nuptial settlement, he had apparently as far as was practicable put under the absolute control of the lady who became his wife everything he had which was disposable. He had also covenanted to assign to the second wife policies of insurance and other interests which he might thereafter acquire. Looking at the settlement it is not uncharitable to suppose that the C author of it realised what the situation was as between the husband and the wife at whose suit he had been divorced, and that it was intended by that settlement to secure him from claims of the petitioner in this suit in respect of a prospective improvement in his position of life. I was not surprised when it was pointed out that the settlement is of a singular kind, and that the object in view seemed to be that the husband, though at some risk to himself, should continue to enjoy all the advantages of any wealth he might acquire, but that, by being at the absolute D disposal of his intended wife it should be safe from any attack on the part of his previous wife. That settlement was made, and it is produced and relied upon. It is said on the part of the husband that the settlement must either be impeached in point of law and got rid of, or it must be treated as effective. There is an act which, in law, has had effectual consequences. It is said that if the settlement is to be got rid of, that must be done in the ordinary course of law. The husband E and his present wife, the lady in whose favour the settlement was made, must be brought into court, and the settlement must be tested upon such evidence as could then be procured. If it is said to constitute a secret trust, or to be a fraudulent transaction, or if it is said that the transaction is against public policy, then let that be declared in a suit in which the proper parties are before the court. That has not been done, and it is conceded that the settlement must be taken, at any F rate for the purposes of this inquiry, as a valid settlement, but it is said that, although there is a settlement, it must be examined and it must be seen whether in truth the means the husband had before he disposed of them in the way in which he purports to have done are not still his means. The contest has waged chiefly around those provisions of the settlement which vest in the husband as G trustee for the wife his proprietary interest in his shares in the joint stock company, or five-sixths of them. It is said on the husband's part that, if that stands, the dividends paid in respect of those shares are dividends belonging to the wife, the husband being merely trustee of those dividends for the wife. That is so. I am not going to pursue the matter with regard to the furniture in possession, the furniture hereafter to be acquired, and the insurance policy of £500 subsisting, and any insurance policies in which the husband might hereafter be interested. H These matters were used chiefly as ammunition for an attack upon the settlement—not, as it was said, to cause it to be set aside, but to lead the court to take the view that the substantial interest in the whole of the assets affected by it remained in the husband. The settlement is an effectual settlement. The husband's receipts from 500 of the shares which he held in the joint stock concern were effectually transferred in equity to the wife; they were her property. The I chattels in the house were held by trustees for her, and the other interests which were affected were held in trust for her.

There being thus an effectual transfer of the husband's property to the extent to which it was transferred by the settlement, two questions have to be faced upon the wife's application. First of all, has there been an increase of the income of the husband since the award of maintenance of £400 a year was made? And if there has been such an increase, how ought it to be reflected in an increased award? To what extent has the court jurisdiction to increase the award by reason of the improved position of the husband in the state of facts brought about by his

own actions? It was contended by counsel for the husband that there was not in truth an increase of the husband's means, meaning thereby "faculties" or ability, and that it was contrary to the principles laid down in the authorities which bind a judge sitting here to hold that there had been an increase in his means. It was said that by effectual legal process he had divested himself of funds which would otherwise have been his, and the court must take that into account. It is true that he has effectually divested himself, at any rate for the time being, of his control over assets and his interest in assets, which would have been his. What effect does that have? The ecclesiastical courts showed a degree of practical wisdom which well justified their existence, and which anybody who considers their proceedings will attribute, perhaps, to the fact that those who conducted what were called ecclesiastical proceedings were very learned lawyers skilled in the civil law. They were not misled by appearances. When they considered what maintenance, in those days, for the purpose of their decree (I would again refer to the remarks at the commencement of this judgment), a husband should provide for a wife from whom he was separated by a decree of the court, they looked at the realities. It is quite true that if the husband became voluntarily a pauper, or if he entered into religious orders in another church and had divested himself of his means, it might have been said that he had got nothing. So far as I am aware there is not a case in which a judge in the ecclesiastical courts had to deal with that kind of respondent. They were more worldly minded. But this emerges. The court not only ascertained what moneys the husband had, but what moneys he could have had if he liked, and the term "faculties" describes his capacity and ability to provide maintenance. The principle went to this extent, that if a man were living at ease upon an income which was given him voluntarily by other parties, that income could be taken into account. It went further than that. If a man were living in idleness and chose to refuse to earn money, his "faculties" were not treated as non-existent for that reason. The court considered, having regard to the substance of the matter, what was the ability of the husband to provide for the wife, and it made its decree while the relation subsisted upon a footing which came to be almost stereotyped, that a wife separated from her husband by decree was entitled *prima facie* to about a third of his income in normal cases.

I have to consider this case, bearing that in mind, but bearing in mind, too, that I am not here administering ecclesiastical law. I am here applying the Matrimonial Causes Act, 1857, as it is reproduced in the Supreme Court of Judicature (Consolidation) Act, 1925, and I am dealing with the case of a woman who has procured a dissolution of her marriage. I conceive that I must take into consideration the position in which the parties were, and the position in which the wife was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation; but I have no obligations cast upon me to ascertain what resources the husband at present has, and what mathematical proportion of them would have been assigned by an ecclesiastical court to a wife separated by a decree *a mensa et thoro*. I have no such task. What I have to ascertain is: The wife applying for an order for payment of moneys periodically for her maintenance and support, has there been an increase of the husband's means since the prior order, and what, having regard to her fortune and to his ability, and the conduct of the parties, the court deems reasonable by way of an increased order? That is the problem to which I have to apply my mind, and I put out of the case all the considerations which arise by reason of the fact that in the ecclesiastical courts a wife separated by decree *a mensa et thoro* received normally one-third of the amount of her husband's income. When I examine the order which is sought to be maintained on the part of the wife here, I see that it is an order which proceeds on the footing of the old ecclesiastical practice, and upon the footing also that it may be expected that the income attributed to the husband and which he could have had, if he had not made the settlement in question in 1926-7, is to be taken into account in determining his ability to pay.

A The result is that, the income which he could have had, being an income which is spoken of as about £4,500, the amount which has been awarded for the maintenance of the wife, is very nearly as great as the net amount—it is something like three-quarters or four-fifths—of the moneys which in fact come to the husband out of the joint stock concern. It will be seen when the assessment is examined that it proceeds upon the basis that the measure attributable is that which was applied in the ecclesiastical courts as between a husband and a wife who remained husband and wife. As I have said, I put that aside. It is seen, too, that the husband's means are treated as being the whole value of his earnings, as well as the interest which he originally had in the joint stock concern. But it had ceased to be so. He had his earnings, £1,000 a year, and he retained 100 shares, having one-sixth of the dividend. The order also proceeds on the footing that this

C exceptional year of 1926–7 in which, as is very reasonably pointed out in the husband's evidence, people in his business were sure, or at least very likely, to get a large excess of profit by reason of the peculiar circumstances of that year, is to be taken as its basis, and it has been left to the husband to get it reduced hereafter, if he can, by showing that his means have decreased.

It seems to me that those are errors that I must avoid in considering here what

D ought to be done. What is it to which the wife here is entitled? Has she shown there was an increase of the means of her husband? In my opinion, she has. He had in that year 1926–7 an income which was not very far short of the income which came to him in the year 1925–6. He had an income of something like £1,500 a year. In the previous year it had been in that region—perhaps £1,600. He had made a settlement on his second wife, determinable, as has been pointed

E out, by agreement between them, whereby the other £3,000 which he earned—or something like that sum—was placed at the disposal of that wife. The matrimonial home was also vested in her, and the evidence is that he was sharing the advantages intended to be secured and, in fact, secured by the settlement. There was provision for a joint establishment upon the footing of an income of £3,000 a year, or thereabouts, and the husband, as of right, was enjoying the establishment so provided. It is said that I ought to put that out of the case, and that that is not an increase of the means or the abilities of the husband. It is quite true that it is not an increase of the money which comes to his bank account, but it provides for a large part of the expenses which fall upon him for livelihood and for maintaining his position in life, and it leaves free the sum which I called £1,500 a year to be dealt with by the court, having regard to the increase in his means. Here

G is a husband who has the substantial advantage of his home provided for him and secured by the ante-nuptial settlement into which he has entered after many vicissitudes, and who in addition has moneys coming to him to the extent, it is said, of £1,500 a year.

The question is, in view of that increase in his abilities, and bearing in mind that these people were divorced before that improvement occurred, what ought to be done? The learned registrar, as I have said, proceeded on the footing that it was a case for disregarding the settlement, and for an award upon the footing of the rule administered by the authorities in the ecclesiastical courts. I put that aside. The award in respect of the child will stand. I am happy to say that it has been agreed that the award of £150 a year in respect of this child shall be maintained. The question comes to be whether, in view of this increased means

I of the husband, something ought to be added to the £400 a year out of the free moneys which are at the husband's disposal, and whether something ought to be added notwithstanding that the parties have been divorced. I have come to the conclusion that something ought to be added. Here is the income I have mentioned. Here is an interest in a great business. Here is great business capacity. All of these are advantages to which the first wife during the marriage was legitimately entitled to look forward. They are not accidental accessions of fortune. They are benefits which have arisen during the course of years, and by the development of the husband's "faculties" and position he has secured the sum,

which has been spoken of, as available. What I propose to do, dealing with this matter on the principles I have indicated, is to direct that the permanent maintenance to be provided for the wife by the husband shall be £750 less income tax, and the maintenance to be provided for the son of the marriage to be, by consent, £150 a year, free of income tax. A

Order accordingly. B

Solicitors: *Indermaur & Brown; Waterhouse & Co.*

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

G. W. LEGGOTT & SON, LTD. v. C. H. NORMANTON & SON, LTD. C

[KING'S BENCH DIVISION (Swift and Acton, JJ.), November 29, 1928] D

[Reported 98 L.J.K.B. 145; 140 L.T. 224; 45 T.L.R. 155]

Bailment—Negligence—Liability of bailee for act of servant—Servant in bailee's temporary employment—Permanent servant of bailor.

Where a servant is hired from his permanent employer by another person for a particular temporary employment, and, while engaged in that temporary employment, he causes damage to the property of his permanent employer, he is to be regarded as the servant of the hirer for the purpose of the temporary employment, so that his permanent employer is entitled to recover from the hirer damages in respect of the damage to his property. E

A. H. Bull & Co. v. West African Shipping Agency and Lighterage Co. (1), [1927] A.C. 686, applied. F

Notes. Referred to: *Willard v. Whiteley, Ltd.*, [1938] 3 All E.R. 779.

As to the responsibility of a bailee for the acts of servants, see 2 HALSBURY'S LAWS (3rd Edn.) 117; and for cases see 34 DIGEST 20 et seq.

Cases referred to:

- (1) *A. H. Bull & Co. v. West African Shipping Agency and Lighterage Co.*, [1927] A.C. 686; 96 L.J.P.C. 127; 137 L.T. 498; 43 T.L.R. 548; 17 Asp.M.L.C. 292, P.C.; Digest Supp. G
- (2) *Société Maritime Française v. Shanghai Dock and Engineering Co., Ltd.*, [1921] 2 A.C. 417, n; 90 L.J.P.C. 85; 125 L.T. 134; 37 T.L.R. 379, P.C.; 34 Digest 27, 55. H
- (3) *Donovan v. Laing, Wharton and Down Construction Syndicate*, [1893] 1 Q.B. 629; 63 L.J.Q.B. 25; 68 L.T. 512; 57 J.P. 583; 41 W.R. 455; 9 T.L.R. 313; 37 Sol. Jo. 324; 4 R. 317, C.A.; 34 Digest 26, 49.

Appeal from Manchester County Court.

The plaintiffs, G. W. Leggott & Son, Ltd., were owners of motor vehicles and haulage contractors; the defendants, C. H. Normanton & Son, Ltd., who were builders and contractors, were in the habit of hiring from time to time the plaintiffs' vehicles. On such occasions with the vehicle was sent a man, who was a general servant of the plaintiffs, to drive it, but upon his arrival at the defendants' premises the driver was, throughout the period of hire, under the order of the defendants' representatives. On Nov. 20, 1927, one, Gent, and an assistant were sent by the plaintiffs with an engine and trailer to the defendants. Gent was instructed by the defendants to carry a cement-mixer belonging to the defendants on the trailer to a place some five or six miles distant. In the course of the journey, I

A owing (as the county court judge found) to the negligence of Gent, the engine and trailer became stuck in a tunnel under an aqueduct over the road. The plaintiffs incurred £4 10s. 4d. expenses owing to their vehicle being so stuck, and they claimed this amount from the defendants. The defendants counter-claimed £37 5s. 5d. for damage to their cement-mixer. The county court judge found as facts that the accident had been occasioned by the negligence of the driver and his assistant, and that they were at the time, for the particular purpose on which they were engaged, the servants of the defendants. He held that such negligence on their part ought to be treated in law as the negligence of the defendants, and gave judgment for the plaintiffs on the claim and counter-claim. The defendants appealed.

C *R. P. Croom-Johnson, K.C.*, and *P. Butlin* for the defendants.
Cyril Atkinson, K.C., and *H. Rhodes* for the plaintiffs.

SWIFT, J.—This is an appeal from a judgment of His Honour Judge LEIGH in the county court of Lancashire holden at Manchester. The case was one in which the plaintiffs sued for £49 14s. 7d., being the balance due for the hire of motor and steam-wagons and trailers and for work done for the defendants at their request. D On that claim the only amount on which there was any dispute was an item of £4 10s. 4d., which was alleged to be due to the plaintiffs as expenses incurred by them on Nov. 20, 1927, owing to a motor-wagon and trailer, hired out by them to the defendants, becoming stuck in a tunnel at Barton. The defendants counter-claimed a sum of £37 5s. 5d. for injuries to a cement-mixer which had been travelling on the trailer when it became stuck.

E The plaintiffs are owners of motor vehicles such as this wagon and trailer and are described as haulage contractors. The defendants are builders and contractors. From time to time they hire from the plaintiffs motor vehicles, and with the vehicles are sent men to drive them. When the desired motor vehicle arrives at the defendants' premises in the early morning, the driver receives instructions from the defendants' servants in regard to what he is to do throughout the day. F He receives a paper headed "transport instructions," stating what orders he is to carry out, where he is to go to pick up loads, where he is to carry them and put them down, and so forth. Throughout the day he remains under the orders of the defendants' representatives, and, if he does not do what they tell him, they are at liberty to send him back to his original employers, the plaintiffs. On Nov. 20, 1927, G a driver of the name of Gent was in charge of a wagon and a trailer sent by the plaintiffs for the purpose of assisting the defendants. Late in the afternoon he was instructed to take a cement-mixer to a place called Barton, some five or six miles distant. He was instructed or advised that he should take a particular route. Whether he went by that particular route does not matter, but in any event he went by a route which brought him to a tunnel under an aqueduct which was above the road, and instead of first ascertaining whether his vehicle would go through the tunnel, he drove on and got jammed in the tunnel, with the result that damage H was caused to the cement-mixer, and also to the trailer. The county court judge came to the conclusion that the damage was caused by the negligence of the driver of the vehicle and his assistant. Speaking for myself, I do not think that there can be the slightest doubt about it; if the question of fact were a question for me to decide, which it is not, I should have said that the county court judge was perfectly I right in coming to the conclusion that the damage was caused by the negligence of Gent; but, sitting here as one of an appellate tribunal, it is enough to say that there was ample evidence on which the county court judge could come to the conclusion to which he did.

The question then arises who is responsible in law for that negligence on the part of Gent and his assistant in damaging the cement-mixer and in causing delay in the user of the wagon and, consequently, loss both to the plaintiffs and the defendants. The plaintiffs claimed £4 10s. 4d. on the ground that, owing to the negligence of Gent, they were put to that expense through their wagon becoming stuck

in the tunnel. The defendants counter-claimed £37 5s. 5d., the amount of the damage to the cement-mixer. The county court judge had to decide between these two parties who was responsible in law for the negligence of Gent. He looked at the contract, and came to the conclusion as a matter of fact upon the evidence that

"while these two men who were in charge of the wagon and trailer remain for general purposes the general servants of the plaintiffs, yet the nature of the contract was such that for the particular purpose they had in hand they became the servants of the defendants, at all events for the day from the hour of 8 o'clock or thereabouts in the morning when they reported until they had finished the work that was under their care and that they were directed to do during the day. It may be that for some occurrence during the day they might still act in such a manner as to render their general employers, the plaintiffs, liable, but I am satisfied, upon a number of authorities that have been cited before me and upon the facts as given in evidence, that for the purposes of this particular day and at the moment of this particular accident, the servants were the servants of the defendants in such a way that any negligent conduct of theirs in the carrying out of orders given by the defendants' representatives ought to be treated in law as the negligence of the defendants themselves."

Again, it is not necessary to say whether on the evidence I do or do not agree with the county court judge. The only question for me is whether there was any evidence on which he could come to the conclusion of fact that at the time of this accident Gent and his assistant were in truth the servants of the defendants. Had I been trying the case as a judge of fact, I should unhesitatingly have come to that conclusion. There was, not merely some, but overwhelming evidence that these two men were entirely under the control, in every business sense of the word, of the defendants' representatives.

That raises this interesting point of law. Supposing the man guilty of negligence was at the time the servant of the defendants, are the plaintiffs entitled to recover from the defendants for injuries caused to them by one who was their general servant, but whom they had handed over and let on hire for the particular purpose which he was performing when the accident occurred? We are told by counsel that a case exactly like the present has never arisen before, with the exception of *A. H. Bull & Co. v. West African Shipping Agency and Lighterage Co.* (1). It seems to me, as it seemed to the county court judge, that that case, although it was the first in which the point had ever arisen, exactly covers the case with which we are concerned. There the facts were as follows. The appellants let on hire to the respondents a lighter manned by two native lightermen. The lighter was moored to the respondents' ship in Lagos Harbour, and was used by them during the day in loading the ship. During the night the lightermen negligently left the lighter. The lighter got adrift, and owing to the absence of the lightermen it was carried out to sea, ran ashore, and broke up. It was held that, the lightermen being under the orders and control of the respondents during the night as well as during the actual loading, the respondents were responsible for their negligence and were liable to the appellants in damages. Till the decision in that case, all cases in which liability had been dependent on the question who had control of the servant at the time of the accident were cases in which third parties had brought actions against one or other of the employers. That was the first case in which one master had sued the other and was held to be entitled to recover because of the negligence of his permanent servant while temporarily hired and in the temporary employment of some other person.

That case was, however, not quite the first in which the matter had to be discussed, because in 1921, in a case which also came before the Privy Council, *Société Maritime Française v. Shanghai Dock and Engineering Co., Ltd.* (2), the converse point arose. There the respondent company lent some of their servants to the appellants to assist in repairing the engines in a wooden motor vessel which

A belonged to the appellants. They worked under the orders of the ship's engineer. Lighted candles by his instructions were used, and owing to the alleged negligence of the respondents' servants a fire occurred on the vessel and the appellants brought an action claiming to recover damages from the respondents. It was held that the respondents were not liable as the workers were not under their control, and it made no difference whether they were paid for the men's services or not. That

B was the opposite to this case, for there the servants who had been lent did damage to the person to whom they had been lent; and upon his claiming from the lender, it was held that the lender was not liable because he had parted with the control and responsibility. For these reasons I think that the decision of the county court judge was perfectly right, and that this appeal should be dismissed with costs.

C **ACTON, J.**—I agree. In all cases of this kind, which may arise in an immense variety of circumstances, the question ultimately is a question of fact, the precise nature of which was indicated by BOWEN, L.J., in *Donovan v. Laing, Wharton & Down Construction Syndicate* (3) in the following terms ([1893] 1 Q.B. at p. 633):

D "We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act."

Here the question was: Did the plaintiffs retain the power of control over the driver? and if there was evidence which left it open to the county court judge to find as he did, and if the judge has not misdirected himself in law in any way, it is not possible for this court to interfere with his decision. The conclusion to

E which the county court judge came is to be found in the passage of his judgment which has been already read by SWIFT, J., and which I need not read again. In my opinion, it is quite impossible to say that there was not evidence on which the county court judge could so find, and it is not seriously suggested that he misdirected himself in regard to the law applicable to the problem with which he was faced. With regard to the question whether the consequences in law are affected

F by the subsistence of this relationship that the plaintiffs are in fact the general employers of a negligent workman and that the defendants are his temporary employers, this is, in my opinion, if not absolutely concluded, at any rate concluded for all practical purposes by the decision in *A. H. Bull & Co. v. West African Shipping Agency and Lighterage Co.* (1), to which the county court judge was referred, and on which he based his decision. For these reasons I agree that this

G appeal must be dismissed.

Appeal dismissed.

Solicitors: *Barlow, Lyde & Yates*, for *Jas. Chapman & Co.*, Manchester; *Rochester, Pusey & Co.*, for *T. A. Needham*, Manchester.

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

Re DAWSON'S SETTLED ESTATES

[CHANCERY DIVISION (Clauson, J.), February 9, 1928]

[Reported [1928] Ch. 421; 97 L.J.Ch. 343; 139 L.T. 94]

Settled Land—Trust for sale—Land held in undivided shares vested in possession—Bequest of income of realty to life tenant—Vesting of fee simple in trustee on death of life tenant—Children of testator entitled to rents and profits during joint lives in undivided shares—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 31—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), Sched. I, Part IV, para. 1 (1), (3).

The testator devised and bequeathed his realty and personalty to his trustees and executors, G.H.D. and E.A.D., upon trust that his wife should for life use and enjoy the same and receive the rents and profits thereof, and after her death upon trust for the testator's two daughters in the will named, as to income, rents, and profits in equal shares, and, so soon as both should be married in trust as to the entirety thereof, both capital and income for all his children absolutely. The testator died in 1884. His widow died in 1889. The first trustee died in 1923 and the surviving trustee, E.A.D., in 1927. On a summons to determine who, upon the true construction of the will and in the events which had happened, were entitled to his real estate,

Held: as there were trusts to be performed after the death of the widow it was true to say that the purposes of the trust continued beyond her life, and, therefore, under s. 31 of the Wills Act, 1837, the fee simple of the real estate had vested in the trustees; on Dec. 31, 1925, the surviving trustee had the fee simple vested in her and the two daughters were beneficially entitled to the rents, etc., during their joint lives in undivided shares so long as they remained unmarried; the case was precisely covered by para. 1 (1) of Part IV of Sched. I to the Law of Property Act, 1925, with the result that the land was to be held by the trustees on the statutory trusts defined by s. 35 of the Act.

Per CLAUSON, J. (it having been argued that, the land being settled land and the trustees of the settlement having died, it vested in the Public Trustee under para. 1 (3) (ii) of the schedule): If a case is found to be covered by para. 1 (1), there is no need to go further. The sub-paragraphs which follow para. 1 (1) are intended to provide for cases which are not covered by any preceding sub-paragraph. [The present case falling within para. 1 (1) it was, therefore, unnecessary to consider para. 1 (3).]

Notes. Followed: *Re Barrat, Body v. Barrat*, [1929] 1 Ch. 336. Referred to: *Re Robins, Holland v. Gillam*, ante, p. 360.

As to undivided shares in land, see 27 HALSBURY'S LAWS (2nd Edn.) 629–635, and *ibid.*, vol. 29, 763 et seq; and for cases see 40 DIGEST (Repl.) 858 et seq. For Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326; and for Law of Property Act, 1925, see *ibid.*, vol. 20, 427.

Cases referred to:

- (1) *Blaggrave v. Blaggrave* (1849), 4 Exch. 550; 19 L.J.Ex. 414; 154 E.R. 1332; 43 Digest 731, 1675.
- (2) *Re Myhill, Hull v. Myhill*, [1928] 1 Ch. 100; 97 L.J.Ch. 81; 138 L.T. 486; 72 Sol. Jo. 86; 40 Digest (Repl.) 859, 3337.
- (3) *Re Higgs' and May's Contract*, [1927] 2 Ch. 249; 96 L.J.Ch. 413; 137 L.T. 803; 71 Sol. Jo. 761; 40 Digest (Repl.) 3356.
- (4) *Re Flint, Flint v. Flint*, [1927] 1 Ch. 570; 96 L.J.Ch. 248; 137 L.T. 178; 40 Digest (Repl.) 859, 3339.
- (5) *Re Colyer's Farningham Estate*, [1927] 1 Ch. 677; 96 L.J.Ch. 348; 137 L.T. 413; 71 Sol. Jo. 351; 40 Digest (Repl.) 862, 3354.

A Adjourned Summons.

By his will, dated Nov. 2, 1883, the testator, Robert Dawson, appointed his son and daughter, George Hurst Dawson and Elizabeth Ann Dawson, executors and trustees, and devised and bequeathed to them all his real and personal estate, upon trust that they should permit his wife Elizabeth Ann Dawson and her assigns to use and enjoy the same and to receive the rents, interest, and income of it during the wife's life, the insurance and repair of any buildings forming part of the estate being kept up by his wife and her assigns, and after the death of his said wife, upon trust that the executors and trustees should pay the said rents, interest, and income to or for the benefit of the two daughters of the testator, Elizabeth Ann Dawson and Mary Sandwell Dawson, in equal shares, if both were alive and unmarried at the time, and upon trust, so soon as both his said daughters should be married, as to both capital and income and the whole of his estate, both realty and personalty, absolutely for all the children of the testator in equal shares. The testator died in 1884. In 1889 his widow Elizabeth Ann Dawson died, having been the first tenant for life under his will. Of the six children who survived him John Dawson died in 1894, George Hurst Dawson—a co-executor of the testator's will with the testator's daughter Elizabeth Ann Dawson—in 1923, and Elizabeth Ann Dawson, the surviving executrix, in the latter part of January, 1927. Mary Sandwell Dawson, the other of the two daughters in the will mentioned, took out this summons for the determination of the questions: (i) Who, upon the true construction of the will and in the events which had happened, were the persons entitled to the testator's estate, both capital and income? (ii) Whether, from and after Jan. 1, 1926, the real estate vested under the statutory trusts as defined by s. 35 of the Law of Property Act, 1925, (a) in the daughter Elizabeth Ann Dawson as surviving trustee of the will, under para. 1 (1) of Part IV of Sched. I to that Act, or (b) in her, as surviving trustee of the will, and, therefore, trustee for the purposes of the Settled Land Act, 1925, for the settlement which it created, under para. 1 (3), or in the Public Trustee? On the first question, CLAUSON, J., held that the daughters Elizabeth Ann Dawson and Mary Sandwell Dawson, so long as both were unmarried, were tenants for life in equal shares of the income of the testator's estate, and that the daughter Mary Sandwell Dawson, so long as she remained unmarried, took the whole of the said income as from the date of the death of Elizabeth Ann Dawson, while if Mary Sandwell Dawson married or died all the children of the testator who were alive, and the estates of his children who were deceased at the date of her marriage or death, would be entitled to the whole of the testator's estate in equal shares.

E. M. Winterbotham, for the plaintiff, referred to Part IV of Sched. I to the Law of Property Act, 1925, para. (1), (3); *Blagrove v. Blagrove* (1); *Re Myhill, Hull v. Myhill* (2); *Re Higgs' and May's Contract* (3); *Re Flint, Flint v. Flint* (4); *Re Colyer's Farningham Estate* (5).

Harman for the personal representative of the testator's son, John Dawson.

H *L. F. Mumford* for another of the testator's children.

Christie, for the testator's eldest son and for the personal representative of his deceased son, George Hurst Dawson, submitted that s. 31 of the Wills Act applied.

CLAUSON, J.—I have delivered my judgment upon the question of construction raised by the first part of the summons, and determined the interests of the various parties claiming to be interested in the testator's estate. The effect of my decision is as follows. There is a gift in the will of the real and personal estate to the trustees upon trust, in the first place, to permit the widow to receive the income during her life. Pausing there, as the law stood before the Wills Act, 1837, the effect of that gift standing alone was to vest in the widow an estate in the land at law for her life. After the decease of the testator's widow, there is a trust to pay the income to or for the benefit of his two daughters, Elizabeth and Mary, as tenants in common during their joint lives, and on the marriage or death of either to or for the benefit of the survivor of them, and on the marriage or death of the

survivor, then the trustees are to hold the estate, both capital and income, in trust A
for the testator's children in equal shares. According to the law, apart from any
provision in the Wills Act, as established by the authorities, the widow took a legal
estate in the land for life, and, upon her decease, the trustees took the legal estate
for the duration of the interests of the two daughters Elizabeth and Mary and of
the survivor of them, and after the determination of these interests the legal estate B
would be vested in the testator's children in undivided shares. That being the
position of the testator's estate upon the construction of the disposition contained
in his will, the first point that I have to consider is the effect, if any, upon that
construction of s. 31 of the Wills Act, 1837, a section which has been a puzzle for
several generations of practitioners, and as regards which slight assistance is to be
gained from the reported cases or the text-books. Section 31 provides :

"Where any real estate shall be devised to a trustee, without any express C
limitation of the estate to be taken by such trustee, and the beneficial interest
in such real estate, or in the surplus rents and profits thereof . . . shall be
given to any person for life, but the purposes of the trust may continue beyond
the life of such person, such devise shall be construed to vest in such trustee
the fee simple, or other the old legal estate which the testator had power to D
dispose of by will in such real estate, and not an estate determinable when the
purposes of the trust shall be satisfied."

By the will, the trustees to whom the testator's real estate was devised were to
hold it upon trust to permit his widow to receive the rents thereof for life; conse-
quently, a beneficial interest in the rents of the real estate was given to her for life;
and, although it is true there is no trust continuing beyond the life of the survivor E
of the two daughters, yet, as there are trusts to be performed after the death of the
widow, in that it then became the duty of the trustees to pay the rents to or for
the benefit of the two daughters Elizabeth and Mary during their lives and to the
survivor during her life, it is true to say that the purposes of the trust continued
beyond the life of the widow to whom the first beneficial interest for life was given.
From that it follows that, through the operation of s. 31 of the Wills Act, the effect F
of the devise to the trustees was, in my judgment, to vest in the trustees the fee
simple of the real estate.

Therefore, on Dec. 31, 1925, immediately before the Law of Property Act, 1925,
came into operation, the first tenant for life being then dead, the position was that
the then surviving trustee of the will had vested in her the fee simple of the land,
and the two daughters Elizabeth and Mary were beneficially entitled to the rents G
during their joint lives, so long as they remained unmarried, in undivided shares
vested in possession. There is no question that the words in para. 1 of Part IV
of Sched. I to the Law of Property Act, 1925, "held in equity in undivided shares
vested in possession," are satisfied by life interests in possession, so that, at the
crucial date, the land was held precisely in the manner so described in the opening
words of para. 1, namely, "in equity in undivided shares vested in possession." H
That being so, the Act then says that the provisions of sub-para. (1) are to have
effect, and the question is whether the entirety of the land was, at the crucial date,
vested in trustees in trust for persons entitled in equity in undivided shares. The
land in question was vested in the then surviving trustee of the will in trust for
herself and her sister Mary in undivided shares, and, after the marriage or death
of the survivor of them, in trust for the testator's children in undivided shares. I
As was said by ASTBURY, J., in *Re Myhill* (2), the words "entitled in equity in
undivided shares" are used in the general sense of having a present interest in
undivided shares, and are not confined to absolute interests. In my judgment, the
present case is precisely covered by sub-para. (1), with the result that the land is
to be held by the trustees upon the statutory trusts as defined by s. 35 of the Act
of 1925. It is clear that sub-para. (2) does not apply to this case.

Sub-paragraph (3) of para. 1 relates to a case where the entirety of the land is
settled land. Having regard to the provisions of the will, it is not disputed that

A the land devised was at the crucial date settled land, and it has been suggested that, if that be the case, the land falls within sub-para. (3), and became vested in the trustees of the settlement created by the will for the purposes of the Settled Land Act, 1925. But as the law then stood, there were no such trustees of the will. If the case calls equally under either sub-para. (1) or sub-para. (3), the question is, under which one of those sub-paragraphs must the case be treated as falling. That question came forward for consideration in *Re Myhill* (2), but it was not found necessary to decide the point. In my judgment, the proper solution of the question is to be found by reading sub-para. (1) first of all; if the case in point is found to be covered by its provisions, then, in my judgment, there is no need to go further. The sub-paragraphs following sub-para. (1) are, in my opinion, intended to provide for cases which are not covered by any preceding sub-paragraph.

C I am assisted in arriving at this view by the language of sub-para. (4), which provides for any case "to which the foregoing provisions of this part of the schedule do not apply."

There will be a declaration that, upon Jan. 1, 1926, the testator's real estate, by force of sub-para. (1) of para. 1 of Part IV of Sched. I to the Law of Property Act, 1925, vested in Miss Elizabeth Dawson as the surviving trustee of the will upon the statutory trusts, namely, upon trust for sale and to apply the proceeds according to s. 35 of that Act.

Solicitors: *Patersons, Snow & Co.*, for *K. & W. Daniel*, Ramsgate.

[Reported by J. C. T. RAINS, Esq., Barrister-at-Law.]

E

F

CURTIS v. FRENCH

[CHANCERY DIVISION (Eve, J.), October 30, 31, 1928]

[Reported [1929] 1 Ch. 253; 98 L.J.Ch. 29; 140 L.T. 133;
45 T.L.R. 15; 72 Sol. Jo. 762]

G

Sale of Land—Misrepresentation—Protection of vendor—Condition that no compensation be allowed in respect of mis-statement—Deliberate mis-statements—National Conditions of Sale, 1925, condition 10.

H

At a sale by auction the plaintiff purchased a house for £400. It was stated in the particulars that it was let to T. for one of his employees (which was untrue); that the tenancy had been determined, but possession had not been pressed for (which was untrue); and that vacant possession would be given on completion (which was also untrue). The sale was subject to the National Conditions of Sale, 1925, by cl. 10 of which: "No error, mis-statement, or omission in the particulars, sale-plan, or conditions shall annul the sale, nor shall any compensation be allowed either by the vendor or the purchaser in respect thereof." In an action by the purchaser for damages for breach of contract,

I

Held: the particulars of sale contained a series of mis-statements, which were not innocent mistakes, affecting the subject-matter of the contract which, if the contract had been silent regarding the effect of those mis-statements, would have entitled the purchaser to damages, but the effect of cl. 10 of the National Conditions of Sale was to deprive the purchaser of that right and leave him with a right to have the contract rescinded and the return of his deposit with such interest as it had earned in the hands of the stakeholder.

Per EVE, J.: It would be prudent, especially in the case of sales held in the country, where a sale is made subject to general conditions, that a copy of those conditions should be circulated with the particulars. A

Notes. The condition in this case can be compared with condition 35 of the Law Society's Conditions of Sale, 1953, as to which see *Watson v. Burton*, [1956] 3 All E.R. 929.

As to conditions relating to misdescription of the property, see 29 HALSBURY'S LAWS (2nd Edn.) 291-296; and for cases see 40 DIGEST (Repl.) 104-106. B

Action for specific performance and other relief.

At a sale of land by auction held on June 22, 1926, the plaintiff was declared the purchaser of lot 5 for the sum of £400 and thereupon he paid the usual deposit of 10 per cent., namely, £40, and signed the memorandum attached to the particulars whereby he agreed to pay the balance of the purchase money "and in all other respects to complete the purchase according to the within written conditions of sale incorporated therein." The auctioneers as agents for the vendor, the defendant in this action, confirmed the sale and as stakeholders acknowledged the receipt of the deposit. Lot 5 in the particulars was described as a "freehold old-fashioned cottage situate at the north corner of Farley Green, Albury, in the county of Surrey," and at the foot of the particulars was contained a statement to the effect that this "lot was let to Mr. A. Tickner, a local farmer, for one of his employees. The tenant formally and legally terminated the tenancy, but has not yet handed over vacant possession; the vendor has not pressed for possession, allowing the occupier to remain on sufferance, but the premises will be sold with vacant possession on completion." Completion was fixed for July 22, one month after the auction sale, and neither at that date nor at any time after the sale was the vendor in a position to deliver to the purchaser the premises with vacant possession. The learned judge stated that, so far as he could see, the vendor had never taken any steps to qualify himself when the day of completion arrived to fulfil his contract. The sale was subject to the National Conditions of Sale, by condition 10 of which: C D E F

"No error, mis-statement, or omission in the particulars . . . shall annul the sale, nor shall any compensation be allowed either by the vendor or purchaser in respect thereof."

The plaintiff issued his writ on Feb. 22, 1928, claiming specific performance of the agreement constituted by the memorandum, damages in addition to or in lieu of specific performance, and further or other relief. By way of defence to the action the defendant relied on the terms of the contract, pleading that there had been no breach on his part of the contract as properly construed, and that in those circumstances he was not liable in damages for breach. G

R. F. Roxburgh for the plaintiff.

H. Johnston for the defendant. H

EVE, J., stated the facts and continued: The question turns primarily on the construction of this contract, and in order to construe it one must first of all appreciate the various documents which are incorporated in and form part of it. There is, first of all, p. 5 of the particulars; then there are the special conditions primarily, and, in a secondary sense, the general conditions which are to be treated as incorporated with the special conditions except so far as the special ones contradict, or are at variance or are inconsistent with, the general ones. In those cases, if any there be, the special conditions are to prevail. The plaintiff is not now claiming specific performance, but is seeking to treat the contract as broken by the defendant and is asking for damages. He complains of the inability of the defendant to do that which he contracted to do, to put him in possession of these premises on the day fixed for completion, and he says, and, in my opinion, he says with considerable force, that there is contained on the face of the particulars a I

A series of statements which, although they may be to some extent capable of being reconciled with actual facts, are in the main contrary to or inconsistent with the actual facts, and could only have been framed in order to create in the minds of bidders at this sale an opinion which certainly would not have been entertained by any such bidder had he known the true facts.

I have read the paragraph at foot of the particulars with regard to lot 5. It begins with the statement that the cottage "was let to Mr. A. Tickner, a local farmer, for one of his employees." No evidence has been produced in support of that statement, and, indeed, according to a letter written by the solicitors acting for the farmer in question, and neither answered nor dealt with by the vendor's agents, it is inconsistent with what took place. According to the statement made by those solicitors, it was let to Mr. Tickner with the intention that it should be sublet to other persons, and if that be so the suggestion underlying this statement that any persons in physical occupation of the cottage could be regarded as holding the cottage as part of the remuneration for their services had no foundation in fact.

The next statement is accurate so far as it goes: "The tenant formally and legally terminated the tenancy," but it fails to convey to the would-be purchaser that the notice to determine had been given three years, and had expired nearly two years, before the auction, a material matter, as will be seen from the rest of the paragraph, which goes on, "but has not yet handed over vacant possession." That is true. Mr. Tickner, who had given the notice expiring in September, 1924, had not handed over vacant possession of the premises, but he had never been in actual occupation during any part of the period. He had sublet the cottage and was not, therefore, in a position to hand over vacant possession unless and until he had got rid of the persons in occupation. Then comes a statement which, to my mind, is absolutely untrue: "the vendor has not pressed for possession, allowing the occupier to remain on sufferance." On the contrary, the vendor or his agents had been pressing for possession. They had as early as the end of 1924, or in January, 1925, refused to accept the rent, they had refused to recognise the title of the parties tendering the rent, and according to the evidence of the agent he had, by correspondence and frequent interviews, been urging these people to quit and deliver up possession. Moreover, he had lost the benefit of a contract or contracts for sale—I think there were two—but at any rate of a contract or an offer which could have been turned into a contract of sale with vacant possession, by reason of the obstinate refusal of these persons to vacate the cottage. It is a statement which is untrue in fact and calculated to create, and, in my opinion, intended to create, in the minds of intending bidders the impression that the tenant was willing to go out, but that there had been no pressure put upon him and he had been allowed to remain on sufferance until it would become necessary to turn him out in order to complete this contract. It goes on: "but the premises will be sold with vacant possession on completion," which means, I think, that one must introduce into this contract a term which, having fixed the date of completion as July 22, would run somewhat as follows: "On which day possession shall be given to the purchaser."

I have already stated sufficient to show that, in my opinion, there was here, not only one, but more than one, mis-statement affecting the subject-matter of the contract. If the contract were silent as to what the effect of such a mis-statement would be, I feel very little doubt that in this case the purchaser would be entitled to damages on the footing that this was not an innocent mistake but was an over-colouring of the position, not merely by way of extravagant adulation, but involving mis-statements of fact the inaccuracy of which must have been known to the vendor's agent. But the particulars only constitute one element of the contract, and in this contract is incorporated a condition from the general conditions which has a very material bearing on the result of the conclusions at which I have arrived. Condition 10 of the general conditions—and, if I may be permitted at this stage to make an observation, it is this, that I cannot help thinking it would be prudent, especially in the case of sales held in the country, where a sale is made subject to

general conditions, that a copy of those conditions should be circulated with the particulars—reads: A

“The property is sold subject to land tax, tithe rentcharge, rights of way and water and other rights, easements, quasi-easements, liabilities, and public rights affecting the same.”

So far that seems to me to apply. Then there come a few words with regard to tenancies which in favour of the purchaser I will assume are superseded by cl. 8 of the special conditions. That means to say one would then read into condition 10 of the general conditions condition 8 of the special conditions, which provides that: B

“Each lot is sold subject to all tenancies, outgoing and rights easements and exceptions and any other matters referred to in the particulars and the conveyance to the purchaser of each lot shall contain reservations in respect of these matters.” C

It comes to this, that, so far as lot 5 is concerned, Tickner, the tenant, has not in fact given vacant possession, but the vendor apprehends there will be no difficulty in getting him so to do, that the tenant has been allowed to remain there and has not left simply because the vendor has not pressed him, and that in due course he will be got out before completion. Condition 10 goes on: D

“No error, mis-statement, or omission in the particulars, sale-plan or conditions shall annul the sale, nor shall any compensation be allowed either by the vendor or purchaser in respect thereof.”

What is this paragraph at the foot of lot 5 but a series of mis-statements affecting the premises and contained in the particulars. But here is a term of the contract which says, notwithstanding that there is a mis-statement, the purchaser is not to be entitled to recover any damages or compensation in respect of it. In the position which has arisen he would be entitled to rescind the contract and to recover his deposit with interest and the costs of investigating the title, but nothing more. He has bargained for vacant possession of that which he has purchased. He cannot have vacant possession; the vendor cannot give him what he contracted to give him, but the contract itself precludes him from recovering anything for the loss sustained by reason of the mis-statements. The action is brought for specific performance, but at the trial the plaintiff does not ask for this relief; he is content with damages if he can obtain them. In my opinion, he cannot; the terms of the contract are too strong, and the action, so far as it is an action for damages, fails. The defendant does not seek to retain the deposit. This must be repaid with such interest as it has earned in the hands of the stakeholder, and having regard to the fact that, if rescission had been claimed, the plaintiff would have been entitled to his costs of investigating the title, I think it is a case in which I am justified in saying there should be no costs on either side. E F G

Solicitors: *W. W. Box & Co.; Cooper, Bake, Fettes, Roche & Wade.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.] H

A

Re DEBTOR (No. 21 of 1928). Ex parte LAWRENCE

[CHANCERY DIVISION (Astbury and Tomlin, JJ.), May 10, 16, 1928]

[Reported [1928] Ch. 665; 97 L.J.Ch. 255; 139 L.T. 519]

B *Bankruptcy—Petition—“Other sufficient cause” for dismissal—Request by creditor for payment of part of debt—Tender in cash by debtor—Refusal by creditor as acceptance would reduce debt below £50—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 4 (1), s. 5 (3).*

C Before a bankruptcy notice had been filed a creditor requested the debtor to pay part of the debt. The debtor tendered to the creditor the sum in question in cash, but the creditor refused to accept the money because, if he accepted it, the balance of the debt remaining due would not amount to £50 and so, under s. 4 (1) (a) of the Bankruptcy Act, 1914, would not afford a ground for the presentation of a bankruptcy petition.

D **Held:** although in the circumstances the tender of part of the debt was not a legal tender and the whole of the debt was still owing, the conduct of the creditor constituted “other sufficient cause” within s. 5 (3) of the Act for the petition to be dismissed.

Notes. As to a creditor’s petition in bankruptcy, see 2 HALSBURY’S LAWS (3rd Edn.) 286–292; and for cases see 4 DIGEST 110 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY’S STATUTES (2nd Edn.) 303.

E Cases referred to:

- (1) *Poole v. Tumbidge* (1837), 2 M. & W. 223; Murp. & H. 32; 6 L.J.Ex. 74; 150 E.R. 738; sub nom. *Poole v. Crompton*, 5 Dowl. 468; 1 Jur. 23; 12 Digest (Repl.) 360, 2800.
- (2) *Re Andrew, Ex parte Andrew* (1875), 1 Ch.D. 358; 45 L.J.Bcy. 57; 33 L.T. 556; 24 W.R. 197, C.A.; 4 Digest 115, 1041.
- F** (3) *Re Le Fevre, Ex parte Astrup* (1879), 11 Ch.D. 303; 40 L.T. 403; 27 W.R. 518, C.A.; 4 Digest 117, 1067.

Appeal from Manchester County Court.

G By a guarantee dated Mar. 1, 1927, the debtor agreed to pay Henry Percy Lawrence £71 5s. by three instalments of £23 15s. on Oct. 31, Nov. 30, and Dec. 31, 1927. On Dec. 12, 1927, two instalments were due, and on that day Lawrence issued a writ claiming from the debtor the amount of the whole debt. On Jan. 3, 1928, he obtained judgment for £47 10s., being the amount of the first two instalments due and costs. The judgment did not affect the third instalment, which had become due on Dec. 31, 1927. On Jan. 3, which fell on a Tuesday, Lawrence’s solicitors wrote to the debtor’s solicitors as follows:

H “Confirming our conversation on the telephone we write to say that our client will not proceed on the judgment he has obtained to-day until Thursday morning next, by which time we understand you will have obtained instructions. Unless some satisfactory arrangement be made with regard to the balance of the debt, for which judgment was not obtained, our instructions are to issue a writ, and we shall be glad to know whether you have instructions to accept service thereof.”

I On Wednesday, Jan. 4, 1928, the debtor sent to Lawrence a cheque for £23 15s., the amount of the third instalment, and asked for time to pay the judgment debt. On Jan. 6 Lawrence’s solicitors wrote to the debtor’s solicitors stating that on their advice Lawrence was not clearing the cheque for the moment, “but will hold it until he has received satisfaction in respect of the amount for which he has obtained judgment.” On Jan. 9 the debtor wrote to Lawrence stating that as the cheque for £23 15s. had not been cashed he had stopped payment thereof, and in lieu thereof he enclosed £23 15s. in notes and cash. On Jan. 11 Lawrence returned the

amount sent, saying that he was not prepared to accept any payment less than the full amount of the guarantee and costs. On Jan. 27, 1928, Lawrence filed a bankruptcy notice in the Manchester County Court in respect of the £47 10s. judgment debt. On Feb. 16, 1928, he presented a petition for a receiving order against the debtor, alleging that the debtor owed him £71 5s., made up of the judgment debt and the £23 15s. final instalment, and that he had failed to comply with the bankruptcy notice of Jan. 27. On Mar. 14, 1928, the registrar of the county court dismissed the petition. This was done apparently on the ground that, owing to the tender of the £23 15s., the petitioner's debt was under £50, and also on the ground of an alleged irregularity in the sealed copy of the bankruptcy notice. The letter of the petitioner's solicitors of Jan. 3 was not before the registrar, and he was not asked to exercise any discretion under s. 5 (3) of the Bankruptcy Act, 1914. The petitioner appealed to the Divisional Court.

du Parcq, K.C., and *H. Infield*, for the petitioner, referred to *Poole v. Tumbridge* (1) and *Ex parte Andrew* (2).

Tindale Davis, for the debtor, referred to *BULLEN AND LEAKE'S PRECEDENTS* (8th Edn.), p. 823, and *Ex parte Astrup* (3).

ASTBURY, J., stated the facts; said that the letter of Jan. 3, 1928, was really an intimation that the petitioner would give the debtor until Thursday, Jan. 5, to pay the judgment debt, and that unless the £23 15s. which had then become due was paid at once a writ would be issued; and continued: Various points were taken before the registrar as to the tender, and as to an alleged irregularity in the sealed copy of the bankruptcy notice, which I do not propose to discuss; and in the result the registrar dismissed the petition, apparently upon the points raised before him, and without dealing, or being asked to deal, with any question of discretion.

Under s. 4 (1) of the Bankruptcy Act, 1914, a creditor is not entitled to present a bankruptcy petition unless the debt owing to him or his co-petitioners (if any) amounts to £50. At the date of this petition there were, in a sense, two debts owing by the debtor to the petitioner: (a) the £47 10s. judgment debt, and (b) the £23 15s. instalment debt, for which the debtor had offered cash which the petitioner had refused. The tender, being made at the time and in the circumstances in which it was made, was not, of course, a legal tender so as to extinguish the debt, and at the date of the petition there were, therefore, two debts due, together amounting to over £50. But the debtor had on the petitioner's invitation offered him cash for the £23 15s. debt, and, if that had been accepted, the total debt would have been under £50. Section 5 (3) of the Bankruptcy Act, 1914, provides that if the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, "or that for other sufficient cause no order ought to be made," the court may dismiss the petition. The matter comes before us by way of re-hearing, and we have to decide whether on this appeal a receiving order ought to be made or not. Speaking for myself, I think without hesitation that a device of this character ought not to succeed, and that, where at the creditor's request part of the debt is tendered in cash before the bankruptcy notice, and refused because, if accepted, it would leave a debt of less than £50, then, although the tender is not in the circumstances a legal tender, and the whole debt is still owing, we ought not to allow this quasi-penal statute to be put into operation against the debtor. How the debtor intended to meet the £47 10s. judgment debt I do not know, but the fact remains that the petitioner could have no reason for refusing the £23 15s. tendered at his invitation, except the reason that its acceptance would have reduced the debt under £50. In these circumstances I am of opinion that there is "sufficient cause" for making no order on this petition. In my opinion, there is ample ground on the first point for refusing to make a receiving order, and in these circumstances I do not propose to deal with the question of the bankruptcy notice. The appeal fails, and must be dismissed with costs.

A TOMLIN, J.—I agree. I only desire to add with regard to the first point that the principle to be applied to the circumstances of this case is that applied by JAMES, L.J., in *Ex parte Astrup* (3). To make a receiving order in the circumstances of this case, having regard to the petitioner's conduct in refusing to accept payment of the £23 15s. tendered on his invitation, in order to keep his debt over £50, would be to make an order in his favour in a proceeding tantamount to an abuse of the bankruptcy law.

Solicitors: *Herbert Baron & Co.*; *Harrison, Fielder & Co.*, for *West & West*, Manchester.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

THE ROYAL STAR

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Hill, J.), December 9, 1927, March 23, 1928]

[Reported [1928] P. 48; 97 L.J.P. 49; 138 L.T. 558; 44 T.L.R. 163; 17 Asp.M.L.C. 417]

Admiralty—Appeal to High Court—Finding of colonial court—Appeal by master—No suspension or cancellation of certificate—Finding of negligence, and censure—Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), ss. 475, 478—Merchant Shipping Act, 1906 (6 Edw. 7, c. 448), s. 66.

A court of formal investigation in a British possession inquired into a shipping casualty, in which a British ship was concerned, and found the master of the vessel guilty of negligence and severely censured him, but did not suspend or cancel his certificate.

Held: although the master's certificate had not been cancelled or suspended so as to bring the case within s. 475 (3) of the Merchant Shipping Act, 1894, he had a right of appeal to the High Court against the finding of negligence and the censure by the colonial court because (i) the general words of s. 478 (6) of the Act, which gave a right of appeal from a finding of a colonial court, were not limited by the express words of s. 475 (3), and so an appeal lay under s. 478 (6), and (ii) the master had an "interest in the investigation or inquiry" by, and was affected by the decision of, the colonial court within s. 66 of the Merchant Shipping Act, 1906, and so he was entitled to appeal under that section.

Admiralty—Appeal—Costs—Order against Board of Trade.

Where the Board of Trade unsuccessfully contest the right of an appellant to appeal, the costs of the argument as to the right of appeal may be given against the Board. But notwithstanding that the appellant succeeds on the appeal, the costs of the appeal will not be given against the Board of Trade unless the decision appealed against was made by an officer appointed by the Board.

Notes. As to shipping casualty appeals, see 1 HALSBURY'S LAWS (3rd Edn.) 120–124; and for cases see 1 DIGEST 233, 234. For Merchant Shipping Acts, 1894 and 1906, see 23 HALSBURY'S STATUTES (2nd Edn.) 395, 783.

Motion by the appellant, the master of the British steamship *Royal Star*, of the Port of London, to hear and determine as a preliminary point the question whether he had a right of appeal from a decision of a court of formal investigation at Singapore.

The appellant was a master mariner, and held a certificate issued at Barry. On Jan. 13, 1927, he was in command of the British steamer *Royal Star* when the *Royal Star* grounded in the Straits of Singapore. A court of formal investigation was held at Singapore by order of the governor of the Straits Settlements. The court found that the casualty was caused by the negligence of the master in omitting to satisfy himself personally that his charts were up-to-date, and in respect of other matters. They did not consider it necessary to deal with the appellant's certificate, but severely censured him for the above-mentioned acts of negligence. On May 27, 1927, the appellant gave notice of appeal. Subsequently he applied to the Board of Trade for a re-hearing which was refused. At the hearing of the summons for directions before the registrar, the Board of Trade objected that no right of appeal lay, and that the court had no jurisdiction to hear an appeal unless the court of formal investigation had suspended or cancelled the appellant's certificate. The registrar, accordingly, adjourned the application sine die, and gave leave to the appellant to issue out a motion to the Divisional Court to hear and determine as a preliminary point the question whether he had a right to appeal.

By s. 475 of the Merchant Shipping Act, 1894, it is provided:

"(1) The Board of Trade may, in any case where under this Part of this Act a formal investigation as aforesaid into a shipping casualty, or an inquiry into the conduct of a master . . . has been held, order the case to be re-heard . . . and shall do so . . . (b) if . . . there has in their opinion been ground for suspecting that a miscarriage of justice has occurred. . . . (3) Where on any such investigation or inquiry [i.e., a formal investigation or inquiry into the conduct of a master, mate, or engineer] a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for re-hearing under this section has not been made or has been refused, an appeal shall lie from the decision to the following courts, namely, (a) if the decision is given in England or by a naval court, to the High Court."

By s. 478 (1) it is further provided that the legislature of any British possession may authorise any court or tribunal to make inquiries as to shipwrecks or other casualties affecting ships, or as to charges of incompetence or misconduct on the part of mariners, mates, or engineers where a shipwreck or casualty occurs to a British ship on or near the coasts of the British possession. By sub-s. (6):

"The Board of Trade may order the re-hearing of any inquiry under this section in like manner as they may order the re-hearing of a similar investigation or inquiry in the United Kingdom, but if an application for re-hearing either is not made or is refused an appeal shall lie from any order or finding of the court or tribunal holding the inquiry to the High Court in England, provided that an appeal shall not lie (a) from any order or finding on any inquiry into a casualty affecting a ship registered in a British possession, or (b) from a decision affecting the certificate of a master, mate, or engineer, if that certificate has not been granted either in the United Kingdom or in a British possession under the authority of this Act."

By the Merchant Shipping Act, 1906, s. 66:

"Where on any investigation or inquiry under the provisions of Part VI [which includes ss. 475 and 478] of the [Act of 1894] the court find that a shipping casualty has been caused or contributed to by the wrongful act or default of any person, and an application for re-hearing has not been made under sections 475 or 478 of the principal Act, or has been refused, the owner of the ship or any other person who, having an interest in the investigation or inquiry, has appeared at the hearing and is affected by the decision of the court, may appeal from that decision in the same manner and subject to the same conditions in and subject to which a master may appeal under those

A sections against a decision with respect to the cancelling or suspension of the certificate."

Dunlop, K.C., and Hayward for the motion.

Bucknill for the Board of Trade.

LORD MERRIVALE, P.—This is a preliminary application in a proposed appeal of an officer in the merchant marine against a finding of the Wreck Inquiries Court in the Straits Settlements by which he conceives himself to be aggrieved. The court in the Straits Settlements found him guilty of negligence in three particulars whereby a vessel of some 8,000 tons had been stranded, expressed its severe censure judicially, and declared that it did not deem it necessary to deal with his certificate. That, of course, is a grave matter for an officer in the merchant marine, especially an officer who has been in charge of one of the great ships which sail the wide seas, and he seeks to secure re-consideration of those findings of negligence, and of the censure which has been so expressed. Whether he is entitled to a re-hearing is a matter of statute. He is not entitled to a re-hearing unless some statute, which creates the jurisdiction under which he has been placed at disadvantage, confers that right of re-hearing. The view has been taken that there is a limited right of re-hearing which does not apply to his case—that under the terms of the relevant section in the Merchant Shipping Act, if his certificate had been dealt with, he would have been entitled to be re-heard, but that in view of the fact that his certificate has not been dealt with the statute gives him no right of re-hearing. That, of course, is a matter purely of the construction of the statute. The matter has been well and concisely argued, and it was hardly necessary that counsel for the Board of Trade should emphasise the fact that the Board has no desire to restrict, in the case of officers in the merchant marine service, their right of access to His Majesty's courts when they are aggrieved. The Board of Trade would fall short of its duty if it pursued any such course. It has not pursued any such course, and does not, and in desiring a determination of the preliminary question here the Board of Trade has simply taken an account of opinions expressed from the Bench from time to time, and views which have evidently been held by the judicial authorities in respect of which neither of us, I am sure—no one who is aware of their eminence or of their ability—would entertain any doubt. But the question still has to be determined.

It is said on behalf of the proposed appellant that under the relevant section of the Merchant Shipping Act, 1894, ss. 475 and 478 in particular, the proposed appellant probably had a right of appeal—that there is a construction of the sections which would give him a right of appeal—but it is said further that under the Merchant Shipping Act, 1906, s. 66, he has unmistakably a right of appeal. The relevant sections of the Merchant Shipping Act, 1894, certainly do not make it clear beyond all doubt. I think they are capable of a construction which would give the right of appeal. After providing for wreck inquiries, and establishing tribunals which have power to deal with the certificates of masters, mates and engineers, and providing power for the Board of Trade to order the re-hearing of any such inquiries, s. 475 goes on to say in sub-s. (3):

"Where on any such investigation or inquiry, a decision has been given with respect to the cancelling or suspension of the certificate of a master,"

I and so forth, an appeal shall lie. I pressed counsel for the Board of Trade (perhaps a little too closely) as to whether in this case there had been a decision with respect to the cancelling or suspension of the certificate of the proposed appellant, but he found an answer to the inquiry which was that it depended upon the true construction of s. 475 (3). This was a decision with respect to the cancelling or the suspension of the certificate of the proposed appellant. It was decided to be unnecessary to cancel or suspend his certificate. That does not look like the kind of decision against which the right of appeal is of necessity to be assumed. That leaves the matter an open question. I do not express any concluded view as to

the proposition that there would be a right of appeal there—I leave that matter where it is. Section 475 dealt with wreck inquiries in this country, and the subsequent s. 478 dealt with wreck inquiries in the Dominions overseas, and dealt with them in a different manner. After giving to the Board of Trade the like power of ordering a re-hearing which was expressed in s. 475, s. 478 went on to say, if an application for re-hearing either was not made or was refused,

“an appeal shall lie from any order or finding of the court or tribunal holding the inquiry to the High Court in England.”

It was suggested that a possible view of the two sections was that those general words in s. 478 are limited by the specific words in s. 475, and we are asked to apply a well-known rule of construction. In my view, those general words in s. 478 are not limited by the express words in s. 475. I think that an appeal lies at the instance of a party to the proceedings from an order or finding of the court or tribunal holding the inquiry except, in the specified cases, where such an appeal, it is directed, shall not lie.

That is the view I hold upon the Merchant Shipping Act, 1894, but many things have happened since 1894. From time to time there has been resort to this court by persons alleging themselves to be aggrieved, and it was found that persons might suffer a substantial grievance by proceedings before tribunals dealing with shipping casualties, and be left without a specific right of redress. There was a case to which my brother referred of the owners of a vessel who were in effect placed in a position of great disadvantage and were held not to be within the provisions of the Act which gave the right of appeal, and by reason of occurrences of that kind s. 66 was placed in the Merchant Shipping Act, 1906. That directs that where, on any investigation or inquiry such as is here under consideration, the court finds that the shipping casualty has been caused or contributed to by the wrongful act or default of any person—the owner of the ship or any other person—who, having an interest in the investigation or inquiry, has appeared at the hearing, and is affected by the decision of the court, such person may appeal. It is necessary after reading that section for us to see whether the proposed appellant here comes within its terms. Had he an interest in the investigation or inquiry? He had. He was accused of negligence and was subject to the cancellation of his certificate, or to the endorsement of his certificate. Had he appeared at the hearing? He had. He had appeared and given his evidence. Was he affected by the decision of the court? That has been submitted as the true question here. He was found guilty of negligence—that is, of professional misconduct. He was found guilty at a public proceeding, and the decision of the court was placed on record. The court sat in public, as such courts do, and, of course, ought to do. To my mind, it is impossible to say that an officer in the merchant service, who has been tried upon charges of negligence and found guilty, is not affected by the decision of the court. It seems to me that he is placed very nearly in the position of a person tried under a criminal charge who is found guilty, but who is subjected to no sentence.

That being so, it seems to me that the proposed appellant has a right of appeal, probably under the sections of the Act of 1894, but certainly, under s. 66 of the Act of 1906. I do not think there is any substantial danger of a great rush of litigants to the court giving the right of appeal, and if the court should be obstructed in that way it will know how to deal with any such phenomenon. In my view, the proposed appellant is entitled to succeed upon this motion.

HILL, J.—I agree. Whether under s. 475 of the Merchant Shipping Act, 1894, a man who is found guilty of negligence, but whose certificate was neither cancelled nor suspended, had a right of appeal, I express no opinion. But assuming that he had not such right under that section, in my opinion the words of s. 478 of the Act of 1894, which are so much wider than the words of s. 475, gave him in such a case a right of appeal from a colonial court of inquiry. But any doubt is removed by s. 66 of the Act of 1906, which was passed—as is clear upon its terms—

A in order to enlarge the right of appeal, and clearly includes the proposed appellant in that he appeared, and, indeed, must have been given notice to appear, because it was proposed that his certificate should be dealt with, and he was clearly a person affected by the finding that the casualty had been caused by his negligence. I, therefore, agree that he has a right of appeal.

Appeal allowed. Order as to costs to stand over until hearing.

B The appeal was heard before the court (LORD MERRIVALE, P., and HILL, J.) on Mar. 23, 1928. The court held that the master had not been guilty of negligence, accordingly allowed the appeal and set aside the censure upon the master. On the question of costs,

C **LORD MERRIVALE, P.**—I think that upon principle the appellant is entitled to the costs of the previous argument to determine his right to appeal, but I do not think that it would be proper to make any order against the Board of Trade for payment of costs. The Board of Trade has discharged its public duty. There was no litigation between them and the appellant. The order which I propose to make is that the appellant should have the costs of the previous motion, but that there should be no costs of this appeal.

D **HILL, J.**—I agree.

Solicitors: *G. F. Hudson, Matthews & Co.; Solicitor to the Board of Trade.*

[*Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.*]

E

F

PIPER v. ST. MARYLEBONE LICENSING JUSTICES

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Acton, JJ.), April 2, 3, 1928]

[Reported [1928] 2 K.B. 221; 97 L.J.K.B. 602; 139 L.T. 144;
92 J.P. 87; 44 T.L.R. 510; 26 L.G.R. 308]

G

Licensing—Appeal to quarter sessions—Special removal—Refusal—Finality of decision of quarter sessions—Absence of power to state a Case—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 29 (5).

H

The licensee and the owners of refreshment rooms applied to the licensing justices under the Licensing (Consolidation) Act, 1910, s. 24 and s. 27, for a special removal of the licence. The justices refused the application, and the applicants appealed to quarter sessions, the justices being the respondents to the appeal. Quarter sessions allowed the appeal, but at the request of the justices stated a Case for the opinion of the High Court. Before the High Court the applicants took a preliminary objection that by reason of the provisions of s. 29 (5) of the Act of 1910, which provided that: "The judgment of the court of quarter sessions shall be final and conclusive for all intents and purposes," quarter sessions had no power to state a Case, and, consequently, the High Court had no power to deal with the matter.

I

Held: a Case stated by quarter sessions was, in the light of s. 25 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, an appeal; the effect of s. 29 (5) of the Act of 1910 was to prevent any appeal from quarter sessions, and, therefore, the statement of a Case by quarter sessions; and the justices' appeal must be dismissed.

Kydd v. Liverpool Watch Committee (1), [1908] A.C. 327, applied.

Notes. Sections 24, 27, and 29 (5) of the Licensing (Consolidation) Act, 1910, have been replaced by ss. 24, 26, and 35 (5) of the Licensing Act, 1953, for which see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

As to the removal of licences, see 22 HALSBURY'S LAWS (3rd Edn.) 570-574; and as to appeals from licensing justices, see *ibid.* 606 et seq. For cases see 30 DIGEST (Repl.) 39, 40, 76.

Case referred to :

- (1) *Kydd v. Liverpool Watch Committee*, [1907] 2 K.B. 591; 76 L.J.K.B. 1155; 97 L.T. 453; 71 J.P. 408; 23 T.L.R. 624; 5 L.G.R. 1168, C.A.; reversed, [1908] A.C. 327; 77 L.J.K.B. 947; 99 L.T. 212; 72 J.P. 395; 24 T.L.R. 772; 52 Sol. Jo. 639; 6 L.G.R. 903, H.L.; 33 Digest 450, 1607.

Case Stated by the County of London Quarter Sessions.

Amos Piper, the licensee, and the Metropolitan Rail. Co., the owners, applied to the Marylebone licensing justices for a special removal of the licence of the refreshment rooms at Edgware Road station. The application was refused, and the applicants appealed to the quarter sessions of the county of London, which allowed the appeals. The justices applied for a Special Case and quarter sessions stated a Case. When the Case Stated came on for hearing the licensee and the owners took the preliminary objection that quarter sessions had no jurisdiction to state a Case.

du Parcq, K.C., and *Christmas Humphreys* for the licensee.

du Parcq, K.C., and *Sidney H. Lamb* for the owners.

Mitchell Banks, K.C., and *Harold L. Murphy* for the licensing justices.

LORD HEWART, C.J.—This is a Case stated by the court of general quarter sessions for the county of London, and, as appears by the Case, it was contended, *inter alia*, in the court below by the licensee and the owners that there was no power in the court of quarter sessions to state a Case. The subject-matter of the appeal was the refusal of licensing justices to grant a special removal of the licence of the refreshment rooms at Edgware Road station. The matter, therefore, was one of those referred to in s. 29 of the Licensing (Consolidation) Act, 1910, which provides :

“(1) Any person who thinks himself aggrieved by the refusal of the licensing justices of any licensing district to grant a renewal, transfer or special removal of a justices' licence . . . may appeal against the refusal to the court of quarter sessions for the county in which the premises in respect of which the appeal is made are locally situated. . . . (5) The judgment of the court of quarter sessions shall be final and conclusive for all intents and purposes.”

Those words are reproduced from s. 27 of the Alehouse Act, 1828.

The question, then, is whether the provision that the judgment of quarter sessions shall be conclusive applies to prevent the statement of a Case for the opinion of this court. In my opinion, that question is concluded by the judgment of the House of Lords in *Kydd v. Liverpool Watch Committee* (1). That case in the court below turned on the construction of s. 11 of the Police Act, 1890, which provided for an appeal to the next practicable court of quarter sessions, and that that court might make such order in the matter as appeared to the court just, “which order shall be final.” The question was whether that finality prevented the statement of a Special Case. The House of Lords unanimously decided that it did. LORD LOREBURN says of the language of the section :

“Where it says, speaking of such an order, that it is to be final, I think it means there is to be an end of the business at quarter sessions, and I am fortified in the view I take by knowing that the same view commended itself to the majority of the Court of Appeal, had they felt themselves free from precedent.”

A An examination of the judgments in the Court of Appeal shows that three at least of the lords justices expressed the view to which LORD LOREBURN there refers. The phrase there was "shall be final"; the phrase here is "shall be final and conclusive for all intents and purposes."

B For these reasons, whatever the practice in some cases may have been, I think that a court of quarter sessions has no jurisdiction in these circumstances to state a Case. That such a Case is an appeal is made clear by s. 25 (1) of the Supreme Court of Judicature (Consolidated) Act, 1925. Therefore, I think that the contention of the present respondents is right.

AYORY, J.—I agree.

C **ACTON, J.**—I agree.

Appeal dismissed.

Solicitors: *White & Leonard; I. Buchanan Pritchard; Greenwell & Co.*

[Reported by J. FERGUSON WALKER, ESQ., Barrister-at-Law.]

D

R. v. SOUTHAMPTON COUNTY CONFIRMING COMMITTEE.

E

Ex parte SLADE

[COURT OF APPEAL (Scrutton, Lawrence and Sankey, L.JJ.), November 8, 9, 1928]

[Reported [1929] 1 K.B. 263; 98 L.J.K.B. 62; 140 L.T. 167;

93 J.P. 37; 45 T.L.R. 72; 72 Sol. Jo. 873]

F *Licensing—Removal of licence—Ordinary removal—Refusal of order on ground that grant would result in payment of monopoly value being avoided—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 26 (1), (5).*

G By s. 26 of the Licensing (Consolidation) Act, 1910, the ordinary removal of a justices' licence might be authorised in the following manner: "(1) The application for the order authorising the removal shall be made by the person desiring to be the holder of the licence when removed: (2) The application shall be made at the general annual licensing meeting, or any adjournment thereof, to the justices who have power to authorise the removal: . . . (5) The justices shall not make the order unless they are satisfied that no objection to the removal is made by the owner of the premises from which the licence is to be removed, or by the holder of the licence, or by any other person whom the justices may determine to have the right to object to the removal; subject as aforesaid, the licensing justices shall have the same power to make an order authorising the removal as they have to grant new licences, but no such order shall be valid unless it is confirmed by the confirming authority."

H The applicant, who held an old beer-house on-licence within Part I of Sched. II to the Act of 1910, applied to the licensing justices for a removal of the licence to premises to be erected on a new site which had been acquired by the owners of the beer-house. The licensing justices unanimously sanctioned the removal, but quarter sessions, as the confirming authority, refused to confirm the removal on the ground that by it, unlike what would be the position if a new licence were granted, the payment of monopoly value would be avoided. The applicant obtained rules nisi for certiorari and mandamus to quash the order of the confirming authority.

I **Held:** although licensing justices had no jurisdiction to make a grant of an ordinary removal of a licence subject to the condition that monopoly value be

paid: *R. v. Drinkwater* (1), [1905] 2 K.B. 469; it was open to them to refuse an order on the ground that, if it were granted, the payment of monopoly value would be avoided to the detriment of the public, and, therefore, quarter sessions had decided rightly and the rules must be discharged.

Notes. Section 26 of the Licensing (Consolidation) Act, 1910, has been replaced by s. 25 of the Licensing Act, 1953, for which see 33 HALSBURY'S STATUTES (2nd Edn.) 176.

As to the removal of licences, see 22 HALSBURY'S STATUTES (2nd Edn.) 570 et seq.; and for cases see 30 DIGEST (Repl.) 39, 40.

Cases referred to:

- (1) *R. v. Drinkwater, Wincott's Case*, [1905] 2 K.B. 469; 74 L.J.K.B. 722; 93 L.T. 165; 69 J.P. 300; 54 W.R. 95; 21 T.L.R. 514, D.C.; 30 Digest (Repl.) 36, 276.
- (2) *Sharp v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 39 W.R. 561; 7 T.L.R. 389, H.L.; 30 Digest (Repl.) 12, 51.
- (3) *Re Cathcart, Ex parte Campbell* (1870), 5 Ch. App. 703; 23 L.T. 289; 18 W.R. 1056, L.J.J.; 42 Digest 669, 795.

Appeal from orders of the Divisional Court, discharging rules nisi for certiorari and mandamus calling on the confirming committee of the county of Southampton to show cause why a certain order made by them on or about April 25, 1928, refusing the application of William Slade for the confirmation of the provisional grant of the ordinary removal of the licence of the Bird-in-Hand, Gosport Road, Fareham, should not be quashed, and commanding them to hear and determine the application according to law, on the grounds (i) that the confirming committee sought to attach a condition to the grant of an order for removal; (ii) that they had failed to consider the convenience of the public, the fitness of the premises, the fitness of the applicant, or any other relevant matters; and (iii), alternatively, that when considering such matters they had before them no evidence to warrant them in differing from the licensing justices.

The applicant for the rule, William Slade, was the licensee of the Bird-in-Hand, the licence being an old beer-house on-licence within the meaning of the Licensing (Consolidation) Act, 1910, Sched. II, Part I. The owners of the house, Kinnell and Hartley, Ltd., acquired a new site, and on Mar. 5, 1928, Mr. Slade applied for the removal of the licence of the Bird-in-Hand to premises to be erected on the new site. A bench of twelve licensing justices unanimously resolved to sanction the removal, which was strongly supported by the police as being in the interests of the neighbourhood generally. The quarter sessions of the county of Southampton, as the confirming authority of that county, had duly delegated their powers to a committee, which, on April 25, 1928, heard the unopposed application of Mr. Slade, and refused to confirm the removal on the ground that monopoly value would not be attracted. Sir Francis Charles Gore, chairman of the confirming committee, deposed in his affidavit that the Bird-in-Hand was situated in a somewhat sparsely populated locality and in the immediate vicinity of another licensed house, and that the proposed new site was 450 yards away and in the centre of a large number of houses occupied by persons of the working classes. The committee felt a difficulty in confirming the removal order because the two sites were so far apart and were in neighbourhoods with such different prospects as to customers. They were of opinion (a) that the pecuniary gain to the brewers and the tenant, if the application were granted, would be considerable; and (b) that the monopoly value of the new premises would be substantial. They unanimously resolved to refuse the application because it appeared to them that this was not a case which should be dealt with by way of removal order, whereby the payment of monopoly value would be avoided to the detriment of the public. No question arose as to the fitness of the applicant or of the proposed new premises.

W. Blake Odgers showed cause.

Sir Reginald Mitchell Banks, K.C., and *M. F. Healy* in support of the rules.

A LORD HEWART, C.J., giving judgment in the Divisional Court, said that it was significant that s. 26 of the Licensing (Consolidation) Act, 1910, which dealt with the ordinary removal of a licence, provided that no order authorising such a removal should be valid unless it was confirmed by the confirming authority. He referred to *R. v. Drinkwater* (1) and said that there was nothing in the case to be complained of. ACTON, J., and BRANSON, J., agreed, and the rules were discharged.

B The applicant appealed.

Sir Reginald Mitchell Banks, K.C., and *M. F. Healy* for the applicant.
Holman Gregory, K.C., and *Blake Odgers* for the justices.

SCRUTTON, L.J.—This is an appeal from the refusal of the Divisional Court to grant a writ of certiorari and a writ of mandamus. The writ of certiorari is to remove a decision of the confirming committee for the county of Southampton in order that it may be quashed on the ground that in coming to their decision the justices have considered a matter which they ought not by law to have considered, the writ of mandamus being a merely consequential order that the committee shall now hold a meeting to hear and determine.

C There is a small beer-house with an on-licence in the parish of Fareham. It is in a neighbourhood not very crowded with houses, and it is close to another licensed premises. The holder of the licence and the brewers who own the house desire to remove that licence to a site, about a quarter of a mile off, which has no other licensed premises near it, and which is in the middle of a crowded workmen's district. Obviously, the effect of that will be that for premises where there is not a great difference between the value of the premises with a licence and their value without a licence, the brewers and the licence-holder will obtain premises where there may be a very considerable difference between the value of the premises with a licence and their value without a licence—in other words, there may be a largely increased monopoly value. The justices, the licensing authority for Fareham, granted the removal order, but their decision is subject to revision, and the removal order must be confirmed by the confirming authority for the county of Southampton. On its coming unopposed before the confirming committee, the committee took the view, as stated in Sir Francis Gore's affidavit, that they were of opinion that the pecuniary gain which would accrue to the brewers and to the tenant if the application were granted would be considerable, and that the monopoly value of the proposed new premises, as licensed premises, would be substantial. The committee, after retiring and considering the evidence, unanimously resolved to refuse the application, because it appeared to them that this was not a case which should be dealt with by way of removal order, whereby the payment of monopoly value would be avoided to the detriment of the public. No question arose as to the fitness of the applicant or of the proposed new premises. Thereupon the licence-holder applied to have that decision quashed. To succeed the applicant must satisfy the court that it is not open to a confirming authority

D to refuse a removal order simply because the payment of the monopoly value will be avoided to the detriment of the public. The removal order under s. 24 of the Act is to be authorised by the licensing justices at their discretion, and by s. 26 no such order shall be valid unless it is confirmed by the confirming authority, who have an exactly similar discretion.

E "Discretion" was defined by LORD HALSBURY in *Sharp v. Wakefield* (2) ([1891] A.C. at p. 179):

" 'Discretion' means when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion . . . according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular."

F I suppose, therefore, the applicant must say that it is contrary to the rules of reason and justice or contrary to law that a confirming authority should say: We

think the fact that you, the brewers, if this removal is sanctioned, will get a large increase in monopoly value without paying anything to the public for it is a reason for refusing.

We have this amount of guidance from authority, that in *R. v. Drinkwater* (1) the licensing justices granted the removal subject to a condition that the monopoly value should be paid and that the Divisional Court held, following a previous case where another obligation to pay had been imposed on the applicant, that the justices had no authority to affix to their transfer of the licence a condition that the monopoly value should be paid. But LORD ALVERSTONE, C.J., in giving the judgment of the court, said that he thought, but did not intend to determine by his decision, that the justices were entitled to take into consideration the circumstances that a great pecuniary gain would be conferred upon the applicant, and that the public would lose that pecuniary gain which would arise if the matter was left to the application for a new licence. KENNEDY, J., expressly agreed with that reservation, and RIDLEY, J., also agreed, and, therefore, there appears to me to be nothing in the decision itself to stop the justices or the confirming authority from taking into account the fact that the removal of the licence in that way will give a considerable increase in monopoly value to the applicant and the brewers without the public obtaining any part of the monopoly value.

It seems to me that it is impossible, in those circumstances, to say that it is contrary to reason and justice that they should consider that matter; it seems to me a matter that they eminently may consider, having regard to reason and justice. It seems to me equally impossible to say that it is contrary to law that they should consider that matter among other circumstances, in deciding whether or not they should refuse or grant the transfer. I can quite understand that in some cases it may be that they will think: There is a disadvantage in that the public will not get the monopoly value, but there are such advantages in getting rid of the particular public-house in that particular place that we think, weighing the two together, we need not give effect to the loss of monopoly value. With regard to the entirely imaginative case that counsel for the applicant has put to us, of a public-house in the centre of a town on awkward crossroads, where motorists who ride through may be much embarrassed by the presence of a public-house and the desirability of getting rid of a public-house from there and transferring, as counsel said, beer to virgin soil in a new town on the other side of the railway, I can quite see that the magistrates in that case may, in considering the various things, think: We will sacrifice the monopoly value in order to get a clearer thoroughfare in the middle of the town and a benefit to the people who will now get a public-house in their midst, but I am quite unable to see how it can be said to be contrary either to reason and justice or to law that the magistrates should say: We consider the fact that if we grant this removal we shall be giving a large increase in the monopoly value to the brewer, without the public getting anything for it, and in those circumstances we decline to sanction the transfer and leave the applicant to his remedy of applying for a new licence, when he will get proper satisfaction. For these reasons, which I think are only repeating with variations the reasons of the Divisional Court, I think they came to a right conclusion and these appeals must be dismissed.

LAWRENCE, L.J.—I agree. In *R. v. Drinkwater* (1) it was decided that s. 4 (2) of the Licensing Act, 1904, which is now replaced by s. 14 of the Licensing Consolidation Act, 1910, giving the licensing justices power to attach conditions to the grant of a new on-licence in order to secure to the public a monopoly value, does not apply to an order for the removal of a licence, and the licensing justices, therefore, have no power to attach those conditions to the making of an order for removal. That decision has stood unquestioned for over twenty-three years: moreover, five years after the decision the consolidating Act was passed, and that consolidating Act repeats in the same language the section which I have referred to and which was dealt with in *R. v. Drinkwater* (1). I think counsel for the

A applicant was right in saying that in the present case what was said by JAMES, L.J., in *Re Cathcart, Ex parte Campbell* (3) applies (5 Ch. App. at p. 706) :

B "When once certain words in an Act of Parliament have received judicial construction in one of the superior courts, and the legislature has repeated them without any alteration in a subsequent statute, I conceive the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them."

C Therefore, whatever might be my own opinion upon the correctness or otherwise of the decision in *R. v. Drinkwater* (1), I think that this court ought to give effect to ss. 14 and 24 of the Act of 1910 according to the construction placed upon the corresponding sections in the old Act by the decision in that case. That being so, the question resolves itself into whether, although licensing justices have no jurisdiction to make the grant of an ordinary removal of a licence subject to any condition as to the payment of monopoly value, they are entitled to refuse the removal upon the sole ground that it would confer a great pecuniary gain upon the applicant and that, therefore, the applicant ought to apply for a new licence and pay a monopoly value. It is contended by counsel for the applicant that that would not be the proper exercise of the discretion conferred upon the licensing justices by the Act, that it is, in effect, indirectly doing that which *R. v. Drinkwater* (1) has said that it is not right and proper for the licensing justices to do. As against that, I think it must be borne in mind that both the learned judges, LORD ALVERSTONE, C.J., and KENNEDY, J., qualified and expressly explained their decision by saying that, although no condition such as was imposed in that case is proper to be imposed, yet the licensing justices, in exercising their discretion in granting or refusing an ordinary removal of a licence, may take into consideration as a proper ground the fact that the applicant will gain a pecuniary advantage to himself. I agree with LORD HEWART, C.J., and my Lord in construing that to mean that they may take that into consideration as a proper ground, and if it is the only ground, it none the less is a proper ground for them to take into consideration. In the present case the justices have by their affidavit explained their ground in the most frank and fair manner, but as it happens, in my judgment, to be a good ground, their decision ought not to be interfered with. For those reasons, I agree that this appeal fails and ought to be dismissed.

G SANKEY, L.J.—I agree, and it seems to me that the question to be solved in this appeal is: Can it be said that the justices did not exercise their jurisdiction and their discretion properly? I think that the answer to that question was given as far back as *Drinkwater's Case* (1), where LORD ALVERSTONE, C.J., in giving judgment, said ([1905] 2 K.B. at p. 477) :

H "I wish, however, to say that I do not indicate or suggest that the justices have not a discretion as to whether they will, or will not, make an order sanctioning the removal; and, speaking for myself, I think they are entitled, and ought to take into consideration the circumstance, if it exists, that by making the order, a great pecuniary gain would be conferred upon the applicant, and the public would lose that pecuniary gain, which might have been preserved to them if the application had been for the grant of a new licence."

I Counsel for the applicant says that that statement is obiter, and, therefore, one ought not to pay attention to it. I do not regard it as obiter. I regard it as explaining what the learned judge meant in giving the judgment upon the point which was involved in the case. Counsel for the applicant said that it is bad and, therefore, here is a judgment, part of which is quite good, part of which is quite bad, and so he asks us to reject the bad part. I cannot accept that argument, for two reasons. First of all, that decision has stood for a great number of years, nearly a quarter of a century. I do not attach so much importance to that, because I recognise the truth of the statement of counsel for the applicant that it is not often that one gets magistrates stating their reasons for a decision which enables

one to appeal to a higher court. Magistrates generally hold their tongues, and they may be well advised to do so. But there is something more in the present case, because since that decision has been given a new Act of Parliament has been passed, which re-enacts the old legislation, and I think this court would be slow to interfere with a decision which has not only stood the test of time, but has also, as it seems to me, been ratified by a subsequent Act of Parliament. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Godden, Holme & Ward*, for *Hobbs & Brutton*, Portsmouth; *Robbins, Olivey & Lake*, for *F. V. Barber*, Winchester.

[Reported by T. W. MORGAN, ESQ., Barrister-at-Law.]

DEWE v. DEWE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Bateson, J.), January 12, 18, 1928]

[Reported [1928] P. 113; 97 L.J.P. 65; 138 L.T. 552; 92 J.P. 32; 44 T.L.R. 274; 72 Sol. Jo. 69; 26 L.G.R. 191]

Husband and Wife—Summary proceedings—Maintenance—Bankruptcy of husband—Proof by wife for capitalised value of payments under separation deed—Receipt by wife of dividend thereon—Subsequent failure by husband to maintain—Power of magistrates to make maintenance order—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), s. 4—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 Geo. 5, c. 51), s. 1 (1).

The common law right to maintenance of a wife against her husband which has been suspended during the existence of an agreement between them for periodical payments will revive as soon as the agreement has gone.

Accordingly, where a wife, having proved in her husband's bankruptcy for an amount representing the capitalised value of weekly payments under a separation and maintenance deed, and having received a dividend in respect thereof, was in need of maintenance, which the husband failed to provide, although able to do so,

Held: justices had power to make an order for maintenance in the wife's favour on the ground of wilful neglect to maintain, whether or not he had been discharged from his bankruptcy.

McQuiban v. McQuiban (1), [1913] P. 208, applied.

Notes. Section 4 of the Summary Jurisdiction (Married Women) Act, 1895, has been further amended and extended since this decision by the Matrimonial Causes Act, 1937, s. 11, the Married Women (Maintenance) Act, 1949, s. 1 (2), s. 5, s. 6, and the Maintenance Orders Act, 1950, s. 1, s. 2; but the provisions on which this decision is based have not been affected. The poor law liability referred to by LORD MERRIVALE, P., has been repealed and replaced by a similar liability under the National Assistance Act, 1948.

Considered: *Tulip v. Tulip*, [1951] 2 All E.R. 91. Referred to: *Markovitch v. Markovitch* (1934), 151 L.T. 139; *Griffith v. Griffith*, [1957] 1 All E.R. 494.

As to grant of maintenance by a magistrate's court after a maintenance agreement, see 12 HALSBURY'S LAWS (3rd Edn.) 484; as to proof in bankruptcy for maintenance, see 2 HALSBURY'S LAWS (3rd Edn.) 471; and for cases see 27 Digest (Repl.)

A 80-86. For Summary Jurisdiction (Separation and Maintenance) Acts, see 11 HALSBURY'S STATUTES (2nd Edn.) 849 et seq.; and for Bankruptcy Act, 1914, see *ibid.*, vol. 2, p. 321.

Cases referred to:

- (1)** *McQuiban v. McQuiban*, [1913] P. 208; 83 L.J.P. 19; 109 L.T. 412; 29 T.L.R. 766; 27 Digest (Repl.) 293, 2382.
- B** **(2)** *Jones v. Newtown and Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 36 T.L.R. 758; 18 L.G.R. 481, D.C.; 27 Digest (Repl.) 82, 627.
- (3)** *Victor v. Victor*, [1912] 1 K.B. 247; 81 L.J.K.B. 354; 105 L.T. 887; 28 T.L.R. 131; 56 Sol. Jo. 204; 19 Mans. 53, C.A.; 4 Digest 295, 2770.
- C** **(4)** *Diggins v. Diggins*, [1927] P. 88; 96 L.J.P. 14; 136 L.T. 224; 90 J.P. 208; 43 T.L.R. 37, D.C.; 27 Digest (Repl.) 714, 6809.
- (5)** *Re Pannell, Ex parte Bates* (1879), 11 Ch.D. 914; 48 L.J.Bcy. 113; 41 L.T. 263; 27 W.R. 927, C.A.; 4 Digest 299, 2806.
- (6)** *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, 250.
- D** **(7)** *Wilson v. Wilson* (1848), 1 H.L.Cas. 538; 12 Jur. 467; 9 E.R. 870, H.L.; 27 Digest (Repl.) 220, 1757.
- (8)** *Manby v. Scott* (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O.Bridg. 229; 1 Sid. 109; 83 E.R. 1065, Ex. Ch.; 27 Digest (Repl.) 192, 1509.
- (9)** *Ozard v. Darnford* (1779), 1 Selwyn's N.P. (13th Edn.) 229; 27 Digest (Repl.) 187, 1433.

E **Appeal** from the decision of a metropolitan police magistrate sitting at Marylebone on Oct. 10, 1927, by which he dismissed a summons brought by Beatrice A. Dewe against her husband Albert Ernest Dewe, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, for maintenance, on the ground that he had wilfully neglected to provide her with reasonable maintenance for herself and her two children.

F The summons was dismissed on the ground that as in 1919 the husband and wife had separated and agreed to live apart on terms which were embodied in a deed dated Dec. 9, 1919, by which the husband agreed to pay the wife the sum of £2 10s. per week for the maintenance of herself and her two children, and as in 1923, on the husband's bankruptcy, from which he was now discharged, the wife had proved for and received a dividend in respect of the estimated capital value of the sums payable by him under the deed, she had extinguished her rights against her husband and discharged him from future liability for her maintenance. The terms of the deed of separation, so far as they are relevant, were as follows:

G "1. The said Beatrice Annie Dewe may at all times hereafter live separate and apart from the said Albert Ernest Dewe and from his marital control and authority as if she were feme sole and unmarried and may from time to time reside at such place or places and in such manner as she shall think proper without any interference on the part of the said Albert Ernest Dewe. 2. Neither of them the said Albert Ernest Dewe and Beatrice Annie Dewe shall directly or indirectly molest or interfere with the other of them or compel or endeavour to compel the other of them to cohabit or live with him or her by any legal proceedings for restitution of conjugal rights or otherwise howsoever. 3. The said Albert Ernest Dewe shall during the lives of himself and the said Beatrice Annie Dewe, or until they shall mutually agree to live together again pay to the said Beatrice Annie Dewe as her separate estate, but without power of anticipation, by equal weekly payments the weekly sum of two pounds ten shillings, the first of such weekly payments to be made on the day of the date hereof and future payments to become due and be made on Monday in each succeeding week, provided always that if the said Beatrice Annie Dewe shall survive the said Albert Ernest Dewe and the said weekly payment shall not have been forfeited or otherwise determined in his lifetime, then the representative

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of the said Ernest Albert Dewe shall continue to pay such weekly payment in manner aforesaid until the said Beatrice Annie Dewe shall again marry or die. 5. If the said Beatrice Annie Dewe shall die in the lifetime of the said Albert Ernest Dewe all her separate estate and property, real and personal, of which she shall not have disposed in her lifetime or by will shall, subject to her debts and liabilities, go and belong to the persons or person who would have become entitled thereto if the said Beatrice Annie Dewe had then died intestate and a spinster, and in the same event the said Albert Ernest Dewe shall permit her will (if any) to be proved or administration to her personal estate and effects to be taken out by the persons or person who would have been entitled to do so, if she had then died a spinster. 6. The said Beatrice Annie Dewe shall at all times hereafter keep indemnified the said Albert Ernest Dewe against all future debts and liabilities contracted or incurred by the said Beatrice Annie Dewe, and in case the said Albert Ernest Dewe shall at any time or times hereafter be called upon to pay or discharge and shall actually pay or discharge any such future debt or liability contracted or incurred then and in every such case it shall be lawful for the said Albert Ernest Dewe to deduct retain and reimburse to himself out of the said weekly sum of two pounds ten shillings the amount which the said Albert Ernest Dewe shall have so paid in respect of such debt or liability. 7. In case the said Albert Ernest Dewe and Beatrice Annie Dewe shall at any time hereafter with their mutual consent come together and cohabit with each other or if their marriage shall be dissolved or if they shall be judicially separated from each other in respect of anything done or suffered by either party after the execution of these presents, then and in either of such cases the said weekly payments of two pounds ten shillings shall cease and be no longer payable and thenceforth all the covenants and provisions herein contained shall become void."

The husband was adjudicated bankrupt on Sept. 12, 1923, and the wife, who had obtained two judgments against him in the High Court in actions for arrears of the weekly payment under the deed, proved in the bankruptcy for £1,380 as the capitalised value of the weekly sums payable to her under the deed. In January, 1924, a first and final dividend of sixpence in the pound was declared and paid in the bankruptcy, the wife receiving the sum of £36 17s. 6d. In 1926 the wife called upon the husband, who had obtained his discharge in the bankruptcy, to contribute towards her maintenance. This he failed to do, and in October, 1927, the wife took out the summons for maintenance on the ground of her husband's wilful neglect to provide it for her. The wife now appealed against the magistrate's dismissal of this summons. By Summary Jurisdiction (Married Women) Act, 1895, s. 4:

"Any married woman . . . whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction acting within the city, borough, petty sessional or other division or district . . . in which the cause or complaint shall have wholly or partially arisen for an order or orders under this Act . . ."

N. R. Fox-Andrews, for the wife, referred to *Jones v. Newtown and Llanidloes Guardians* (2); *Victor v. Victor* (3); *McQuiban v. McQuiban* (1); *Diggins v. Diggins* (4).

G. G. Honeymen, for the husband, referred to *Re Pannell, Ex parte Bates* (5); *Victor v. Victor* (3).

H. W. Barnard for the wife.

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Cur. adv. vult.

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Jan. 18. **LORD MERRIVALE, P.**, read the following judgment: This is an appeal by a wife from the dismissal by a metropolitan police magistrate of her application under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, for an order for maintenance against her husband. The parties were married in 1915, and have two children. In 1919 they separated and agreed to live apart upon terms which were embodied in a deed dated Dec. 9, 1919. The deed recited the agreement to live apart and an agreement by the husband to pay to the wife during their lives £2 10s. per week for the maintenance and support of herself and of the children, of whom the deed stated that the parties had agreed that the wife should have the custody and witnessed that in pursuance of the agreement, and of provisions of the deed, the parties entered into the various mutual covenants therein contained. These are usual covenants in a separation deed. The covenant as to maintenance bound the husband to pay to the wife as her separate estate, without power of anticipation, £2 10s. weekly during their joint lives and provided that in case the wife should survive the husband and the said weekly payment should not have been forfeited or otherwise determined in the husband's lifetime, his representative should continue such weekly payment until she should marry again or die. The wife covenanted for indemnity to the husband against any future debt or liability of hers and for a right of reimbursement out of the weekly allowance in case of breach of this obligation. There were also covenants for living apart and against proceedings to compel cohabitation and a proviso for determination of the weekly payment and avoidance of the deed in case of renewed cohabitation, dissolution of the marriage, or judicial separation, in respect of causes arising after the making of the deed. After proceedings by the wife in the High Court in an action for arrears under the deed, the husband, in 1923, was adjudicated bankrupt. The wife proved in the bankruptcy in respect of her rights under the deed as to moneys payable by the husband during the joint lives of the parties. In January, 1924, a first and final dividend of sixpence in the pound was declared and paid. The wife received in respect of the claim so proved by her a sum of £36 17s. 6d. The wife in 1926 called upon the husband to contribute towards her maintenance. Then and at all material times, as is alleged, the husband was engaged in a profitable practice as a dentist. He made no contribution, and in October, 1927, the wife caused to be issued at Marylebone Police Court a summons alleging against the husband wilful neglect to provide reasonable maintenance for his wife. The husband at the hearing relied on the receipt by the wife of a dividend in his bankruptcy, in respect of the estimated capital value of the sums payable by the husband under the deed. It was submitted on his behalf that inasmuch as the wife was not obliged to claim in the bankruptcy for sums which would thereafter have been payable under the deed but which had not accrued due at the bankruptcy, she had, by this claim and acceptance of the sum paid by the trustee, extinguished her rights against her husband and discharged him from future liability for her maintenance. To this submission the learned magistrate gave his assent and he accordingly dismissed the summons. The material passage in the statement by the learned magistrate of the reasons for the decision at which he arrived is in these words:

"To my mind, it cannot be said that this husband had wilfully neglected to provide reasonable maintenance for his wife, because they separated under a properly drawn deed of separation, approved by the wife's solicitors and providing her with £2 10s. per week for life. Unfortunately, the man went bankrupt, and in his bankruptcy, rightly or wrongly, she was advised to capitalise her claim—not to claim for the smaller amount of arrears then due—but to capitalise her claim for life to the extent of thirteen or fourteen hundred pounds. Unfortunately she only got sixpence in the pound. I cannot see that in the face of this, the wife can now turn round and say 'You have wilfully neglected to maintain me.' "

Before the learned magistrate the wife's rights appear to have been treated as purely contractual rights conferred by a deed which had been satisfied by operation of law. Before us, it was more persuasively argued that the wife had accepted the provisions of the deed in satisfaction of all right to maintenance, however arising, and that the husband's liability in respect of any such claim had been discharged by his bankruptcy or by the wife's acceptance of a dividend upon the capital value of the agreed amounts. Reliance was placed on the husband's behalf on numerous cases which established long since the right of a wife situated as this wife was to prove in bankruptcy for the whole value of an agreement for payments by her husband in respect of maintenance and on cases which established that, after bankruptcy, a wife, so situated, had no cause for action under an agreement for maintenance. From a judgment of JAMES, L.J., in *Ex parte Bates* (5), these words were cited :

"The statute has converted the annuity for the purpose of proof into a gross sum immediately payable, and on that sum the creditor is entitled to receive dividend, both parties, the creditor and the trustee, taking the proof for better or for worse."

A judgment of COZENS-HARDY, M.R., in *Victor v. Victor* (3) was cited for this statement :

"It seems to me that the whole policy of the Bankruptcy Act is that the bankrupt is to get complete discharge from contractual obligations to pay sums of money, and the only right of the person under the terms of the contract, whatever the pecuniary claim is, is to come in."

The various authorities relied upon do, of course, establish that bankruptcy is an answer to any claim under a separation deed made before bankruptcy for payment of agreed sums under it. They do not, however, deal with the question of marital right which is here involved, and the amplitude of the language used in some of the cases may be misleading if it is considered without due regard to the subject-matter which was then under consideration.

The practical objection to the conclusion sought to be reached is that it would convert an agreement to live apart with an allowance for maintenance into an agreement to live apart without provision for maintenance. Whether in the case of an agreement for maintenance between strangers the effect of bankruptcy would be what is suggested here would depend, no doubt, on the tenor of the agreement as a whole. Here, however, it is necessary to have definitely in mind the position in law of this wife as a married woman. Though the juristic capacity of married women has been, broadly speaking, equalised in recent years with that of other citizens, the changes made have not eliminated some of their privileges. The course of events, mainly legislative, which has given to married women capacity to contract and to sue and be sued has not abrogated certain rules of law as to the consequences of marriage which affect disputes like the present; but they are apt to be forgotten. Behind the relevant statutory enactments is an historic development of law whereby contractual dealings with matrimonial rights have become cognisable by the courts instead of being excluded as contrary to public policy. The judgment of LORD BROUGHAM in the well-known case of *Warrender v. Warrender* (6) in 1835 and the arguments and judgments in the more important case of *Wilson v. Wilson* (7) in 1848 give some information as to this matter. All the changes in question have left the married woman possessed of exceptional rights which are relevant to the matters now under consideration. It is necessary, then, to see what is the nature in point of law of a wife's right to maintenance by her husband, and to what extent the right is necessarily affected by a separation deed containing an agreement to pay moneys for maintenance. The right of a wife to maintenance as against her husband is not contractual in its nature. It is an incident under the common law of the status or estate of matrimony which is thus summarily expressed (1 Bac. Abr. 713) :

- A "A husband is obliged to maintain his wife and may by law be compelled to find her necessaries as meat drink clothes physic, &c., suited to the husband's degree, estate, or circumstances."

Among the authorities cited is the famous case seven times argued of *Manby v. Scott* (8) (1 Sid. at p. 120), wherein as to one resolution all the judges agreed

- B "Fuit resolve per tous les Justices d'Angleterre que baron joint maintaine l'our femes ove necessaries."

One of the most familiar illustrations of the wife's rights to maintenance is her power to pledge her husband's credit for necessaries, and very often in actions of debt for necessaries supplied to married women living apart from their husbands under agreements for maintenance, the liability of the husband has been found to depend on an inquiry whether the husband had paid as agreed. In *Ozard v. Darnford* (9) LORD MANSFIELD stated the rule as to exemptions from liability for necessaries to the wife, in this concise phrase :

"If upon separation the husband agrees to make her a sufficient allowance and pays it, . . . the husband is not liable."

- D The language is the more striking for its brevity—"If . . . the husband 'agrees' and 'pays.' "

Besides the *primâ facie* authority of the wife to pledge the husband's credit, another expression of the obligation which is inherent in the marriage tie is the liability of the husband to reimburse the costs of the maintenance of his wife which may fall on any poor-law authority. This is statutory and intact. How, and to what extent, a wife can relieve her husband of liability for her maintenance, is not necessary for consideration here. The effect of a separation agreement in common form with common-form clauses as to maintenance is alone in question. An agreement for this provision suspends the common-law right of the wife, but does not annul it. Without some express provision to the contrary that right would become operative in its entirety on a return of the parties to cohabitation. As from the bankruptcy of the husband there ceased to be in existence any agreement of his, providing for the discharge of his common-law obligation, or capable of being set up in answer to the wife's claim thereunder. The equitable right of the husband to set up the agreement made in limitation of the primary right is gone. How far, and for what purposes, the separation agreement subsists, if at all, depends on considerations not necessary for examination in this case. That there is no combined effect of a separation deed with provisions for maintenance and the subsequent occurrence of bankruptcy, which deprives a wife of her claim against her husband to be provided for as a wife, is declared in a considered judgment of SIR SAMUEL EVANS, P., delivered in 1913 in *McQuiban v. McQuiban* (1). The facts in that case bear some likeness to those in this case. The deed contained an agreement for maintenance and a covenant against any suit for restitution of conjugal rights, but the learned President declared that the foundation of such a deed is the obligation to maintain, and in view of the decisions which preclude an action on the deed after bankruptcy, held that the husband's refusal of cohabitation and of maintenance founded a right in the wife to a decree of restitution, a decree which in case of disobedience might be made the ground of a decree of judicial separation with due provision for maintenance.

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- I Besides raising the defence founded on the bankruptcy the husband relies on the wife's action in making proof of a claim under the agreement and receiving a dividend from the estate. The receipt of this dividend is said to operate by way of composition, novation, or satisfaction under a substitutional agreement. It is to be observed, however, that the claim and receipt of dividend were not incidents in a transaction between husband and wife. The husband's estate came to be distributed according to law, and the wife, having an agreement for certain payments of money which gave right of proof, proved on it, without any new bargain with the husband. Whether she proved or not, the husband's liability under the agreement

went on bankruptcy. If there is the appearance of inconsistency, it arises from the statutory provisions governing bankruptcy. The argument comes back to the position that the common-law right of wife against husband, which has been suspended during the existence of the agreement for periodical payment, revived as soon as that agreement was gone, and it revived notwithstanding the receipt of dividends payable by reason of the agreement. The wife is not, then, disabled in point of law, by the separation agreement and the husband's bankruptcy, from alleging that her husband is "guilty of wilful neglect to provide reasonable maintenance" for her within the terms of the statutes under which her summons was issued. The husband is not relieved by the facts on which he has relied, from his common-law liability. He does not provide maintenance for his wife, and it is proper, therefore, that the case should go back to the learned magistrate in order that he may determine, having regard to the wife's position, the husband's resources and the provisions of the statutes, the extent, if any, of the contribution which the husband should be ordered to make. The appeal will be allowed.

BATESON, J.—I concur.

Appeal allowed.

Solicitors: *Lawrence Jones & Co.*; *H. W. Clarkson*, for *Herbert Simpson, Son & Bennett*, Leicester.

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

FLEMING v. HORNIMAN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), January 19, 20, 24, 25, February 7, 1928]

[Reported 138 L.T. 669; 44 T.L.R. 315]

Domicil—Change of domicil—Abandonment of domicil of choice—Country of domicil of choice left with intention to return for visits—Re-acquisition of abandoned domicil of choice.

A person abandons a domicil of choice when, having formed the intention to leave the country of that domicil for good, he leaves it, or when, having left that country, he abandons the intention to live in it permanently. For this purpose a person has the intention to leave a country "for good," *sine animo revertendi*, if he has the intention of giving up permanent residence there, even though he has in mind that he may or will pay a temporary visit to that country at some future time. Once a domicil of choice has been abandoned it can be re-acquired only by fulfilment of the same conditions (*viz.*, residence in the country of such domicil with the intention of permanently residing there) as were necessary to acquire it originally.

Notes. As to domicils of origin and of choice, see 7 HALSBURY'S LAWS (3rd Edn.) 15-24; and for cases see 11 DIGEST (Repl.) 328-331.

Cases referred to:

- (1) *Re Marrett, Chalmers v. Wingfield* (1887), 36 Ch.D. 400; 57 L.T. 896; 36 W.R. 344; 3 T.L.R. 707, C.A.; 11 Digest (Repl.) 329, 40.
- (2) *In the Goods of Raffanel* (1863), 3 Sw. & Tr. 49; 1 New Rep. 569; 32 L.J.P.M. & A. 203; 8 L.T. 211; 9 Jur.N.S. 386; 11 W.R. 549; 164 E.R. 1190; 11 Digest (Repl.) 353, 221.
- (3) *Re Steer* (1858), 3 H. & N. 594; 28 L.J.Ex. 22; 32 L.T.O.S. 130; 157 E.R. 606; 11 Digest (Repl.) 335, 78.
- (4) *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326; 32.

A Probate Action for revocation of a probate in common form.

The plaintiffs, Juan Enrique Augustin Fleming and Maria Carmen Hawtrey, claimed as lawful children of the testator, James Albert Fleming, who died in London on July 28, 1926, a widower, aged sixty-nine, having made a will four years earlier. They contended that he died intestate and domiciled in the Argentine Republic, under the law of which the plaintiffs would be entitled to four-fifths of the estate. They asked the court to revoke probate of the will, dated July 24, 1926, which had been granted in common form. They took further points as to this will, on which the case is not reported. The defendants, John Eric Horniman and James Dey, the executors of the will of July 24, 1926, claimed probate of the will in solemn form and a declaration that the deceased died domiciled in England. The intervener, Elizabeth Knox Fleming, the widow of a brother of the testator, adopted the defence, but she died before the action was heard. The facts so far as they are material appear from the judgment.

Ernest Charles, K.C., and T. Bucknill for the plaintiffs.

Sir Ellis Hume-Williams, K.C., and H. W. Barnard for the defendants.

Cotes-Preedy, K.C., and Noel Middleton for the intervener's executors.

Cur. adv. vult.

Feb. 7. **HILL, J.**, read the following judgment.—The testator died on July 28, 1926, in London. He had executed his last will on July 24, 1926. It disposed of all his property. The defendants, the executors, proved that will in common form. This action was begun on Jan. 5, 1927, by the two children of the testator, a son and daughter. Neither of the children takes any benefit under the will of July 24, 1926. By their allegations in the statement of claim the plaintiffs attacked the will as a whole. As to this part of the case, the plaintiffs wholly failed. The due execution was proved, the testator's knowledge and approval was proved, the case as to insane delusions wholly broke down, and was very properly withdrawn by counsel for the plaintiffs. It follows that the will is entitled to probate in solemn form. By the statement of claim the plaintiffs further allege that the testator died domiciled in the Argentine Republic. The importance of this in administration lies in the fact that by Argentine law the testator had no power to dispose of four-fifths of his estate except to the plaintiffs; it must pass to them, whatever the wishes of the testator. The defendants allege that the testator died domiciled in England. The plaintiffs claim a declaration of Argentine domicile. The defendants claim a declaration of English domicile.

The testator was born in 1856 near Halifax, Yorkshire, of English parents. His domicile of origin was therefore in England. In 1881 he went to the Argentine and lived there until early in 1926, except that he and his wife and children came to England for a visit in 1899; he himself came to England for a visit in 1923, and again in 1925. On Mar. 3, 1926, the testator sailed from Buenos Aires, and after breaking his journey at Madeira and Portugal, reached England on April 26, 1926. He remained in England till the day of his death. All his life he retained his British nationality.

Two questions are to be determined: (i) Did he acquire a domicile of choice in the Argentine? The onus of this is on the plaintiffs. (ii) If he did, did he abandon that domicile of choice before his death? If he did, had he reverted to his domicile of origin? The onus of proving abandonment is on the defendants. On the first question the matter to be decided is this, as stated by BOWEN, L.J., in *Re Marrett* (1) (36 Ch.D. at p. 408):

"When a man takes up his residence in a new country, the problem which has to be solved is whether there has been such a fixed and settled intention permanently to reside in the new country as, concurring with the actual residence there, amounts to an adoption of a domicile of choice, instead of the domicile of origin."

The authorities speak of the change *animo et facto*. The *animus* is the fixed and settled intention permanently to reside. The *factum* is the actual residence. On

the second question the law is thus stated in DICEY'S CONFLICT OF LAWS (4th Edn.) at p. 110, under r. 8:

"A domicile of choice is retained until both residence (factum) and intention to reside (animus) are in fact given up, but when once both these conditions have ceased to exist, it is abandoned as well in law as in fact."

[See now 7th Edn., p. 110, r. 10, which has been re-phrased.] A mere intention is not enough so long as the person continues to remain within the territory of his domicile of choice: see *In the Goods of Raffanel* (2). A leaving that territory is not enough, so long as the person continues his intention to reside permanently in the country of his domicile of choice: *Re Steer* (3). But when the intention is formed and the residence is brought to an end, or the residence having been brought to an end, the intention is formed, then there is a complete abandonment of the domicile of choice. The intention here meant is a formed intention to leave the country of the domicile of choice for good. I would only add this. The authorities often speak of a person leaving the country of his domicile of choice *sine animo revertendi*. That, I take it, means without the intention of returning to it as his permanent home. If a man intends to give up his domicile of choice, and in fact gives up his residence there, it is not inconsistent with an abandonment that he has it in mind that he may or will pay a temporary visit to that country at some future time. For instance, a man with a domicile of origin in England acquires by residence and intention a domicile of choice in France. He then leaves France with the intention to give up permanent residence there but has it in mind that he will make his home in England but occasionally will go to the French Riviera for a holiday. *Udny v. Udny* (4) settled the point that a domicile of choice may be abandoned though no intention has been formed to choose another domicile in any particular country. In such a case upon the abandonment there is an intended reversion to the domicile of origin. It follows that if a person leaves the country of his domicile of choice with the fixed and settled intention to give up residence there, and thereupon reverts to his domicile of origin, and afterwards changes his mind, and forms the intention of returning to that country as permanently residing there, he re-acquires a domicile of choice there, only when, with that intention he again resides there; or, in other words, a domicile of choice must be acquired over again by fulfilment of the same conditions as before.

I have come to the conclusion on the evidence (a) that the testator acquired a domicile of choice in the Argentine; and I think that he retained it until he left the Argentine on Mar. 3, 1926. But in my judgment the evidence makes it quite clear (b) that he abandoned it when he so left the Argentine. The intention was already fixed and settled, and with that intention he in fact ceased to reside. In my judgment when the ship in which he travelled set sail from Buenos Aires he reverted to his domicile of origin; and thereafter he acquired no new domicile in the Argentine or in any other country. Even if I am wrong in concluding that the intention was already fixed and settled when the testator sailed from Buenos Aires, it became fixed and settled between the time of his reaching England in April, 1926, and his death in July, 1926. [His Lordship then having reviewed the evidence in great detail, pronounced for the will to be proved in solemn form, directing that probate should be handed out to the defendants, the executors, and he made a declaration that the testator died domiciled in England.]

Solicitors: *Thomas Cooper & Co.*; *A. F. & R. W. Tweedie*; *G. & A. Marshall*.

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

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Re DEBTOR (No. 27 of 1927)

[CHANCERY DIVISION (Astbury and Clauson, JJ.), March 27, 1928]

[Reported [1929] 1 Ch. 125; 97 L.J.Ch. 167; 140 L.T. 186;

[1928] B. & C.R. 34]

B

Bankruptcy—Receiving order—Petition based on judgment debt—Judgment obtained pursuant to compromise of action—Power of court to go behind judgment under compromise—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 5 (3).

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The Bankruptcy Court, before making a receiving order, has power to go behind a compromise in an action in which the petitioning creditor sued the debtor, under which compromise judgment was given for the debt on which the petition is founded, but the court will not do so when on the compromise the defendant was properly represented by counsel and no *prima facie* case is shown for impeaching the propriety of the compromise.

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Notes. Approved: *Re Gregory, Ex parte Norton*, [1935] Ch. 65.

As to when the bankruptcy court may go behind a judgment non-compliance with a notice based on which is relied on as an act of bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 315; and for cases see 4 DIGEST 95. For the Bankruptcy Act, 1914, s. 5 (3), see 2 HALSBURY'S STATUTES (2nd Edn.) 334.

Cases referred to:

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(1) *Re Hawkins, Ex parte Troup*, [1895] 1 Q.B. 404; 64 L.J.Q.B. 373; 72 L.T. 41; 43 W.R. 306; 39 Sol. Jo. 115; 2 Mans. 14; 14 R. 44, C.A.; 4 Digest 325, 3052.

(2) *Re Lennox, Ex parte Lennox* (1885), 16 Q.B.D. 315; 55 L.J.Q.B. 45; 54 L.T. 452; 34 W.R. 51; 2 T.L.R. 60; 2 Morr. 271, C.A.; 4 Digest 325, 3054.

F

Appeal by the debtor from a receiving order made by the registrar of the Brighton County Court on Jan. 17, 1928.

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On Nov. 27, 1926, an action was tried in the King's Bench Division which was brought by the petitioning creditors, a firm of outside stockbrokers, against the debtor for a sum of £700 or thereabouts, which was alleged to be the balance of the price of certain stocks and shares and German marks sold by the petitioning creditors to the debtor. The debtor pleaded the Gaming Acts, and at the trial, at which the debtor was represented by a leading and junior counsel, a compromise was arrived at, by which the debtor submitted to judgment against her for the sum of £332 4s. 6d., consisting of £80 10s., the balance of the debt after certain deductions, and £250 14s. 6d., the taxed costs of the plaintiffs. On May 5, 1927, the judgment creditors served on the debtor a bankruptcy notice to pay the judgment debt. The debtor did not comply with the notice, and on June 10, 1927, the judgment creditors presented a bankruptcy petition against her. On the hearing of the petition the registrar held that the debtor had made out a case for going behind the judgment, but that there was good consideration for the judgment which the debtor had submitted to on the advice of her counsel, and he, therefore, made a receiving order. The debtor appealed.

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W. N. Stable, for the debtor, submitted that there was "sufficient cause" for making no receiving order under s. 5 (3) of the Bankruptcy Act, 1914, and referred to *Re Hawkins, Ex parte Troup* (1) and *Re Lennox, Ex parte Lennox* (2).

E. A. Harney, K.C., and *G. F. Kingham*, for the petitioning creditors, were not called upon.

ASTBURY, J., stated the facts and continued: In this case the judgment was submitted to by the appellant, the debtor, on the advice of her counsel, who presumably had full knowledge of the facts which led up to the compromise on which the judgment was founded. At the trial in the King's Bench Division the debtor

was represented by a leading and a junior counsel, and she is now asking the court, in face of those facts, to go behind the judgment and investigate the circumstances which led up to the compromise. True it is that the Bankruptcy Court may, on a *prima facie* case being shown, go behind a judgment for the purpose of satisfying itself that the debt enforceable thereunder was a real debt. But here counsel for the debtor has failed to show anything in the circumstances of this compromise which raises any such suspicion of unfairness or impropriety as to justify this court in looking behind the judgment to inquire into the consideration for the debt or the propriety of the compromise. The appeal fails and must be dismissed.

CLAUSON, J.—I concur.

Solicitors: *Gordon, Gardiner, Carpenter & Co.*, for *F. H. Carpenter*, Brighton;
W. J. Pitman.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

BLANCHARD v. BLANCHARD

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (HILL, J.), February 8, 14, 1928]

[Reported 138 L.T. 176; 44 T.L.R. 313; 72 Sol. Jo. 138]

Divorce—Judicial separation—Dismissal of petition—Discretion of court—Petitioner's motive for not asking for divorce—Opinion of court that divorce preferable—Petitioner not needing protection, but seeking custody and maintenance—Supreme Court of Judicature (Consolidation) Act, 1925, (15 & 16 Geo. 5, c. 49), s. 178, s. 185.

The court has no discretion to refuse a decree of judicial separation, if prayed for, simply on the ground that it thinks it would be better to decree a dissolution of the marriage, nor on the ground that the petitioner's motive in seeking judicial separation rather than divorce is a vindictive desire to prevent the remarriage of the respondent.

A wife petitioned for a judicial separation on the ground of her husband's adultery, which was proved. The wife did not require protection from her husband, but did require maintenance and custody of the child of the marriage. Her motive for seeking a judicial separation, and not a divorce, was a vindictive desire to prevent her husband marrying the other woman.

Held: maintenance and custody were part of the purpose for which the suit was brought, and, therefore, the suit was not brought wholly for the collateral purpose of punishing the husband, and the wife was entitled to a decree.

Matthews v. Matthews (1) (1860), 3 Sw. & Tr. 161, distinguished.

Notes. Section 178 and s. 185 of the Judicature Act, 1925, have been repealed and replaced by the Matrimonial Causes Act, 1950, s. 4 and s. 14 (1). Section 4 is in different terms to s. 178, but is of similar effect. Section 14 (1) is similar to s. 185 (1), but provides (in lieu of s. 185(2)) that the provisions of s. 4 as to the duty of the court to inquire and to grant or refuse a decree on a petition for divorce "shall apply in like manner to a petition for judicial separation." The difference in wording discussed by HILL, J., therefore, no longer exists. The court now has jurisdiction (under s. 23 of the 1950 Act) to make an order for maintenance without making a decree, on the ground of the husband's wilful neglect to maintain the wife or a child; and so some of the reasoning of HILL, J., in this case no longer applies. This case, however, remains an authority for the propositions set out in the headnote.

A As to the discretion of the court to refuse a decree of judicial separation, see 12 HALSBURY'S LAWS (3rd Edn.) 286; and for cases see 27 DIGEST (Repl.) 330. For the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to:

- B (1) *Matthews v. Matthews* (1860), 3 Sw. & Tr. 161; 29 L.J.P.M. & A. 118; 2 L.T. 472; 6 Jur.N.S. 659; 8 W.R. 591; 164 E.R. 1235; 27 Digest (Repl.) 415, 3451.
(2) *Johnson v. Johnson*, [1901] P. 193; 70 L.J.P. 44; 84 L.T. 725; 27 Digest (Repl.) 421, 3521.

C **Petition** by Mrs. E. A. Blanchard for a decree of judicial separation from her husband, Mr. W. B. Blanchard, on the ground of his adultery with Mrs. H. The facts and argument appear from the judgment.

The Supreme Court of Judicature (Consolidation) Act, 1925, provided:

"Section 178 (3). If the court is satisfied on the evidence that the case for the petition has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall pronounce a decree of divorce; Provided that the court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the court he has been guilty: (a) of unreasonable delay in presenting or prosecuting the petition; or (b) of cruelty towards the other party to the marriage; or (c) of having without reasonable excuse deserted, or of having without reasonable excuse wilfully separated himself or herself from the other party before the adultery complained of; or (d) of such wilful neglect or misconduct as has conduced to the adultery.

F Section 185 (1). A petition for judicial separation may be presented to the court either by the husband or the wife on the ground of adultery, or cruelty, desertion without cause for not less than two years, failure to comply with a decree for restitution of conjugal rights, or on any ground on which a decree for divorce a mensa et thoro might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857. (2) The court may, on being satisfied that the allegations contained in the petition are true and that there is no legal ground why the petition should not be granted, make a decree for judicial separation, and any such decree shall have the same force and effect as a decree for divorce a mensa et thoro had immediately before the commencement of the Matrimonial Causes Act, 1857."

G *Walter Frampton* and *H. W. M. Potter* for the petitioner.

G. Tyndale and *Wavell-Paxton* for the respondent.

Cur. adv. vult.

H Feb. 14. **HILL, J.**, read the following judgment: In this case a petitioner wife seeks a decree of judicial separation on the ground of the respondent husband's adultery. The adultery proved was subsequent to 1923, and the petitioner is therefore entitled to a decree of dissolution, but she seeks only for judicial separation. There was no doubt about the adultery. The respondent left the petitioner, and was found living with another woman. The husband of that woman petitioned for divorce, naming the present respondent as co-respondent. The jury found the adultery proved, and a decree nisi was pronounced. The respondent and the other woman are still living together. The other woman wants to marry the respondent as soon as the decree against her is made absolute. The respondent, if he is able to do so, wants to marry the other woman. It is probable that they will continue to live together, whether they can marry or not. But the petitioner does not ask for dissolution, and, as the law stands, dissolution cannot be decreed unless she asks for it.

In cases such as this, I have thought it my duty to inquire why judicial separation and not dissolution is asked for. My reason for so doing is twofold: (i) That, according to law, judicial separation is not to be decreed when it is sought not for the protection of the wife, but for some wholly collateral purpose; and (ii) that I am well aware of the evils likely to result when persons bound by the marriage ties are living apart with no real prospect of reconciliation. In the words of SIR F. JEUNE in *Johnson v. Johnson* (2) ([1901] P. at p. 195):

"It is a terrible thing that people should be going about this world, neither married nor unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery."

And as was said in the Majority Report of the Divorce Commission, and said with the high authority of LORD GORELL:

"If a party sues, where there is ground for divorce, the remedy claimed is not one which concerns the party alone, but also the parties, the children, the State and the interests of morality."

Inquiring the reason why judicial separation and not dissolution is sought, I have found sometimes that it is religious conviction, the belief that whatever the law may say, marriage is indissoluble. Such a conviction conscientiously held I am bound to respect. That I do not share it, is apparent from the fact that I administer a law based on the contrary view. Sometimes the reason is ignorance of the law—the mistaken idea that, if she divorces her husband, a wife cannot obtain maintenance from him; whereas, in fact, the powers of the court in regard to maintenance are greater on a decree of dissolution than on a decree of judicial separation. Sometimes the wife has the hope that some day her husband will return to her and thinks that there will be a better chance of this if the marriage is not dissolved. But sometimes the motive is much less worthy. It is the desire to punish the husband by making it impossible during the wife's lifetime that he should marry anyone else, and to punish the other woman by making it impossible that she shall marry the husband. With that desire, so wanting in charity and, it may be, so cruel in its effects, there can be no sympathy, especially now, when a wife is entitled to relief on the ground of a single act of adultery, I think it shocking that it should depend on her caprice to inflict upon the husband so severe a punishment.

Following my practice, I asked the petitioner why she sought judicial separation and not divorce. She was quite frank about it. She had no religious objection to divorce. She had no expectation or wish that her husband should return to her. Her reason was this—the other woman had ruined her home, and she did not want her husband to marry that woman. In these circumstances I greatly regret that the law gives me no power to decree dissolution. Parliament has not acted on the recommendation of the Divorce Commission that the court should have a discretion in these cases. But the petitioner has been grievously wronged by the respondent and though she needs no protection against interference by the respondent, yet she wants orders for permanent maintenance and for custody, and this court has no power to make such orders except on a decree. Maintenance and custody are at any rate part of the purpose for which the suit is brought. It is not brought wholly for a collateral purpose, as in the case I was referred to, *Matthews v. Matthews* (1).

It was argued that the court had a discretion. As the point was argued I ought to add that on the facts of this case and on the law as it stands, the petitioner, in my opinion, has a right to a decree of judicial separation. The court has a discretion, but not an unlimited discretion. The discretion must be exercised on some legal ground. That, in my view, is the effect of s. 185 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925. It is true that the word used in s. 185 is "may," whereas in s. 178, which relates to dissolution, the word used is "shall." The same difference in wording is to be found in the repealed section of the Act of 1857. The reason for this difference in 1857 was, I think,

A this. As regards judicial separation the Act merely conferred on the Divorce Court, with certain additions, the jurisdiction formerly exercised by the Ecclesiastical Courts as regard divorce a mensa et thoro, and directed the Divorce Court to act on the principles on which the Ecclesiastical Courts had theretofore acted. But as regards dissolution, the Act created a new right and defined in detail the conditions to which it was subject—the absolute and discretionary bars to a decree.

B No such detailed definition of the right to judicial separation and its conditions was necessary. They were already regulated by the rules of law which had prevailed in the Ecclesiastical Courts. The Supreme Court of Judicature (Consolidation) Act, 1925, deals with the two heads of relief in the same way, s. 178 as to dissolution defines the absolute and discretionary bars, and uses the word “shall”; s. 185, as to judicial separation, uses the word “may,” but instead of setting out the absolute and discretionary bars, requires the court to be satisfied that “there is no legal ground why the petition should not be granted.” The legal grounds are to be found in the cases, and they include the absolute and the discretionary bars, and the ground that the suit is not brought *bonâ fide*, but only for some collateral purpose. But it is not a legal ground that the court thinks it would be better that the relief to be granted should be dissolution and not judicial separation.

C Before the Act of 1923, when the only marital offence of the husband was adultery, the wife could obtain no relief other than a decree of judicial separation. But if there were no legal ground against it, she had a right to that decree. That right has not been taken from her, because an alternative remedy was given her by the Act of 1923. There will, therefore, be a decree of judicial separation with custody of the younger child of the marriage and with costs.

E Solicitors: *Firth & Co.* for *Wilfrid Firth*, Brentford; *Oswald Hanson & Smith*.

[Reported by C. G. MORAN, ESQ., Barrister-at-Law.]

F

Re DEBTOR (No. 549 of 1928)

G [COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), October 19, 1928]

[Reported [1929] 1 Ch. 170; 98 L.J.Ch. 35; 140 L.T. 165; 45 T.L.R. 10; 72 Sol. Jo. 729; [1928] B. & C.R. 125]

Bankruptcy—Receiving order—Landlord creditor requiring under-tenant to pay rent direct to him—Payment by under-tenant—Over £50 still owing to landlord—Jurisdiction to make receiving order on landlord’s petition—Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 6—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 1 (1) (g), s. 2, proviso (ii).

H A landlord presented a bankruptcy petition against his tenant founded on non-compliance with a bankruptcy notice based on a judgment for arrears of rent. Subsequently, the landlord gave notice to the tenant’s sub-tenants, under the Law of Distress Amendment Act, 1908, s. 6, requiring them to pay their rent direct to him as superior landlord. One sub-tenant paid £62 rent to the landlord, but there still remained £155 owing under the judgment.

I **Held:** the landlord’s notice under the Act of 1908 had not prevented or hindered the debtor from discharging his debts, and, therefore, it did not prevent the landlord from continuing the bankruptcy proceedings, and a receiving order made on his petition was rightly made.

Re Bond, Ex parte Capital and Counties Bank (1), [1911] 2 K.B. 988, and *Re Debtor* (2), [1917] 2 K.B. 60, applied.

Notes. As to a landlord petitioning creditor exercising concurrent remedies against the debtor, see 2 HALSBURY'S LAWS (3rd Edn.) 290. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321; and for the Law of Distress Amendment Act, 1908, see *ibid.*, vol. 6, p. 170.

Cases referred to:

- (1) *Re Bond, Ex parte Capital and Counties Bank, Ltd.*, [1911] 2 K.B. 988; 81 L.J.K.B. 112; 19 Mans. 22; sub nom. *Re Lupton, Ex parte Lupton*, 55 Sol. Jo. 717, D.C.; 4 Digest 87, 788.
- (2) *Re Debtor, Ex parte Petitioning Creditor*, [1917] 2 K.B. 60; 86 L.J.K.B. 745; 116 L.T. 581; [1917] H.B.R. 123, C.A.; 4 Digest 144, 1345.

Appeal by a debtor against a receiving order made by the Registrar, Sir Denham Warrington, on July 31, 1928, on the petition of the debtor's landlord.

The facts are fully set out in the judgment of the Master of the Rolls.

R. F. Kingham for the debtor.

Tindale Davis for the petitioning creditor, the landlord.

LORD HANWORTH, M.R.—This appeal fails. One point in it has been argued which may be said to be a matter of some public interest. The debtor is tenant to the petitioning creditor of some premises in Victoria Street, and parts of those premises were sublet by the debtor to two other persons. On May 22, 1928, judgment was obtained by the petitioning creditor against the debtor for £204, being in respect of rent, rates, and insurance, and the amount payable under that judgment is raised to £217 odd by the addition of some costs. In respect of that debt of £217, the petitioning creditor, on June 1, served a bankruptcy notice. That notice was not complied with, and the result was that, under s. 1 (1) (g), of the Bankruptcy Act, 1914, an act of bankruptcy had been committed by the debtor. Subsection 1 (g) provides that an act of bankruptcy has been committed by a debtor

"If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him a bankruptcy notice under this Act, and he does not, within seven days after service of the notice, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid."

It is to be noticed that there is a proviso to s. 2 of that Act, and it provides that a bankruptcy notice

"Shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mis-statement."

It is quite clear, therefore, that in the present case an act of bankruptcy could be alleged against the debtor.

A petition for a receiving order was presented on June 15. A day or two later, some few days before June 24, quarter day, the petitioning creditor exercised the powers given to him by s. 6 of the Law of Distress Amendment Act, 1908, and served on the sub-tenants of the premises a notice stating the amount of arrears due to him, and requiring all rents to be paid direct to him, as superior landlord, until the arrears had been made up. There is no doubt that the petitioning creditor, as superior landlord, had that statutory right to ask the under-tenants to pay him direct, and in fact the sum of £62 was received from one of those sub-tenants, so that the debt due of £217 has been in part liquidated. But at the time when the bankruptcy notice was issued it was a regular notice, and it seems to me that nothing intervened to prevent the operation of s. 1 (1) (g) of the Bankruptcy Act, 1914. There was a hearing before the registrar, which was adjourned, and there was a hearing again on July 3. Evidence was given on that occasion as to the debtor's conduct, which was apparently not very satisfactory, but the

A hearing was again adjourned until July 17. It was then adjourned again until July 31, on the suggestion that if time were allowed to the debtor he might be able to make some arrangement which would enable him to pay in full. On July 31 it was again urged that the money could be paid if a reasonable time were granted, but apparently the registrar thought that time enough had been given, and so a receiving order was made, the advertisement of it, at the debtor's request, being stayed.

This is an appeal from the making of the receiving order. Counsel for the appellant debtor takes two points. First, he says that the receiving order should not be made because it would not give the debtor time to clear up his position. As regards that, I think that the registrar came to the right conclusion. I think that the matter should pass into bankruptcy, and I really cannot say that the registrar has not exercised a proper discretion. But the other point taken is this. It is said that the petitioning creditor, having exercised his powers under the Law of Distress Amendment Act, 1908, has precluded himself from proceeding under the bankruptcy notice, because he has intercepted money which otherwise would have flowed into the coffers of the debtor and have been available for his creditors in bankruptcy. In other words, counsel says that as the petitioning creditor has elected to proceed under another remedy, the Act of 1908, all proceedings under the bankruptcy notice should be stayed. The petitioning creditor, he contends, should not be allowed to harass the debtor under two different modes of procedure. In my view, that argument is not sound. Authority has been cited by counsel for the petitioning creditor which shows that if the sum of £50 still remained owing to the petitioning creditor, it was the duty of the registrar to make a receiving order. I do not think that the point that the petitioning creditor is pursuing two separate remedies is a very convincing one. The two authorities cited are *Re Bond, Ex parte Capital and Counties Bank, Ltd.* (1), and *Re Debtor* (2). Those authorities show that there is no ground for saying that the petitioning creditor is not entitled to proceed, even though he still has a debt of over £50 due to him. The fact that the act of bankruptcy was complete on June 9 is enough. The remedy under s. 6 of the Law of Distress Amendment Act, 1908, is simply to prevent loss being suffered; it is a remedy which may save assets which might otherwise go to the debtor, but I do not think that it affects the right of the petitioning creditor to get a receiving order, if the proceedings he has taken are in order and the debt still due to him is over the required amount.

G **LAWRENCE, L.J.**—I agree. It is not disputed that the bankruptcy notice is perfectly valid; that the debtor failed to comply with it, and that the bankruptcy petition was properly presented. But counsel for the debtor contended that the subsequent service by the petitioning creditor on the debtor's under-tenants of a notice under s. 6 of the Law of Distress Amendment Act, 1908, and the consequences which ensued on the service of that notice constituted sufficient cause why no receiving order ought to be made within the meaning of s. 5 (2) of the Bankruptcy Act, 1914. It is said that the action taken by the petitioning creditor has prevented the debtor from receiving the rents otherwise payable to him, and has therefore hindered him in discharging his debts. What actually happened was that one of the under-tenants paid his rent, amounting to about £62, to the petitioning creditor, with the results that if the petitioning creditor is entitled to retain this sum as against the trustee in bankruptcy, a question on which I express no opinion, the petitioning creditors debt would be reduced by that amount; but there would still be left the balance of the debt, which is sufficient in amount to support the bankruptcy petition. Another under-tenant refused to pay his rent, amounting to £62 10s., either to the petitioning creditor or to the debtor, but agreed with the debtor to place the amount due in the joint names of the solicitors of the under-tenant and of the debtor. The under-tenant apparently adopted this course because he had notice of the act of bankruptcy, and he was, in my opinion, well advised in acting as he did. In view of these facts, and of the other facts

stated by the Master of the Rolls, which I will not repeat, it is idle to suggest that the action of the petitioning creditor has in any way prevented or hindered the debtor from discharging his debts. Nor has the conduct of the petitioning creditor, in taking steps to prevent the rents due from the under-tenants reaching the debtor, in my opinion, been such as to disentitle them in a receiving order. In my judgment, therefore, the debtor has not shown any sufficient cause why a receiving order should not be made, with the result that the appeal fails and ought to be dismissed.

RUSSELL, L.J.—I agree. When the dates in this case are borne in mind the bottom falls out of the argument for the debtor. It is quite impossible to say that the notice given to the sub-tenants by the petitioning creditor operated to hinder or prevent the debtor from complying with the bankruptcy notice, and therefore the order made by the registrar was, in my opinion, a proper order.

Appeal dismissed.

Solicitors: *W. S. Elsmore; Smythe & Brettell.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

PICKUP v. UNITED KINGDOM DENTAL BOARD

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), May 10, 1928]

[Reported [1928] 2 K.B. 459; 97 L.J.K.B. 604; 139 L.T. 607; 92 J.P. 147; 44 T.L.R. 544; 72 Sol. Jo. 369; 28 Cox, C.C. 536; 26 L.G.R. 393]

Dentist—Register—Erasure of name—Conviction by court of summary jurisdiction of misdemeanour—"Misdemeanour"—Dentists Act, 1878 (41 & 42 Vict., c. 33), s. 13, as amended by Dentists Act, 1921 (11 & 12 Geo. 5, c. 21), s. 8.

In the Dentists Act, 1878, s. 13, as amended, the words "convicted . . . of . . . misdemeanour" are not confined to convictions of indictable misdemeanours.

Notes. The Dentists Act, 1878, s. 13, as amended by the Dentists Act, 1921, s. 8, and by the Dentists Act, 1956, s. 6 (6), s. 37 (2), and Sched. II, was repealed by the Dentists Act, 1957, s. 51 (1) and Sched. II. See now s. 22 (1) and s. 25 (1), (2) of the Act of 1957.

By the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 2 and Sched. I, the offence of committing an act of gross indecency with another male person, contrary to the Criminal Law Amendment Act, 1885, s. 11, was made triable on indictment by quarter sessions presided over by a legally qualified chairman. Section 11 of the 1885 Act has been replaced by the Sexual Offences Act, 1956, s. 13, and by Sched. II, Part I, to that Act the offence is triable on indictment at quarter sessions under s. 2 of the Act of 1938, but not otherwise.

As to removal from the dentists register, see 22 HALSBURY'S LAWS (2nd Edn.) 350-351; and for cases see 34 DIGEST 561-562. For the Dentists Act, 1957, s. 22 and s. 25, see 37 HALSBURY'S STATUTES (2nd Edn.) 695, 696.

Case referred to:

- (1) *Du Cros v. Lambourne*, [1907] 1 K.B. 40; 76 L.J.K.B. 50; 95 L.T. 782; 70 J.P. 525; 23 T.L.R. 3; 21 Cox, C.C. 311; 5 L.G.R. 120, D.C.; 14 Digest (Repl.) 99, 633.

A **Appeal** under s. 9 of the Dentists Act, 1921, from an order of the General Medical Council.

The appellant, James Pickup, a dentist, had been convicted in 1927 by a Court of Summary Jurisdiction of committing an act of gross indecency. He had been previously convicted summarily of indecent exposure and of being drunk and disorderly. The respondents, the Dental Board of the United Kingdom, held an inquiry under the Dentists Act, 1878, s. 13, as amended by the Dentists Act, 1921, s. 8 (1) (b), and reported the facts and their findings to the General Medical Council, who ordered that the appellant's name should be erased from the dentists register under s. 13 of the Act of 1878.

The appellant contended that the word "misdemeanour" in s. 13 of the Act of 1878 as amended included only indictable misdemeanours.

C The Dentists Act, 1878, s. 13, as amended by the Dentists Act, 1921, s. 8, provides:

"When a person registered in the dentists register has, either before or after the passing of this Act, and either before or after he is so registered, been convicted either in His Majesty's dominions or elsewhere of an offence which, if committed in England, would be a felony or misdemeanour . . . that person shall be liable to have his name erased from the register. . . Provided that the name of the person shall not be erased under this section . . . on account of a conviction for an offence which, though within the provisions of this section, does not, either from the trivial nature of the offence or from the circumstances under which it was committed, disqualify a person for practising dentistry."

E *Maurice F. Healey* for the appellant.

Whiteley, K.C., and *Douglas C. Bartley* for the respondents.

LORD HEWART, C.J.—The question of substance raised by this appeal is what is the true meaning of the expression "misdemeanour" in s. 13 of the Dentists Act, 1878. The scheme and method of that section are quite clear. It is contended on behalf of the appellant that the word "misdemeanour" in that section means "misdemeanour triable on indictment." In my opinion, that contention cannot be supported, as is clear from the judgment of LORD ALVERSTONE, C.J., in *Du Cros v. Lambourne* (1). When one looks at the words of the section which we have to construe, it is clear that the meaning of "misdemeanour" is not confined to "indictable misdemeanour." It seems from the proviso that it was contemplated that the offences might be of a trivial nature, and that, because of their trivial nature, the person convicted might be allowed to retain his name on the register. It seems to be contemplated that the conditions of the section may be fulfilled and the liability to erasure incurred for offences which, by their trivial nature, make the application of the proviso proper. The appeal must be dismissed.

H **AYORY, J.**—I am of the same opinion. The offence, described as committing an act of gross indecency in a public urinal, was a misdemeanour within the meaning of s. 13 of the Dentists Act, 1878. The word is there used in its wider sense, and is not confined to convictions on indictment.

I **SHEARMAN, J.**—I am of the same opinion. The word "misdemeanour" in its ordinary sense includes all those offences for which the law has not provided a special name, and which are punishable according to their gravity with fine or imprisonment or both.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, for *Hall & Smith*, Bury; *C. J. S. Harper*.

[*Reported by J. F. WALKER, Esq., Barrister-at-Law.*]

Re WHEELER. JAMESON v. COTTER

[CHANCERY DIVISION (Tomlin, J.), July 13, 20, 1928]

[Reported [1929] 2 K.B. 81, n; 141 L.T. 322]

Estate Duty—Property out of which duty payable—Undivided share of realty subject to statutory trust—Payment by executors of duty as testamentary expense—Repayment by devisee of share.

Where an undivided share of real property disposed of by will has become subject to the statutory trusts, and so converted into personalty, the incidence of estate duty remains unchanged. The estate duty is a charge on the realty, and where the executors have paid the estate duty on the share as a testamentary expense, the amount so paid is repayable to them by the devisee of the share. The repayment may, at his option, be by instalments.

Notes. Followed: *A.-G. v. Public Trustee and Tuck*, [1929] 2 K.B. 77. Distinguished: *Re Kempthorne, Charles v. Kempthorne*, [1929] All E.R.Rep. 495; *Re Newman, Slater v. Newman*, [1930] All E.R.Rep. 617. Considered: *Re Warren, Warren v. Warren*, [1931] All E.R.Rep. 702. Referred to: *Re Harvey, Public Trustee v. Hoskin*, [1947] 1 All E.R. 349.

As to the incidence of estate duty, see 15 HALSBURY'S LAWS (3rd Edn.) 130 et seq.; and for cases see 21 DIGEST 29 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Case referred to:

- (1) *Re Mellish, Clark v. Buchanan* (1927), cited in [1929] 2 K.B. at p. 82 n; Digest Supp.

Originating Summons.

By the will, dated June 24, 1925, of A. L. Wheeler, the executors and trustees thereof were appointed to be trustees for the purposes of the Settled Land Acts, 1882–1890, and of the Conveyancing Act, 1881, s. 42. Bequests and legacies were given by the will, and the whole of the testator's real estate and undivided shares of real estate in the county of York were devised, subject to a yearly rent-charge, to each of the testator's daughters, E. L. Cotter and V. A. Jameson, to D. J. A. Cotter, the testator's grandson and an infant, and his assigns, during his life, with remainder over. The residue of the testator's real and personal estate was devised upon trust for sale and conversion, and payment thereof of funeral and testamentary expenses, debts and legacies. The will also contained directions for investment of the proceeds of sale of the real and personal estate, and directed that the trustees should stand possessed of one moiety of the moneys so invested in trust to pay the income thereof to E. L. Cotter for her separate use during her life, and after her death to hold the said moiety and the future income thereof in trust for her children or remoter issue as in the will mentioned. The will contained like trusts in favour of V. A. Jameson in respect of the remaining moiety, together with a direction that, should those later trusts fail, that moiety was to go and accrue by way of addition to the moiety of A. L. Cotter, and was to be held upon the trusts declared concerning it. The will was confirmed by a codicil dated Sept. 3, 1927, and the testator died on Sept. 27, 1927. The real estate in the county of York had been vested, before Jan. 1, 1926, in the testator and one other in fee simple in undivided moieties, the value of the testator's moiety being over £40,000. On Jan. 1, 1926, the entirety of the real estate became vested in both those persons, as joint tenants upon the statutory trusts, by virtue of the Law of Property Act, 1925, Sched. I, Part IV, para. 1 (2). When the affidavit to lead to probate came before the revenue authorities, the testator's interest in his undivided moiety was treated as personal estate on the ground that, by virtue of the statutory trust for sale, there had been notional conversion, and, accordingly, estate duty was paid upon it out of the residue. There was some uncer-

A tainty whether this course was right, and the trustees of the will, wishing to be clear as to the proper ultimate incidence of duty as between the persons entitled to the interest of the testator in the land or in the proceeds of sale thereof, and those entitled to his residuary estate, took out this summons for the determination, inter alia, of the question whether the amount of duty paid by them as a testamentary expense in respect of the undivided moiety of real estate in the county of York was repayable by the devisee of the moiety, and, if so, whether he might, at his option, repay it with interest at 4 per cent. per annum in accordance with the Finance Act, 1894, s. 9 (4), the Finance Act, 1896, s. 18, and the Finance Act, 1919, s. 30.

During the argument it was ordered that the summons stand over for consideration of an unreported case entitled *Re Mellish, Clark v. Buchanan* (1), in which C EVE, J., in July, 1927, had decided a like point on undivided shares and estate duty. That was a case in which the testator, by his will dated Jan. 18th, 1923, had appointed as executors and trustees the plaintiffs and C. J. Buchanan, a defendant, and had devised the whole of his share and interest in a certain estate to the defendant in fee simple, his interest being, at the date of his death, one one-ninth undivided share in the legal estate in fee simple, and also another one-ninth share D in the proceeds of sale of a further third thereof. After payment of estate duty out of personalty, a summons was taken out for the determination of the questions whether the interest of the testator had not been adeemed, either wholly or in part, by the provisions of the Law of Property Act, 1925, or if not, what effect, if any, those provisions had on that interest, and whether the said C. J. Buchanan ought to pay back into the testator's personal estate under the Finance Act, 1894, E and all amending provisions, including the Law of Property Act, 1925, s. 16, the whole of the moneys which had been paid in respect of the duty upon the devise to him. EVE, J., decided that the Act of 1925 did not adeem the devise, which was thus effective as a devise of the entire interest of the testator in that estate and the proceeds of sale of it, that under s. 16 (4), (5) of the Act of 1925, the incidence of the duty was upon the share of C. J. Buchanan, which was to arise from F the sale of the one one-ninth share in fee simple of the testator, and that C. J. Buchanan, by virtue of the above-mentioned sections of the Finance Acts, was bound to repay to the executors, by instalments, with interest at 4 per cent. per annum, the whole of the moneys paid out of the testator's personal estate by way of duty on the one one-ninth share therein devised to C. J. Buchanan.

G W. A. Peck for the trustees.
T. W. F. Beaumont for the infant defendant.
F. Baden Fuller for the remaining defendants.

TOMLIN, J.—The amount of the estate duty is repayable by the defendant D. J. A. Cotter, and such repayment may, at the defendant's option, be by instalments. The short point in the case is as to the effect in regard to estate duty H where an undivided share in land has become subject to a statutory trust. The testator made a will before 1926, devising to the defendant D. J. A. Cotter his undivided shares in certain land. The testator died after 1925, having not altered the provisions as to those shares, and a question now arises, in regard to the disposition of them, regarding the effect upon it so far as concerns ademption and duty. The attention of the court has been called to *Re Mellish* (1), and the court I has seen the summons and the evidence in that case and the order made in it. It seems that it will be impossible in the case before the court to come to a conclusion either that there has been ademption or that there has been any change in the burden of duty without coming into conflict with the views expressed by EVE, J., in that case. It seems clear that EVE, J., in circumstances sufficiently similar to those in the present case to make his decision an authority of importance, directly decided the two points. I have not had the advantage of reading any reasoned judgment of the learned judge, as no shorthand note has been produced, but I can see that there are many reasons which may be advanced for

supporting the conclusion at which EVE, J., arrived. Among others, so far as the question of incidence of duty is concerned, it seems to me that a forcible argument may be based on the Law of Property Act, 1925, s. 16 (4), where it may well be that "land" includes, and is required by the context to include, an "undivided share in land," and that that subsection alone is enough to ensure that there is no change in the incidence of duty. But, however that may be, in a matter such as is before me, not only is it proper and in accordance with ordinary practice for one judge to follow the decisions of another judge of co-ordinate jurisdiction, but it is important that it should be done on matters of title and conveyancing under the property legislation of 1925, in order that the advantage of uniformity may be secured, whatever may be the other difficulties to be encountered.

Solicitors: *Blunt, Torr & Co.*

[Reported by K. R. A. HART, ESQ., Barrister-at-Law.]

FOREMAN AND ELLAMS, LTD. v. BLACKBURN

[KING'S BENCH DIVISION (Wright, J.), January 20, 1928]

[Reported [1928] 2 K.B. 60; 97 L.J.K.B. 355; 139 L.T. 68;
33 Com. Cas. 359; 17 Asp.M.L.C. 461]

Sale of Goods—C.i.f. contract—Goods shipped before contract—Bill of lading not issued until after goods shipped and return of steamer to port of loading after intermediate voyage.

By a contract dated July 22, 1926, the sellers sold to the buyer a consignment of frozen rabbits to be shipped in a named steamer during August from Sydney c.i.f. Liverpool. The bill of lading was issued on Aug. 17, 1926, and stated that the goods had been shipped by the steamer then lying in Sydney. In fact, the goods had been shipped at Sydney on July 25, 1926, the steamer had proceeded on an intermediate voyage and had returned to Sydney, sailing from there on Aug. 17, 1926. The buyer refused to take delivery of the goods, and the sellers claimed damages for breach of contract.

Held: the sellers had themselves committed breaches of contract and were, therefore, not entitled to recover, because (i) the word "shipment" in the contract referred to a shipment in the future and could not refer to a shipment which had already taken place; and (ii) the bill of lading was not good in that, although some latitude of time for issuing it was allowed, it was not issued till seven weeks after the shipment and after an intermediate voyage.

Notes. As to shipment of goods and bills of lading under a c.i.f. contract, see 29 HALSBURY'S LAWS (2nd Edn.) 214-216; and for cases see 39 DIGEST 575-581.

Special Case stated by an arbitrator.

By a contract in writing dated July 2, 1926, Messrs. Foreman and Ellams, Ltd., the sellers, sold to Mr. Blackburn, the buyer, 1000 crates (5 per cent. more or less) of frozen furred rabbits. The contract was as follows:

"Description: N.S.W. frozen furred rabbits packed not earlier than May, not later than July. Price 36s. per crate c.i.f. Liverpool. Shipment: (With all liberties as per bill of lading) per *Suffolk*, due to sail during August to Liverpool. Payment: Net cash against documents on steamer and/or steamers . . . each shipment to be considered a separate contract."

- A** There was also an arbitration clause. It was the custom in the frozen rabbit trade, as found by the arbitrator, for the seller, in addition to the usual c.i.f. documents, to tender a freezing certificate or its equivalent. The bill of lading which was dated Aug. 17, 1926, stated that there had been shipped "in apparent good order and condition by the steamship *Suffolk*, now lying in Sydney," 1011 crates hard frozen rabbits. The freezing certificates showed that the goods were shipped per steamship *Suffolk* to Liverpool on June 25, 1926, and Aug. 17, 1926. On receiving the shipping documents, the buyer was put on his inquiry and the true facts came to light which were as follows. The consignment of 1011 crates had been loaded on June 25, 1926, and the *Suffolk* had proceeded to a Queensland port before the contract of sale. She returned to Sydney on Aug. 17, 1926, when the bill of lading was issued, and sailed for Liverpool the same day. The buyer refused to take delivery and the frozen rabbits were sold at the best price obtainable, but at a loss of £534 15s. 8d. The sellers claimed this sum as damages, but the buyer denied liability. On reference to arbitration, the arbitrator held, subject to the opinion of the court, that the buyer was guilty of default and that the sellers were entitled to the sum claimed as damages for breach of contract. If he was wrong in so deciding he awarded that the sellers should recover nothing from the buyer and that the sellers should bear the expenses of the arbitration.

Raeburn, K.C., and *N. J. Laski* for the buyer.

G. J. Lynskey for the sellers.

- WRIGHT, J.**—This case is of a somewhat unusual character. The facts on which the dispute arises may be very shortly stated. [His Lordship stated the facts and continued:] The arbitrator has found in favour of the sellers. The buyer contends that the sellers did not fulfil their contract. I have to consider whether the sellers have fulfilled their contract. In my opinion, they have not. I think the tender which they made was not good. In the first place it appears from the freezing certificate, which is a material document, that, before the date of the contract, the goods or part of them had already been shipped. Whether that is true of all the goods or only of some of them is immaterial, because, on a sale of goods, all the goods tendered must correspond with the contract description, and the fact that some do and others do not does not make the tender good. I consider that the word "shipment" in the contract must be understood to refer to a shipment in the future, and cannot refer to a shipment which had already taken place either in whole or in part.
- G** I have further to consider whether the bill of lading was in regular form and a good shipping document. It appears from the documents that, as regards part of the goods, shipment had taken place not less than seven weeks before the issue of the bill of lading, and that in itself was a fact which would properly lead to inquiry and call for explanation. It was not contested that, in that interval of time, the ship had proceeded from Sydney to a number of North Queensland ports
- H** and had then returned to Sydney, and that, during this second stay, the bill of lading was issued. It is true that a bill of lading must be issued on shipment, but still some latitude of time is to be allowed. I have never known a case such as the present. I am prepared to hold, and do hold, that a bill of lading is not regular if it is issued, even though at the original port of loading, seven weeks after the loading actually took place, after the vessel has proceeded on an intermediate
- I** voyage and has sailed some hundreds of miles to other ports, and has then returned to the original port of loading. I think that a bill of lading issued in such circumstances is not a good bill of lading. I think that when it became apparent that those were the true facts, the buyer was entitled to reject.

Looking at the form of the bill of lading in this particular case, I see that it states: "shipment on *Suffolk*, now lying at Sydney," and I should have thought that meant, according to ordinary usage and understanding, that the shipment had taken place at Sydney during the then stay of the vessel at Sydney. I think that that document, according to ordinary understanding, is not correctly applicable

to a case where the shipment had not taken place during the then stay of the vessel at Sydney, but where a substantial part of the shipment had taken place during a previous stay. There appears to have been some earlier documents to represent shipment in the intermediate period, but we have to deal with the final bill of lading and that is not, in my opinion, applicable to the earlier shipment.

There is one further point. The arbitrator found that the *Suffolk* was due to sail in August for Liverpool and we know that she did sail on Aug. 17, 1926, but there is no finding that, at the date of the contract, she was carrying goods of the contract description for Liverpool in August. I, therefore, think that the award of the arbitrator in favour of the sellers is wrong and ought not to stand. I direct that his alternative finding shall be the operative award between the parties.

Solicitors: *Leonard Bingham & Sharp*, for *Harry T. Sales*, Manchester; *Edward Lloyd*, Liverpool.

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

Re SPENCER AND HAUSER'S CONTRACT

[CHANCERY DIVISION (Tomlin, J.), April 22, May 2, 1928]

[Reported [1928] Ch. 598; 97 L.J.Ch. 335; 139 L.T. 287;
72 Sol. Jo. 336]

*Sale of Land—Title—Contract stating title to be made in specified capacity—
Title in fact made in another capacity.*

Where, in a vendor and purchaser contract, it is stated that the vendor will make title in a specified capacity, that does not amount to a warranty that he will make title in a particular manner. The contract is no more than a warranty that a good title shall be made, and the purchaser can be forced to accept a good title, even though made by the vendor in a capacity other than that specified.

Per **Curiam**: The position of a legal personal representative when selling land is that, if he says that there has been no assent, the purchaser need make no inquiry as to debts and funeral and testamentary expenses, and he is bound to accept the title. The mere fact that he had notice that debts had not been paid does not invalidate the title.

Notes. As to the effect of a statement by a vendor of land that title will be made in a particular way, see 29 HALSBURY'S LAWS (2nd Edn.) 282; and for cases see 40 DIGEST (Repl.) 149.

Cases referred to:

- (1) *Re Baker and Selmon's Contract*, [1907] 1 Ch. 238; 76 L.J.Ch. 235; 96 L.T. 110; 40 Digest (Repl.) 155, 1193.
- (2) *Re Atkinson and Horsell's Contract*, [1912] 2 Ch. 1; 81 L.J.Ch. 588; 106 L.T. 548; 56 Sol. Jo. 324, C.A.; 40 Digest (Repl.) 163, 1267.
- (3) *Re Hailes and Hutchinson's Contract*, [1920] 1 Ch. 233; 89 L.J.Ch. 130; 122 L.T. 459; 36 T.L.R. 130; 64 Sol. Jo. 209; 40 Digest (Repl.) 170, 1332.
- (4) *Re Bryant and Barningham's Contract* (1890), 44 Ch.D. 218; 59 L.J.Ch. 636; 63 L.T. 20; 38 W.R. 469, C.A.; 40 Digest (Repl.) 253, 2121.
- (5) *Re Head's Trustees and Macdonald* (1890), 45 Ch.D. 310; 59 L.J.Ch. 604; 63 L.T. 21; 38 W.R. 657, C.A.; 40 Digest (Repl.) 253, 2122.

A Vendor and Purchaser Summons whereby vendors asked for a declaration by the court that sufficient answers had been given to the objections of the purchaser to the title to certain property, and that the title to the said property was good.

The applicants on the summons were Alice Mary Spencer and Richard Percy Spencer, who, as personal representatives of R. E. E. Spencer, deceased, had made title to property comprising lot 5 in an auction held in July, 1927. The contract for sale stated that they were making the title as trustees of the will of the deceased: but they were in fact his executors; and their contention was that they could make a good title as his executors and had done so, despite the erroneous description of themselves as trustees. The purchaser did not admit either that they had made title as executors, or that they could do so: and he asserted that even if they could do so, there was, in law, nothing to compel him to take from them if they made title as executors.

A. F. Topham, K.C., and McMullan, for the vendors, referred to *Re Baker and Selmon's Contract* (1); *Re Atkinson and Horsell's Contract* (2); *Re Hailes and Hutchinson's Contract* (3); *Re Bryant and Barningham's Contract* (4).

Farwell, K.C., and Hunt, for the purchaser, referred to *Re Head's Trustees and Macdonald* (5).

D Topham replied.

TOMLIN, J.—This is an application by certain vendors to have it declared that objections to the title to property comprised in a contract for sale have been sufficiently answered and that a good title has been shown. The vendors were stated to be selling as trustees for sale under the will of R. E. E. Spencer, whereas they were really his executors. This was obviously an error: and if the draftsman had known what was in fact the case, he would have stated it. The position of legal personal representatives is as follows. Under the Land Transfer Act, 1897, the powers of legal personal representatives were those of an executor in connection with chattels real. Under the Administration of Estates Act, 1925, they have certain other powers. It may fairly be said that the position of a legal personal representative when selling land is that, if he says that there has been no assent, the purchaser need make no inquiry as to debts and funeral and testamentary expenses, and he is bound to accept the title. And the mere fact that he had notice that debts had not been paid does not invalidate the title. Thus, the point is not really taken that the vendors as legal personal representatives cannot make title. The question is whether they must make title as trustees for sale under the will, i.e., as trustees exercising an express trust for sale created by the will. If they cannot, can the purchaser repudiate? It is plain that where a man enters into a contract to sell land, stating that a title begins with a certain document, he may make title in any way he can: and the purchaser will be bound to accept it. The question is whether, if a vendor contracts to make title in some particular capacity, such contract is a warranty that he will make title in some particular way, and that, however good the title may be, the purchaser cannot be compelled to accept it unless it is made in that particular way.

Having regard to the general law as to contracts for the sale of real estate, and to the fact that the provisions of that law are based on the fact that title is a very uncertain matter, it would be a strange construction to place upon any contract to say that it was a warranty by the vendor that he was making title in a particular form. I do not feel myself able to hold that the contract does anything more than indicate the way in which the vendor is contemplating making title. If that is the true view, the vendors are entitled to succeed; but if I am wrong, and the contract is a warranty, I still feel great difficulty because of *Re Baker and Selmon's Contract* (1) and *Re Atkinson and Horsell's Contract* (2). Either the contract contains a clause indicating how title is to be made, or the warranty, if any, is only a warranty to make a good title. The contract is not really a warranty at all as to how title will be made. It is a warranty to make a good title together with an indication of how, in the first place, the vendor proposes to make it. In the

present case the vendors are right, and can compel the purchaser to accept the title. The costs will be paid by the defendant, and the declaration will follow the wording of the summons.

Solicitors: *Crossman, Block, Matthews & Crossman*, for *Stanton Atkinson & Bird*, Newcastle-upon-Tyne; *Bell, Brodrick & Gray*, for *Cousins, Botsford & Co.*, Cardiff.

[Reported by K. R. A. HART, Esq., Barrister-at-Law.]

HORRELL v. LORD ST. JOHN OF BLETSO

[KING'S BENCH DIVISION (Talbot, J.), May 24, 1928]

[Reported [1928] 2 K.B. 616; 97 L.J.K.B. 655; 139 L.T. 400]

Agriculture—Agricultural holding—Compensation—"Recoverable upon order made by county court"—Jurisdiction of High Court to entertain action—Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), s. 19.

By the Agricultural Holdings Act, 1923, s. 19 [now the Agricultural Holdings Act, 1948, s. 71] "Where any sum agreed or awarded under this Act to be paid for compensation costs or otherwise by a landlord or tenant of a holding is not paid within fourteen days after the time when the payment becomes due, it shall . . . be recoverable upon order made by the county court as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable."

An action for a sum agreed between landlord and tenant as compensation for tenant right in respect of an agricultural holding may be brought in the High Court, as the language of s. 19 is permissive and not imperative, and express words taking away the *prima facie* right of a plaintiff to sue in the High Court are not to be found therein.

Statute—Exclusion of jurisdiction of High Court—Need for express words.

Per **CURLIAM**: if a *prima facie* right to recover in the High Court is to be taken away, it should be taken away by express words.

Notes. The Agricultural Holdings Act, 1923, s. 19, has been replaced by the Agricultural Holdings Act, 1948, s. 71.

As to recovery by action of sums due under the Agricultural Holdings Act, see 1 HALSBURY'S LAWS (3rd Edn.) 329; and for cases see 2 DIGEST (Repl.) 84-85. For the Agricultural Holdings Act, 1948, s. 71, see 28 HALSBURY'S STATUTES (2nd Edn.) 81.

Case referred to:

- (1) *Re Jones and Carter*, [1922] 2 Ch. 599; 91 L.J.Ch. 824; 127 L.T. 622; 38 T.L.R. 779; 66 Sol. Jo. 611, C.A.; 2 Digest (Repl.) 46, 242.

Action tried before TALBOT, J., as a short cause.

The plaintiff, Horrell, was the tenant and the defendant, Lord St. John Bletso, the landlord of a farm in Bedfordshire. On Sept. 29, 1927, in pursuance of an agreement between the parties, their respective valuers made an inventory and valuation of the tenant right upon the farm, and the compensation payable by the landlord under the Agricultural Holdings Act, 1923, proved to be £532 odd. In March, 1928, the tenant brought an action in the High Court, claiming £420 odd as the amount of the above compensation, less a half-year's rent, in respect of the farm. The landlord, in his defence, contended that the sum claimed was a sum

A or part of a sum agreed or awarded under the above Act and was, therefore, not recoverable by action or otherwise in the High Court.

Rowland Burrows (Alan Bell with him) for the plaintiff.

Graham Mould for the defendant.

TALBOT, J.—This action is brought by the plaintiff as tenant against the defendant as landlord to recover a sum arrived at by agreement as the compensation to be paid by the latter to the former under the Agricultural Holdings Act, 1923. The amount of the compensation has been agreed. The whole question is whether the action on the agreement can be brought in this court, or whether the county court has exclusive jurisdiction. The amount in question is £420 13s. 6d., and it is, therefore, above the ordinary jurisdiction of the county court.

C The Act, after referring to the right to compensation for the matters specified in the schedules, provides in s. 16 for the way in which an arbitration under the Act is to be conducted. By s. 19, on which this question turns, it is provided:

D “Where any sum agreed or awarded under this Act to be paid for compensation costs or otherwise by a landlord or tenant of a holding is not paid within fourteen days after the time when the payment becomes due, it shall, subject as in this Act provided, be recoverable upon order made by the county court as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable.”

E The amount claimed in this action is, within the meaning of that section, a “sum agreed . . . under this Act to be paid for compensation . . . by a landlord,” which “is not paid within fourteen days after the time when the payment becomes due.” There is, therefore, no doubt that the plaintiff could have sued for it in the county court, because the Act allows him to do so. So much is common ground. The whole question is whether the power which the Act gives is exclusive, that is, whether it implies an inability or incapacity to bring an action for such sum in the High Court.

F In construing the section one must apply a rule which is the only safe rule of construction in such cases, namely, to endeavour to see from the words used what Parliament has enacted. Here the language of the section is permissive. It says that the sum shall be “recoverable.” It does not say that it “must be recovered,” or that it shall be “only recoverable.” These words could easily have been used. It is clear, both on principle and on authority, that, if the *prima facie* right to recover in the High Court is to be taken away, it should be taken away by express words. In coming to this conclusion, I am assisted by *Re Jones and Carter* (1). That case arose on different considerations and under a different Act, but it raised a question in regard to the exclusiveness of the jurisdiction conferred upon the county court. By the earlier Agricultural Holdings Act, 1908, certain powers with reference to arbitration proceedings under that Act were transferred to the county court, and the point in that case was whether the transfer of these powers to the county court excluded the jurisdiction of the High Court. It was held that it did not, because neither by express words nor by implication was the inherent jurisdiction of the High Court in regard to these matters transferred to the county court. That case was stronger than the present case, because the Lords Justices held that no interference with the inherent jurisdiction of the High Court was contemplated by Parliament, and that such jurisdiction was not taken away in the absence of express words. For these reasons I am of opinion that the action in the present case was properly brought in the High Court, and that there must be judgment for the plaintiff with costs.

Judgment for plaintiff.

Solicitors: *Kingsford, Dorman & Co.*, for *Simpson & Mason*, Higham Ferrers; *Chamberlain & Co.*

[Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.]

Re CALOW. CALOW v. CALOW

[CHANCERY DIVISION (Eve, J.), May 23, 1928]

[Reported [1928] Ch. 710; 97 L.J.Ch. 253; 139 L.T. 235;
72 Sol. Jo. 437]

Will—Ademption—Change in nature of property given—Specific devise—Part of devise contracted to be sold before will made—Completion of purchase after testator's death—Devisee entitled to proceeds of sale.

By his will made in 1925 a testator devised all his freeholds at D. to his sons A. and H. in equal shares as joint tenants, the trustees to retain the interest of H. on trust to sell or retain at their discretion and pay the income from the investments or the proceeds of sale to him for life, and then to A. absolutely. He devised and bequeathed his residuary real and personal estate on trust to sell and pay the income to his widow for life and then to divide the corpus among his five children in equal shares. At the date of his will, part of his estate at D. was an undivided moiety of 37 acres, 10½ acres of which he had, in 1921, contracted to sell. The purchase was not completed until after his death and probate of his will had been granted. On the question whether the proceeds of this sale passed to the specific devisees or formed part of the residue,

Held: the proceeds of the sale passed to the specific devisees, since the will, having been made after the date of the contract of sale and with full knowledge of the contract, showed an intention by the testator to pass his interest in the property to the specific devisees.

Weeding v. Weeding (1) (1861), 1 John. & H. 424, and *Drant v. Vause* (2) (1842), 1 Y. & C. Ch. Cas. 580, followed.

Notes. Referred to: *Re Sherman, Trevenen v. Pearce*, [1954] 1 All E.R. 893.

As to the failure of a gift in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 126 et seq. As to conversion by contract of sale, see 14 HALSBURY'S LAWS (3rd Edn.) 583-584; and for cases see 20 DIGEST 353-358.

Cases referred to:

- (1) *Weeding v. Weeding* (1861), 1 John. & H. 424; 30 L.J.Ch. 680; 4 L.T. 616; 7 Jur.N.S. 908; 9 W.R. 431; 70 E.R. 812; 20 Digest 357, 956.
- (2) *Drant v. Vause* (1842), 1 Y. & C. Ch. Cas. 580; 11 L.J.Ch. 170; 6 Jur. 313; 62 E.R. 1026; 20 Digest 358, 962.
- (3) *Re Pyle, Pyle v. Pyle*, [1895] 1 Ch. 724; 64 L.J.Ch. 477; 72 L.T. 327; 43 W.R. 420; 39 Sol. Jo. 346; 13 R. 396; 20 Digest 358, 964.
- (4) *Lawes v. Bennett* (1785), 1 Cox, Eq. Cas. 167; 29 E.R. 1111; 20 Digest 338, 807.

Adjourned Summons.

At the date of his will made in 1925 the testator (who died in July, 1925) was possessed of a moiety of some 37 acres of land at Dagenham in Essex. There was then subsisting a contract for the sale, made in 1921, of 10½ acres of the 37 acres to the London County Council, but the completion of that contract was delayed by reason of certain difficulties over the title, and was not completed until after the testator's death by a deed of confirmation executed by the trustees on Dec. 31, 1925, although the testator did, in fact, execute the conveyance in his lifetime. By his will he gave and devised

"all my freehold property situate at Dagenham, Essex, to my sons Alfred John Calow and Herbert William Calow in equal shares as joint tenants but I direct that my trustees shall retain the interest therein of my son Herbert William Calow should he succeed thereto by survivorship upon trust to sell the same or to retain the same at their absolute discretion and to receive the income to

A arise therefrom or from any investment or investments for the time being representing the same or the proceeds of sale thereof and to pay such income to my said son during his life and after his death to hold the same or the proceeds of sale in trust for my son Alfred John Calow and his heirs absolutely."

B He gave and bequeathed his residuary real and personal estate to his trustees on trust to sell and pay the income thereof to his widow for life and then on trust to divide the capital among his five children in equal shares. This summons was issued raising the question whether the proceeds of the sale of the land to the London County Council passed to the specific devisees or formed part of the testator's residuary estate.

Riviere for the summons.

C Overton, for the specific devisees, referred to *Weeding v. Weeding* (1), *Re Pyle* (3), and *Drant v. Vause* (2).

Braund for the residuary legatees.

EYE, J., stated the facts, and continued: The contract of 1921, followed by completion on Dec. 31, 1925, operated as a complete conversion of the 10½ acres, and the question I have to decide is whether the proceeds of the sale of those 10½ acres pass under the specific devise to the sons or whether they fall into residue. It is not suggested that if, in fact, the 10½ acres, the subject of the sale, had represented the whole of the testator's land at Dagenham at the time of his will, the sons would not have been entitled to the sale moneys, but in this case there remains a moiety of 26½ acres of freehold property at Dagenham, and the case is not, therefore, one where a testator, having contracted to sell real estate before making his will, has, with knowledge of the contract, specifically devised the land so contracted to be sold and must in the circumstances be taken to have intended the devise to operate over the proceeds of the sale, but is the ordinary case of a testator who, having converted part only of the specific realty, may well have intended the remaining realty to pass under the specific devise, and the proceeds of that already converted to pass under the residuary bequest. The general rule is, I think, as stated by counsel for the specific devisees. It is to be found in the judgment of WOOD, V.-C., in *Weeding v. Weeding* (1), and reproduced in the judgment of STIRLING, J., in *Re Pyle* (3) ([1895] 1 Ch. at p. 727):

G "When you find, that, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract, without referring in any way to the contract he has entered into, it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it."

H Counsel for the specific devisees says that the rule has been applied where the testator has not limited the devise to the specific property the subject of the contract, and that seems to be the result of the decision in *Drant v. Vause* (2). In that case, the testator had demised certain freehold property at Sculcoates in the County of York to lessees for fourteen years, with a covenant therein that they should have the option at any time during the term of purchasing the property at the sum therein mentioned. He afterwards made his will, and devised all his real estate in the parish of Sculcoates and other specified places to trustees on various trusts. Amongst those trusts was the trust to receive and take the rents and profits of the demised premises at Sculcoates and other lands so long as his son George should live and be under the age of twenty-one years, and when he should attain that age on trust to permit him to receive the rents. After his death, the lessees of the demised premises at Sculcoates having elected to exercise the option, the question arose whether the income of the proceeds of sale under the exercise of that option belonged to George or to residue, and the Vice-Chancellor held that in the circumstances and having regard to the special terms of the devise, the general rule laid down in *Lawes v. Bennett* (4) by LORD KENYON was not applicable

and that the son George must be treated as entitled to the income of the proceeds of sale. A

I think I have some indication of intention in this will in the use of the words "or the proceeds of sale" twice over in the trust. They seem to refer to the proceeds of that which had already been contracted to be sold:

"Upon trust to sell the same or to retain the same at their absolute discretion and to receive the income to arise therefrom [that is from the property if retained] or from any investment or investments for the time being [that is the property when converted under the trust for sale] representing the same or the proceeds of sale thereof." B

These last words are redundant if they are limited in application to proceeds of sale arising under the trust for conversion. It looks as if the testator in using them was contemplating the proceeds of sale of land to be received when the subsisting contract was carried out. On the whole, I think I ought to hold the sons entitled to the proceeds of sale of the 10½ acres, the subject-matter of the contract with the London County Council. C

Solicitors: *Richard Davies & Son.*

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.] D

Re SMITH. PUBLIC TRUSTEE v. ASPINALL

[CHANCERY DIVISION (Romer, J.), July 19, 20, 1928]

[Reported [1928] 1 Ch. 915; 97 L.J.Ch. 441; 140 L.T. 369] F

Trust—Discretionary trust—Assignment of fund—Two persons interested—Fund applicable for benefit of A. and so far as not so applied for benefit of B.—Assignment by A. and B.

The trustees of a fund were directed to apply the whole of the fund or such portion as they should think fit for the benefit of one person and the remainder of the fund for the benefit of certain other persons. G

Held: those persons together were the beneficiaries of the whole fund and could together assign the whole interest in the fund.

Re Nelson, Norris v. Nelson (1) (1918), [1928] Ch. 920, n., applied.

Notes. Referred to: *Re W.D.J.*, [1933] All E.R.Rep. 370; *Re Beckett's Settlement*, *Re Beckett, Eden v. Von Stutterheim*, [1940] Ch. 279; *Re Whichelow*, *Bradshaw v. Orpen*, [1953] 2 All E.R. 1558. H

As to special or discretionary trusts of income for individuals, see 33 HALSBURY'S LAWS (2nd Edn.) 114; and as to the exercise of a power appendant after its estate has gone, see *ibid.*, Vol. 25, p. 590. For cases see 43 DIGEST et seq.

Cases referred to:

- (1) *Re Nelson, Norris v. Nelson* (1918), [1928] Ch. 920, n.; 97 L.J.Ch. 443, n.; 140 L.T. 371, n., C.A.; 43 Digest 593, 427.
- (2) *Green v. Spicer* (1830), 1 Russ. & M. 395; Taml. 396; 8 L.J.O.S.Ch. 105; 39 E.R. 153; 5 Digest 652, 527.
- (3) *Younghusband v. Gisborne* (1844), 1 Coll. 400; affirmed (1846), 15 L.J.Ch. 355; 7 L.T.O.S. 221; 10 Jur. 834, L.C.; 43 Digest 593, 421.

Adjourned Summons as to the effect of an assignment of interests under a trust. The following statement of the facts is in substance taken from his Lordship's judgment:

A The testator, who died on July 30, 1905, by his will dated Mar. 31, 1905, directed his trustees to stand possessed of one-fourth of his residuary estate upon trust during the life of the defendant Mrs. Aspinall at their absolute discretion and in such manner as they should think fit

B “to pay or apply the whole or any part of the annual income of such one-fourth and the investments thereof or if they shall think fit from time to time any part of the capital thereof unto or for the maintenance and personal support or benefit of the said Lilian Aspinall or as to the income thereof but not as to the capital for the maintenance education support or benefit of all or any one or more of the children of the said Lilian Aspinall and either themselves so to apply the same or to pay the same for that purpose to any other person or persons without seeing to the application thereof And during the period of twenty-one years from my death if the said Lilian Aspinall shall live so long to accumulate the surplus if any of such income at compound interest by investing the same and the resulting income thereof in any of the investments aforesaid by way of addition to the capital of such fund as aforesaid and so as to be subject to the same trusts as are hereby declared concerning the same and during the remainder of the life of the said Lilian Aspinall in case she shall survive the said period of twenty-one years to pay or apply such surplus income (if any) to the person or persons or for the purposes to whom and for which the same would for the time being be payable or applicable if the said Lilian Aspinall were then dead And after the death of the said Lilian Aspinall as regards both capital and income both original and accumulated In trust for the child or children of the said Lilian Aspinall who either before or after her decease shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry and if more than one in equal shares.”

Mrs. Aspinall has had three children, all of whom attained the age of twenty-one years and one of whom is now dead. Mrs. Aspinall is of an age when it is quite impossible that she could have any further issue. In those circumstances, Mrs. Aspinall, the two surviving children, and the legal personal representatives of the child who is dead all joined in executing a mortgage, dated April 13, 1923, to the defendants, the Legal and General Assurance Co., which took the form of an assignment to the assurance company of all the interests that Mrs. Aspinall and the three children took under the will in any event. This summons was taken out by the Public Trustee (who was the sole trustee of the will of the testator) for the determination of the question whether he was bound to pay the whole of the income of the one-fourth share of the testator's residuary estate, which was settled by the will upon trust for the benefit of Mrs. Aspinall and her children, to the defendant society, until the discharge of the mortgage, or whether he was at liberty, in his discretion (notwithstanding the notice dated Feb. 6, 1928, given to him by the solicitors of the defendant society, to pay all income then due or to become due in respect of the share of Mrs. Aspinall under the will direct to the society as mortgagees) to apply all or any part of the income or capital of the share for the maintenance or personal support or benefit of Mrs. Aspinall.

Hunt for the plaintiff, the trustee.

I *Sanger* for the defendants, Mrs. Aspinall and Cecil Affleck Herbert Aspinall, one of her children.

Bennett, K.C., and *A. Guest Matthews* for the defendant, the Legal and General Assurance Co.

ROMER, J., stated the facts and continued: The question I have to determine is whether the Legal and General Assurance Co. are now entitled to call on the trustee to pay the whole of the income to them. It will be observed from what I have said that the whole of this share is now held by the trustee on trusts under which he is bound to apply the whole income and eventually pay over or apply the

whole capital to Mrs. Aspinall and the three children or some or one of them. So far as the income is concerned he is obliged to pay it or apply it for her benefit or to pay it or apply it for the benefit of the children. So far as regards the capital he has a discretion to pay it and to apply it for her benefit and, subject to that, he must hold it on trust for the children. Mrs. Aspinall, the two surviving children and the representatives of the deceased child are between them entitled to the whole fund. In those circumstances it appears to me, notwithstanding the discretion which is reposed in the trustee, under which discretion he could select one or more of the people I have mentioned as recipients of the income, and might apply part of the capital for the benefit of Mrs. Aspinall and so take it away from the children, that the four of them, if they were all living, could come to the court and say to the trustees: "Hand over the fund to us."

It appears to me that that is in accordance with the decision of the Court of Appeal in *Re Nelson, Norris v. Nelson* (1), of which a transcript of the judgments has been handed to me, and is in accordance with principle. What is the principle? As I understand it, it is this. Where there is a trust under which trustees have a discretion as to applying the whole or part of a fund to or for the benefit of a particular person, that particular person cannot come to the trustees, nor can any assignee of that particular person come to the trustees, and demand the fund, for the whole fund has not been given to them, but only so much as the trustees think fit to let him have. But when the trustees have no discretion as to the amount of the fund to be applied, the fact that the trustees have a discretion as to the method in which the whole of the fund shall be applied for the benefit of the particular person does not prevent that particular person from coming and saying: "Hand over the fund to me." That appears to be the result of the two cases which were cited to me—*Green v. Spicer* (2) and *Younghusband v. Gisborne* (3). Now this third case arises. What is to happen where the trustees have a discretion whether they will apply the whole or only a portion of the fund for the benefit of one person, but are obliged to apply the rest of the fund, so far as not applied for the benefit of the first named person, to or for the benefit of a second named person? There, two people together are the sole objects of the discretionary trust and, between them, are entitled to have the whole fund applied to them or for their benefit. It has been laid down by the Court of Appeal in the case to which I have referred that, in such a case as that, you treat all the people put together just as though they formed one person for whose benefit the trustees were directed to apply the whole of a particular fund. The case before the Court of Appeal was this: A testator had directed his trustees to stand possessed of one-third of his residuary estate upon trust during the lifetime of the testator's son Arthur Hector Nelson:

"to apply the income thereof for the benefit of himself and his wife and child or children or of any of such persons to the exclusion of the others or other of them as my trustees shall think fit."

What happened was something very similar to what happened in the case before me. Hector Nelson, his wife and the only existing child of the marriage joined together in asking the trustees to hand over the income to them, and it was held by the Court of Appeal that the trustees were obliged to comply with the request, in other words, to treat all those persons who were the only members of the class for whose benefit the income could be applied as being in the position of individuals forming together an individual for whose benefit a fund has to be applied by the trustees without any discretion as to the amount so to be applied.

I only want to add this out of respect to the argument of counsel for the beneficiaries. Where there is a trust to apply the whole or such part of a fund as trustees think fit to or for the benefit of A., and A. has assigned his interest under the trust, or become bankrupt, although his assignee or his trustee in bankruptcy stand in no better position than he does, and cannot demand that the fund shall be handed to them; yet they are in a position to say to A.: "Any money which the trustees do in the exercise of their discretion pay to you, passed by the assign-

A ment or under the bankruptcy." But they cannot say that in respect of any money which the trustees have not paid to A., or invested in purchasing goods or other things for A., but which they apply for the benefit of A. in such a way that no money or goods ever gets into the hands of A. That depends on a perfectly different principle which in no way assists counsel for the beneficiaries in his argument in the present case.

B There will, consequently, be a declaration that, in the events which have happened, the plaintiff is bound to pay the whole of the income of the one-fourth to the defendant society during the lifetime of Mrs. Aspinall, or until the mortgage is discharged.

Solicitors: J. D. Langton & Passmore, for W. E. Rickerd; Lawrence, Graham & Co.

C [Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.]

D

A. AND C. BLACK, LTD. v. CLAUDE STACEY, LTD.

[CHANCERY DIVISION (Tomlin, J.), February 29, March 1, 1928]

E [Reported [1929] 1 Ch. 177; 98 L.J.Ch. 131; 140 L.T. 402;
44 T.L.R. 347]

Copyright—"Author"—*Biographical reference book*—*Information supplied at request of compiler*—*Copyright Act, 1911* (1 & 2 Geo. 5, c. 46), s. 5 (1).

F For the purposes of copyright the "author" of an entry in a biographical reference book is the compiler of the book and not the person who, in response to the compiler's invitation, gives information about the person with whom the entry is concerned.

Nisbet & Co., Ltd. v. Golf Agency (1) (1907), 23 T.L.R. 370, followed.

G **Notes.** The Copyright Act, 1911, has been repealed and replaced by the Copyright Act, 1956, s. 4 (1) of which provides that "the author of a work shall be entitled to any copyright" subsisting therein by virtue of Part 1 of the Act.

As to the "author" entitled to copyright, see 8 HALSBURY'S LAWS (3rd Edn.) 404; for cases see 13 DIGEST (Repl.) 77-84; and for the Copyright Act, 1956, s. 4, see 36 HALSBURY'S STATUTES (2nd Edn.) 77.

Cases referred to:

- H (1) *Nisbet & Co., Ltd. v. Golf Agency* (1907), 23 T.L.R. 370; 13 Digest (Repl.) 79, 223.
(2) *Morris v. Ashbee* (1868), L.R. 7 Eq. 34; 19 L.T. 550; 33 J.P. 133; 13 Digest (Repl.) 60, 88.
(3) *Kelly v. Morris* (1860) L.R. 1 Eq. 697; 35 L.J.Ch. 423; 14 L.T. 222; 30 J.P. 628; 14 W.R. 496; 13 Digest (Repl.) 109, 511.
I (4) *Morris v. Wright* (1870), 5 Ch. App. 279; 22 L.T. 78; 18 W.R. 327, C.A.; 13 Digest (Repl.) 110, 515.
(5) *Cox v. Land and Water Journal Co.* (1869), L.R. 9 Eq. 324; 39 L.J.Ch. 152; 21 L.T. 548; 18 W.R. 206; 13 Digest (Repl.) 60, 90.
(6) *Weatherby & Sons v. International Horse Agency and Exchange, Ltd.*, [1910] 2 Ch. 297; 79 L.J.Ch. 609; 102 L.T. 856; 26 T.L.R. 527; 13 Digest (Repl.) 59, 82.
(7) *H. Blacklock & Co., Ltd. v. C. Arthur Pearson, Ltd.*, [1915] 2 Ch. 376; 84 L.J.Ch. 785; 113 L.T. 775; 31 T.L.R. 526; 13 Digest (Repl.) 58, 78.

- (8) *Macmillan & Co. v. Cooper* (1923), L.R. 51 Ind. App. 109; 93 L.J.P.C. 113; 13 L.T. 675; 40 T.L.R. 186; 68 Sol. Jo. 235, P.C.; 13 Digest (Repl.) 63, 106. A

Witness Action by the plaintiff company for an injunction to restrain the defendant company from infringing the plaintiff company's copyright in its annual publication, *Who's Who*, a biographical reference compilation. The defendant company was owner and publisher of a biographical reference compilation entitled *MEN OF THE WEST*, which gave outlines of the lives and works of many well-known men connected with the west of England. The plaintiff company's action was based on the allegation that many of these outlines consisted of word for word excerpts from *Who's Who*. The plaintiff company therefore asked for damages, as well as for the injunction, and also for an order for delivery up of all copies of the defendant company's said compilation. B

Macgillivray, for the plaintiff company, referred to *Nisbet & Co., Ltd. v. Golf Agency* (1); *Morris v. Ashbee* (2); *Kelly v. Morris* (3); *Morris v. Wright* (4); *Cox v. Land and Water Journal Co.* (5); *Weatherby & Sons v. International Horse Agency and Exchange, Ltd.* (6); *H. Blacklock & Co., Ltd. v. C. Arthur Pearson, Ltd.* (7). C

W. Arnold Jolly, for the defendant company, referred to *Macmillan & Co. v. Cooper* (8). D

TOMLIN, J., stated the facts and continued: The complaint of the plaintiffs is that in the preparation of *MEN OF THE WEST* the defendants have taken, bodily, extracts from *Who's Who* and have used them in *MEN OF THE WEST*. I have seen the witnesses in the box. I have examined with care the extracts in relation to fifteen cases which have been gone into in detail by the plaintiffs, it being alleged by them that eighty-seven cases in all are copied, and, having regard to the evidence which I have heard, I am satisfied that the fifteen cases, and probably a considerable number, if not all, of the eighty-seven cases, are the result of a process in which the defendants have made a use of *Who's Who*, which they were not entitled to make. [His Lordship examined the evidence in detail and continued:] E

The defence which has been advanced has been really based on points of law, and it was urged that a compilation of this sort is one in which the copyright in the particular entries is not in the compilers, although they may have a general copyright in the compilation, but that, as to each particular entry, the copyright is vested in the person to whom it refers on the ground that when a questionnaire of this kind is sent out and is answered, the person who answers it is the author, and that the answers, when embodied in the compilation, remain vested, so far as copyright is concerned, in the person who originally wrote them. The defendants' counsel, being faced with what the results of that would be, I think accepted the view that it followed from that that, if a man calls and asks for particulars on the doorstep and is given them verbally and notes them down in his notebook, in that case, at any rate, the "life" would have no copyright in the resulting production. On the other hand, if the "life," instead of giving the information verbally to the man, says: "I will write it down on a sheet of paper and give it to you," he has a copyright, and if the person who does that happens to be not the owner of the house, but the servant who answers the door, it is the servant who has the copyright. That seems to me a very surprising state of things, and not to be accepted unless the argument leading to such a result is already well founded. I think there is no foundation for it on principle. It seems to me that where a book of this sort is being compiled and the compiler invites information, the information given, whether it be given verbally or in writing, is not given otherwise than as material available for use by the compiler, and that, if it happens to be written, the man who writes it is not the author of something in which he has a copyright in any sense contemplated by the Copyright Act. As a matter of fact, it appears that the case is really covered by the decision of *KEKEWICH, J.*, in *Nisbet & Co., Ltd. v. Golf Agency* (1), and I think that, apart from any other consideration, I F
G
H
I

A ought not to depart from that decision. I must therefore think that the defence based on that point of law must fail, and, as I have already indicated, that in my view there has been a user of a kind which is improper, made of matter in which there is copyright of the plaintiffs, the action must succeed.

The plaintiffs are entitled to an injunction to restrain the defendants, their servants and agents, from printing, publishing, selling, exposing or offering for sale
B any copy or copies of the book entitled *MEN OF THE WEST* containing passages copied from or only colourably altered from the passages appearing in the plaintiffs' work, *WHO'S WHO*. Then they are entitled to delivery up on oath of those parts of the book which represent passages copied or colourably altered. There will be an inquiry as to damages for conversion, but, in directing that inquiry, I am not expressing any view as to what is the proper measure of damages, and it must not
C be taken that the plaintiffs are entitled to treat the whole book, for the purpose of conversion, as their property. The plaintiffs will be entitled to the costs of the action.

Solicitors: *Field, Roscoe & Co.*; *Milner & Bickford*.

[*Reported by K. R. A. HART, ESQ., Barrister-at-Law.*]

D

E

KENNEDY v. THOMASSEN

[CHANCERY DIVISION (Eve, J.), November 28, 29, 1928]

[Reported [1929] 1 Ch. 426; 98 L.J.Ch. 98; 140 L.T. 215;
45 T.L.R. 122]

F *Contract—Conclusion of contract—Offer to redeem annuity—Release by annuitant and subsequent death—Acceptance by annuitant not communicated to purchasers until after death—Money paid to annuitant's solicitors prior thereto—Failure of consideration—Termination of solicitors' authority.*

By a separation deed, made in 1903, W. was entitled to an annuity of £200, and under the will of her husband she was entitled to a further annuity of
G £200. W.'s husband died in 1913, and she subsequently married a Dutch subject and lived in Holland for the rest of her life. In 1927 the trustees of the will offered to redeem both the annuities, and, after negotiations, W.'s solicitors wrote that they would advise her to accept £6,000 in redemption. A deed of release was executed by W. in 1928 and sent to her solicitors with instructions not to hand it over until the money and any balance of the annuities then due were paid. Before the redemption money was paid, W.
H died. The trustees, being unaware of her death, paid the money to her solicitors.

I **Held:** (i) there was no concluded contract for the sale and purchase of the annuities, since communication to the trustees of W.'s acceptance was necessary, and, she having died before that was done, her solicitors had no authority to make it.

(ii) Even assuming there was a concluded contract, there was a failure of consideration owing to W.'s death before completion, and, therefore, the trustees were entitled to the £6,000.

Strickland v. Turner (1) (1852), 7 Exch. 208, applied.

Notes. As to acceptance of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 72-78; and for cases see 12 DIGEST (Repl.) 68 et seq. As to failure of consideration, see 8 HALSBURY'S LAWS (3rd Edn.) 243-245; and for cases see 12 DIGEST (Repl.) 252 et seq.

Cases referred to:

- (1) *Strickland v. Turner (Executrix of Lane)* (1852), 7 Exch. 208; 22 L.J.Ex. 115; 155 E.R. 919; 12 Digest (Repl.) 414, 3221.
- (2) *Brogden v. Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, H.L.; 12 Digest (Repl.) 55, 300.
- (3) *Reynolds v. Atherton* (1922), 127 L.T. 189; sub nom. *Atherton v. Reynolds*, 66 Sol. Jo. 404, H.L.; 12 Digest (Repl.) 69, 389.
- (4) *Governors and Guardians of Foundling Hospital v. Crane*, [1911] 2 K.B. 367; 80 L.J.K.B. 853; 105 L.T. 187, C.A.; 17 Digest (Repl.) 217, 170.
- (5) *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 41 W.R. 210; 9 T.L.R. 124; 4 R. 176, C.A.; 12 Digest (Repl.) 59, 323.

Interpleader Issue.

A separation deed between husband and wife was executed in 1903. By it moneys were vested in trustees to pay the wife an annuity of £200 a year out of the income thereof subject to certain covenants. The husband died in 1913, having by his will directed the trustees thereof, the plaintiffs, to pay the wife an annuity of £200 a year out of the income of his residuary estate. She then married a Dutchman and again became a widow in 1920. In 1927, the plaintiffs wished to distribute the first husband's estate and, by letter dated Nov. 17, 1927, addressed to the widow's solicitors, Messrs. Long and Gardiner, offered to pay her £5,378 16s. 8d. in satisfaction of the two annuities of £200 each, payable to her under the separation deed and the will of her first husband. Their offer was not accepted and, after further negotiations, the plaintiffs offered to redeem the annuities for £6,000. A deed effecting this was signed by the widow in Holland early in 1928 and sent to her solicitors with instructions not to hand it over until the money and any balance of annuities due were paid. Before the payment of the redemption money she died, leaving a will with an executor thereof. The plaintiffs, being unaware of her death, paid her solicitors £6,000 and in return received the deed of release executed by her. On being informed of her death, the plaintiffs claimed the return of the money from her solicitors on the ground that the annuities had ceased, an action was brought, and this summons in interpleader was issued. An order to pay the money into court was made, the widow's executor was substituted for the original defendants, and the trial of the issue to whom the £6,000 belonged was ordered.

Gover, K.C., and *H. H. King*, for the plaintiffs, referred to *Brogden v. Metropolitan Rail. Co.* (2), *Reynolds v. Atherton* (3), and *Strickland v. Turner* (1).

Topham, K.C., and *Cleveland Stevens*, for the defendant, referred to *Governors and Guardians of Foundling Hospital v. Crane* (4)

EYE, J.—This case, in my opinion, can be disposed of on the short point that there never was a concluded contract for the sale and purchase of these annuities. Negotiations commenced in October, 1927, and by the middle of November the intending purchasers communicated to Messrs. Long and Gardiner, the recognised agents of the vendor, certain alternative proposals for the purchase. Each of these proposals involved the payment of a sum of money and the payment of the annuities down to the date of completion. The letter of Nov. 17, which I need not read again, clearly shows that. The alternatives there presented did not commend themselves to the vendor, and the matter went on. Further correspondence followed, and, on Dec. 21, Mr. Smith, the member of the firm of Messrs. Long and Gardiner, who was attending to the matter, wrote to the purchaser's solicitors, Messrs. Rutter and Marchant:

"I have been in communication with my client, but have not been able to make her alter her decision. I think, however, I should point out that you did not give me much ground for argument as your last offer was still below the price of a Government annuity of £400. If you can make a firm offer of

A £6,000 cash I am prepared once again to approach my client and will advise her to accept that sum. If the above suggestion is carried through, the existing annuities must, of course, in accordance with your letters, be paid to the date of payment of the capital sum and the trustees' costs discharged."

B Messrs. Rutter and Marchant thereupon took further instructions from the purchasers, and on Dec. 23 they informed Mr. Smith by telephone of the willingness of the purchasers to give the £6,000 and to accept the conditions laid down in his letter of the 21st. This information Mr. Smith communicated to his client in a letter of the same date. The vendor was not at first disposed to accept this offer, but after some further correspondence between her and Mr. Smith in which she asked for, and was given, further information, she, on Jan. 9, wrote to Mr. Smith, thanking him for his letters and saying: "I will accept on your advice the offer of £6,000." That was communicated to Mr. Smith, not as the agent of the purchasers but in order that he, as the agent of the vendor, should communicate to the purchasers her acceptance of their offer. It is not a case where the mere posting of the acceptance concluded the contract. The acceptance of the offer was not, in fact, communicated to the purchasers' solicitors until Jan. 24, and between Jan. 9 and 24, the vendor had died. The effect of her death was to determine Mr. Smith's agency. In my opinion, after her death he had no authority from her or anybody representing her to communicate the acceptance to the purchasers, and, in the absence of such communication, no contract was ever concluded. It has, however, been argued that a contract was concluded apart from any communication of any acceptance of the offer to the offerers. The offer, it is contended, of Dec. 23, only required one thing to be done by the vendor, and that was to execute a release of the annuities, and when, in fact, as it now turns out, she did on Jan. 12 execute a release, she had, by so doing, done everything to complete the contract and was relieved from any obligation to do anything more. Mr. Smith's statement of the offer, which had been made to him through the telephone, in his letter of Dec. 23 to the vendor is as follows:

E "I have just had a telephone message from Messrs. Rutter and Marchant that their clients have authorised them to make you an offer of £6,000 cash for the release of your annuities."

What does that mean? Does it mean that the moment you sign the release a contract is concluded and it will not be obligatory either on you or me to make any further communication to the purchasers? It only means this, that, for the purchase of these annuities, the purchasers are prepared to pay you £6,000 and you will have to execute a release or some other appropriate document to carry out the matter.

G It is impossible to say that this was an offer which anybody contemplated could be accepted by the mere execution by the vendor of the document of Jan. 12. It would be stretching the result of the cases referred to by BOWEN, L.J., in *Carlill v. Carbolic Smoke Ball Co.* (5) far beyond what was contemplated, to hold that they applied to such a case as this. In my opinion, it is a case in which the communication to the purchasers of the acceptance was necessary, and this never having been made during the time when the person authorised to make it had authority so to make it, no contract was ever concluded.

H I might add that, assuming there was a contract, it was, in my opinion, one for the purchase of the annuities at a future date. It was not intended that the purchase should be completed as on the day of the letters or on Jan. 12, the day when the release was executed. It was intended that the purchase price should be ascertained when the parties were ready for completion, and the purchase price was not merely the £6,000, but it was that sum plus the apportioned part of the two annuities to be calculated down to the day of completion. The case, therefore, would fall within the authority of *Strickland v. Turner* (1), and had I held that there was a concluded agreement, I should have been bound to hold further that the death of the annuitant between contract and completion rendered the contract

incapable of performance, in that there was no consideration which the purchaser would receive for his money. **A**

The fund in court belongs to the plaintiffs and must be paid out to them. If there is no arrangement about the costs, the defendant must pay them.

Solicitors: *Rutter & Marchant; A. F. & R. W. Tweedie.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.] **B**

Re SCHNAPPER **C**

[CHANCERY DIVISION (Clauson, J.), January 24, 1928]

[Reported [1928] 1 Ch. 420; 97 L.J.Ch. 237; 139 L.T. 42;
72 Sol. Jo. 137]

*Infant—Foreign domicil—Legacy—Attainment of majority by law of domicil—
Not of full age by English law—Right to payment.* **D**

An infant having a foreign domicil who has attained majority according to the law of that domicil may be paid a legacy on his own receipt, even though he is not of full age according to English law.

Notes. As to payment of legacies to infants domiciled abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 67–68, para. 128; and for cases see 11 DIGEST (Repl.) 407–408, 610–618. **E**

Cases referred to:

- (1) *Re Hellman's Will* (1866), L.R. 2 Eq. 363; 14 W.R. 682; 11 Digest (Repl.) 407, 611.
- (2) *Donohoe v. Donohoe* (1866), 19 L.R.Ir. 349.

Petition. **F**

Under the will of A. Schnapper, dated Jan. 25, 1922, his niece, E. B. Schnapper, the petitioner, was entitled to a legacy of £1,000. The testator died on Oct. 10, 1922, and on Nov. 21, 1922, the executor of the will paid the legacy into court under the provisions of the Trustee Act, 1893. The petitioner was at all material times of German nationality and domiciled in Prussia. At the date of the testator's death she was thirteen years of age, and, on Oct. 31, 1927, she attained the age of eighteen years. She was then, by a decree of the District Court of Frankfurt-on-Maine, declared to be of age, and, according to the laws of her nationality and domicil (which were both German), she became competent to receive moneys and to take a transfer of and to hold securities, and to give valid receipts for them. Accordingly, the petitioner, by her next friend, presented this petition, asking that the fund standing in court to the credit of the said legacy might be paid out to her. **G**

G. G. Solomon for the petitioner.—Where a beneficiary of foreign nationality and domicil is entitled to a legacy which must be dealt with according to English law, the executors may pay over the legacy if the legatee is of full age according to the law of domicil, though a minor according to English law: *Re Hellmann's Will* (1) and *Donohoe v. Donohoe* (2). **H**

CLAUSON, J.—I will make an order that the funds in court representing the legacy be sold, and that the residue of the proceeds of sale, after payment of the costs of the petition, be paid to the petitioner. The order will be prefaced as follows: "The court being of opinion that the petitioner is competent to give a receipt for her legacy, notwithstanding that she is under the age of twenty-one years, she having attained her majority according to the law of the place of her domicil, that is to say, the law of Prussia, in Germany." **I**

Solicitors: *Adler & Perowne.*

[Reported by J. C. T. RAINS, ESQ., Barrister-at-Law.]

R. v. HAILWOOD
R. v. HAILWOOD AND ACKROYD, LTD.

[COURT OF CRIMINAL APPEAL (Avory, Horridge and Salter, JJ.), February 27, 1928]

[Reported [1928] 2 K.B. 277; 97 L.J.K.B. 394; 138 L.T. 495;
 44 T.L.R. 343; 28 Cox, C.C. 489; 20 Cr. App. Rep. 177]

*Elections—Expenses for “promoting or procuring the election of any candidate”
 —Three-cornered contest—Posters and handbills denouncing one candidate—
 No invitation to vote for either of other two candidates specifically—Representation of the People Act, 1918 (8 & 9 Geo. 5, c. 64), s. 34 (1), (2).*

A person who disparages, and tries to induce the electors not to vote for, one of three candidates at an election is thereby “promoting or procuring the election” of the other two candidates within the meaning of the Representation of the People Act, and so the expenditure incurred by such person is unlawful unless authorised by the election agent.

Notes. The Representation of the People Act, 1918, has been repealed. The current act is the Representation of the People Act, 1949, s. 63 (1) and (5) of which correspond to s. 34 (1) and (2) of the 1918 Act, and s. 63 (2) and (3) of which provide for returns of election expenses.

As to the meaning of “promoting or procuring,” see 14 HALSBURY’S LAWS (3rd Edn.) 165; and for cases see 20 DIGEST 102. As to election expenses, see 14 HALSBURY’S LAWS (3rd Edn.) 175 et seq.; and as to illegal publications see 26 HALSBURY’S LAWS (2nd Edn.) 147. For the Representation of the People Act, 1949, s. 63, see 8 HALSBURY’S STATUTES (2nd Edn.) 631.

Case referred to:

(1) *R. v. Shevill* (1923), 17 Cr. App. Rep. 97, C.C.A.; 14 Digest (Repl.) 331, 3217.

Appeals from convictions before TALBOT, J., at the Central Criminal Court.

The appellants were convicted of unlawfully incurring expenses for the purpose of promoting or procuring the election of a candidate at a parliamentary election contrary to s. 34 of the Representation of the People Act, 1918, and were each fined £10 and ordered to pay the costs of the prosecution. At the by-election for the Parliamentary Division of Brixton, S.W., in June, 1927, three candidates, representing the Conservative, Liberal, and Labour parties respectively, offered themselves for election. The appellant, Hailwood, was a Conservative who was dissatisfied with the attitude of the Conservative party towards certain political questions. He employed in the constituency some of the appellant company’s motor lorries decorated with posters, and also issued leaflets, denouncing the Conservative party for having failed to carry out certain promises. He invited the electors “to vote anything but Conservative,” but carefully abstained from urging them to vote for either of the other two candidates specifically. The appellants were charged and convicted as above stated. Against those convictions they appealed.

A. S. Comyns Carr, K.C. (*W. Frampton* with him), for the appellants.
 AVORY, J.—Do not the words mean “the election agent of any candidate”? HORRIDGE, J.: The object of the section was manifestly to prevent societies or associations intervening to affect the result of an election. Counsel referred to *R. v. Shevill* (1). AVORY, J., referred to FRASER ON LAW OF PARLIAMENTARY ELECTIONS AND ELECTION PETITIONS (6th Edn.), p. 142: “In view of the language of s. 34 (2) of the Act of 1918 . . . it is submitted that a person can render himself guilty of the ‘corrupt practice’ thereby created without having any corrupt intention or motive, and it is, therefore, advisable for any person who intends to hold a public meeting or to issue literature of a political character to consider

carefully whether his action may not involve a breach of the section, and, if so, A
to obtain the requisite authorisation."

Roland Oliver, K.C., and *Willoughby Williams*, for the Crown, were not called on to argue.

The judgment of the court was delivered by

AVORY, J.—In this case the two appellants, *Hailwood*, and *Hailwood and Ackroyd Ltd.*, were convicted of an offence under s. 34 of the Representation of the People Act, 1918, which provides, by sub-s. (1): B

"A person other than the election agent of a candidate shall not incur any expenses on account of holding public meetings or issuing advertisements, circulars or publications for the purpose of promoting or procuring the election of any candidate at a parliamentary election, unless he is authorised in writing to do so by such election agent." C

Subsection (2):

"If any person acts in contravention of this section he shall be guilty of a corrupt practice other than personation within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883, and the expression 'corrupt practice' shall be construed accordingly." D

It is important to observe that the words of those subsections do not say that a person commits the offence only if he does it corruptly; but, having forbidden a person to do a certain thing they say that anyone who does that forbidden thing is liable to be punished as if he had been guilty of a corrupt practice. Then follows a proviso, which deals merely with the remission of punishment in certain circumstances. Subsection (3) provides: E

"Any expenses incurred on account of any such purpose as aforesaid and authorised by the election agent of the candidate shall be duly returned as part of the candidate's election expenses."

The object of this statute is very plain. Prior to this Act, the previous statutes on the subject had fixed a maximum amount which could be lawfully expended by a candidate at his election and had also provided that the election agent should make a true return of his expenses. It was then found that it was a common practice for associations and persons other than a candidate and his agent to incur expenses for the purpose of promoting or procuring the election of a candidate, although not authorised by his agent to do so, and in that event such expenses would not be included in the agent's return. To put a stop to that practice, this section was passed, with the result that the position now is that if an election agent has not authorised the expense, the incurring of it is to be an offence, and if he has authorised it a return of the expense must be made. F

It is now suggested that in a case like the present, where there happen to be three candidates standing in the interest of different parties, if a person, who is not authorised by an election agent, incurs expenses of the character described in this section, he cannot be rendered liable under the section, unless it can be definitely shown that he had in his mind the intention of promoting the election of one of those three candidates in particular. To that the answer is an express one. "Any candidate" must be read in the light of the Interpretation Act, 1889, as including "any candidates." If a person has done what is forbidden by the statute with the intention of promoting or procuring the election of any candidates, there is no question that he has committed an offence under the section. Here not only was there evidence that what was done was done for the purpose of promoting or procuring the election of candidates, or one of them other than the Conservative candidate, but a jury which had hesitated to find that what was done was done for that purpose would have been neglecting their duty. The nature of the posters and leaflets issued by the appellant, *Hailwood*, shows that the purpose of these advertisements was to prevent the election of the Conservative candidate. One uses the terms "Pitch them [i.e., the Conservative party] out at this elec- G H I

A tion" and there is another addressed "Women of Brixton" in similar terms. No possible construction can be placed on these documents but that of an invitation to vote for one of the other candidates. There can be no question that the appellant, Hailwood, must have done what he did intending to promote or procure the election of a candidate other than the Conservative candidate.

It is said that the appellant, both by the evidence he gave at the trial and by the terms of a letter giving instructions for these matters to be prepared, showed that his only intention was to reduce the Conservative majority and not to promote the election of either of the other candidates. It is not open to a person who is charged with doing an act forbidden by statute to say "although I must have known that what I was doing would necessarily have the effect of promoting or procuring the election of the other candidates or one of them, I never intended in my mind that it should have that effect." As TALBOT, J., truly said in the course of his summing-up: "The motive that is in a gentleman's mind is one thing; the purpose for which he takes his action is another." The statute here uses the words "for the purpose of promoting or procuring the election of a candidate," and there is no question that what was done here would have the effect and was intended to have the effect of promoting the possible election of a candidate other than the Conservative candidate.

So far as any criticism can be offered to the summing-up of the learned judge, it appears to me to have been more favourable to the accused than it need have been. He uses the words:

"You may think on the other hand that you cannot say that he incurred this expense for the purpose of procuring the return of one of these two gentlemen, because that was not the dominant motive in his mind."

He might have told the jury that it did not matter what the dominant motive in the mind of the accused was, but that if what he did would necessarily have the effect of promoting the return of some candidate other than the Conservative candidate, he must be taken to have intended the natural consequence of his acts. There are no grounds for this appeal, and it must be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon* for A. A. Burton, Leeds; *Lewis & Lewis*.

[*Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.*]

R. v. JONES

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Acton, JJ.), November 26, 1928]

[Reported [1929] 1 K.B. 211; 98 L.J.K.B. 174; 140 L.T. 144;
21 Cr. App. Rep. 59; 38 Cox, C.C. 572]

Criminal Law—Appeal—“Sentence”—Order for compensation under Forfeiture Act, 1870—Forfeiture Act, 1870 (33 & 34 Vict., c. 23), s. 4—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 21.

An appeal lies to the Court of Criminal Appeal from an order directing a convicted person to pay compensation under s. 4 of the Forfeiture Act, 1870, as being an appeal against “sentence” within the meaning of s. 21 of the Criminal Appeal Act, 1907.

Notes. As to appeal against conviction and sentence on indictment, see 10 HALSBURY'S LAWS (3rd Edn.) 521; and for cases see 14 DIGEST (Repl.) 605–607. As to compensation of a person injured by a felony, see 10 HALSBURY'S LAWS (3rd Edn.) 553; as to compensation for loss of property suffered through a felony, see *ibid.* 819; and for cases see 14 DIGEST (Repl.) 685–687. For the Forfeiture Act, 1870, s. 4, and the Criminal Appeal Act, 1907, s. 21, see 5 HALSBURY'S STATUTES (2nd Edn.) 842 and 939 respectively.

Appeal against an order for compensation.

The appellant was convicted on July 10, 1928, at the Central Criminal Court, of uttering a cheque, knowing the endorsement to be forged. He was sentenced by JUDGE ATHERLEY-JONES, K.C., to eighteen months' imprisonment with hard labour, and was ordered to pay £90 to the prosecutor by way of compensation under s. 4 of the Forfeiture Act, 1870, which provides:

“It shall be lawful for any court [by which judgment shall be pronounced or recorded, upon the conviction of any person for felony] . . . if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding £100, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs [of the prosecution] ordered by the court to be paid under the last preceding section of the Act.”

Before the appellant was sentenced, a police officer, in giving evidence in regard to character, &c., informed the judge that the appellant had given him a written order to his bank to pay the sum, and for this reason no order was then drawn up. The appellant subsequently countermanded the order to his bank, and a fresh application was made to the judge who tried the case on Sept. 7 in the absence of the appellant, and the appropriate order of the court was then recorded. On Oct. 15, the appellant was brought back before the judge, to enable him to put forward his objection to the order. The judge adjourned the matter for consideration, and on Oct. 19 told the appellant that the order must stand. The appellant appealed against the order. By the Criminal Appeal Act, 1907, s. 21:

“The expression ‘sentence’ includes any order of the court made on conviction, and with reference to the person convicted or his wife or children. . . .”

Gerald Howard for the appellant.

W. B. Frampton for the Crown.—The prosecution do not seek to rely on the contention that no appeal lies in this case.

A The judgment of the court was delivered by

LORD HEWART, C.J.—The appellant was convicted at the Central Criminal Court of uttering a cheque for £275, knowing the endorsement to be forged. He was sentenced to eighteen months' imprisonment with hard labour. He afterwards applied to this court for leave to appeal against conviction and sentence, and on July 31 this court refused that application. The appellant now appeals against an order for an award made under s. 4 of the Forfeiture Act, 1870, by which he was ordered to make a payment by way of "satisfaction or compensation." Two points are taken on his behalf. In the first place, it is said that the order which is appealed against was not made "immediately after" his conviction; and, secondly, that the order was made in his absence and without notice being given to him. A preliminary question has arisen whether there is a right of appeal with reference to an order of this kind, but counsel for the prosecution has not thought fit to argue that no such right exists.

B It may be useful here briefly to recapitulate the facts. After the appellant had been convicted—the conviction being on July 10 at a sessions of the Central Criminal Court which opened on June 26—a police officer gave evidence in regard to the appellant's character, and said, among other matters, "The prisoner certainly did give me every assistance in this case and wanted to make restitution of the money in his hands. He gave me a written authority, but the bank would not act on it." We are told, and it is common ground, that a written authority of that kind was in fact given by the appellant to the police. After the appellant had been sentenced on that day counsel for the prosecution immediately applied to the court in these terms: "I ask your Lordship to authorise the cheque for £90. . . ." The learned judge, who by this time had been made aware of the information given by the police, interposed and said: "It is not necessary, but I will do so." We are told by counsel that, at the time when these observations were made, the appellant was still in the dock. He afterwards repented of the authority which he had given and sought to countermand the order to the bank, and it appears that, although the learned judge had said what I have just read on July 10, no order was in fact drawn up. A further application was made on Sept. 7, and the learned judge, who had heard the case, said to the counsel who then made the application:

C "Now you ask me to make the order which I have already made and which was never properly recorded as an order because it was deemed, and apparently with good reason, to be an unnecessary order. Now it turns out not to be an unnecessary order."

D In other passages in the transcript, the account given of the matter is not always the same, but more than once the learned judge says that he did make the order and, in our opinion, the fair view is that it was made on July 10, but was not presently recorded for the reason that everyone in court was then aware of the statement by the police officer that the appellant had himself given authority to repay. The conclusion seems to be that the order, which was afterwards recorded, was in fact made immediately after conviction, and the requirements of that part of the section appear to have been fulfilled. The language of s. 4 of the Forfeiture Act, 1870, is as follows:

E "It shall be lawful for any . . . court [by which judgment shall be pronounced or recorded, upon the conviction of any person for felony] . . . if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding one hundred pounds, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony . . ."

On the true interpretation of what was said and done, it does not appear that this order was not made "immediately after the conviction," and, in any case, this appellant appears to us to be estopped from contending that the order was not made "immediately after the conviction." The order was orally made and the fact that

it was not recorded was due to conduct on his part from which he afterwards endeavoured to recede, and that statement of facts is an answer also to the contention that what was done was done behind the back of the appellant and without notice being given to him. The question whether such an order is the subject of an appeal to this court was not fully argued, because counsel for the prosecution was not disposed to press the point that no appeal lay. It seems to us that there may be more than one ground on which it can be said that such an appeal does lie, but it is sufficient now to mention one ground only. Section 4 of the Forfeiture Act, 1870, goes on:

" . . . The amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs [of the prosecution] order by the court to be paid under the last preceding section of the Act."

The sum of money is, therefore, payable as a judgment debt due to the person entitled to recover from the person so convicted. When one turns to the Criminal Appeal Act, 1907, s. 21, which is the section containing definitions, runs:

"The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted or his wife or children."

In the opinion of the court the words "order made on conviction with reference to the person convicted" are sufficiently wide to include an order made under s. 4 of the Forfeiture Act, 1870, for payment of money by way of "satisfaction or compensation," such amount awarded being deemed to be a judgment debt due from the person so convicted. In the result, therefore, we are of opinion that there is a right of appeal as being an appeal against sentence in such a case as this, but that this appeal fails on both grounds urged in support of it, and the appeal is accordingly dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal; Neve, Beck & Crane.*

[*Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.*]

Re VILLAR. PUBLIC TRUSTEE v. VILLAR

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), October 17, 18, 1928]

[Reported [1929] 1 Ch. 243; 98 L.J.Ch. 223; 140 L.T. 90;
45 T.L.R. 13; 72 Sol. Jo. 761]

Perpetuities—Rule against perpetuities—Will—Estate not distributable until “period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of . . . Queen Victoria who shall be living at my death”—Future difficulty and expense of ascertainment.

By his will, a testator tied up the corpus of his property, certain interim trusts being declared of the income, for what he called a “period of restriction,” which he defined as the “period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of Her late Majesty Queen Victoria who shall be living at my death.”

Held: the trust was valid in that it did not offend against any rule of law, and, although it might be difficult and expensive in the future to ascertain the date of the death of the survivor of Queen Victoria’s lineal descendants, there was no infringement of the rule against perpetuities, nor was the gift void for uncertainty.

Thellusson v. Woodford (1) (1805), 11 Ves. 112, applied.

Decision of ASTBURY, J., [1928] Ch. 471, affirmed.

Notes. Followed: *Re Leverhulme, Cooper v. Leverhulme* (No. 2), [1943] 2 All E.R. 274. Considered: *Re Eden, Ellis v. Crampton*, [1957] 2 All E.R. 430.

As to the choice of period available for the perpetuity rule, see 25 HALSBURY’S LAWS (2nd Edn.) 95–97, paras. 181–184; and for cases see 37 DIGEST 61–63, 53–66.

F Cases referred to:

(1) *Thellusson v. Woodford* (1805), 11 Ves. 112; 1 Bos. & P.N.R. 357; 32 E.R. 1030, H.L.; 37 Digest 63, 67.

(2) *Duke of Norfolk’s Case, Howard v. Duke of Norfolk* (1683), 3 Cas. in Ch. 1; 2 Swan. 454; Freem. Ch. 72, 80; Poll. 223; 2 Rep. Ch. 229; 22 E.R. 931, L.C.; reversed sub nom. *Duke of Norfolk v. Howard*, 1 Vern. 163; restored sub nom. *Howard v. Duke of Norfolk* (1685), 14 Lords Journals 49, H.L.; 37 Digest 77, 181.

(3) *Robinson v. Hardcastle* (1786), 2 Bro.C.C. 22; 29 E.R. 11, L.C.; 37 Digest 62, 58.

(4) *Re Moore, Prior v. Moore*, [1901] 1 Ch. 936; 70 L.J.Ch. 358; 84 L.T. 501; 49 W.R. 484; 17 T.L.R. 356; 37 Digest 63, 66.

H Appeal from a decision of ASTBURY, J.

By his will dated July 14, 1921, William James Villar appointed the Public Trustee and such of his sons as should be ordinarily resident in England at the time of his death, and have then attained the age of twenty-one years, executors and trustees. The testator defined the meaning to be given to certain expressions used in his will, and, inter alia, defined the “period of restriction” to mean “the period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of Her late Majesty Queen Victoria who shall be living at my death,” and defined “participating issue” to mean “all my issue for the time being living, who shall not have any ancestors (being issue of mine) living.” The testator, after making certain specific bequests and devises, gave his residue to trustees on trust out of the income to make certain payments and to pay an annuity to his wife and, subject to such payments, directed his trustees during the period of restriction to divide the income equally per stirpes between all his “participating issue.” The testator declared that, after the expiration

of the period of restriction, his trustees should stand possessed of his residuary trust estate on trust for the participating issue who should be living at the expiration of the period of restriction in certain shares. The testator died on Sept. 6, 1926. Questions arose as to the validity of the "period of restriction" fixed by the will. An affidavit was made by Mr. Alfred Trego Butler, Portcullis Pursuivant of Arms in the College of Arms, and former editor of *BURKE'S PEERAGE*, who stated that in the year 1922 he had prepared a pedigree of the lineal descendants of Queen Victoria then living, and that there were then living about 120 such descendants, which number had probably increased by Sept. 6, 1926. He stated that it would be an enormous expense to prove strictly all the births, deaths, and marriages of the persons named in the pedigree, and that, in his opinion, it would be extremely difficult and very probably impossible to prove in the future who was the last survivor of the lineal descendants of Queen Victoria living on Sept. 6, 1926. He pointed out that such descendants were living in many countries, and that, as a consequence of what had happened since 1914, many of the descendants had ceased to be royal persons and might fall into obscurity. The Public Trustee issued this summons to determine whether the trusts of the income during the period of restriction and the trusts of the corpus at the expiration of that period were void for uncertainty.

ASTBURY, J., held that the principle deducible from the judgments in *Thellusson v. Woodford* (1) was that, if, in the circumstances of a particular gift and the lives selected it was substantially impracticable to ascertain the extinction of the lives, the gift would be void; but that, though the ascertainment of deaths might be difficult and expensive, the gift would not be void if ordinary legal testimony as to the deaths was available. In the present case it could not be said that it was impracticable to ascertain when the corpus was distributable, and, therefore, the gift was not void for uncertainty. The testator's children appealed.

Sir Thomas Hughes, K.C., and Edward Beaumont (for J. W. F. Beaumont) for the appellants.

A. F. Topham, K.C., and H. C. Bischoff for the respondents.

Baden Fuller for the widow.

J. H. Stamp for the Public Trustee.

LORD HANWORTH, M.R.—This is an appeal from *ASTBURY, J.*, who had to determine whether or not in the main the will of the testator ought to be declared ineffective, and that the proposed trust disposition of his residuary estate failed on the ground that it was void for uncertainty, or, in other words, impracticable. [His Lordship stated the facts, and continued:] It is said that the terms of the residuary gift which are easy to carry out as regards the payment of income at the present time are to be treated as invalid because of the period of restriction to the end of which distribution of the capital was postponed. The argument is that, as the ascertainment of the end of the period will create serious difficulty in time to come, the residuary gift ought to be set aside as invalid. The period of restriction is defined as

"the period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of Her late Majesty Queen Victoria who shall be living at the time of my death."

We have the evidence of a member of the College of Arms, who said that the descendants of Queen Victoria numbered not less than 120 in 1922, and that they might have increased in number by 1926, that is, the time of the testator's death. On the other hand, I suppose they might have decreased in number, for I do not know whether the births of new descendants between 1922 and 1926 were sufficient to fill the vacancies among the descendants caused by death during these years. However, it is quite clear that there were a large number of descendants of Queen Victoria in being on Sept. 6, 1926, when the testator died, and obviously there may be great difficulty in ascertaining whether, and when, the last of these lineal

A descendants had passed away. As has been pointed out in some cases, that is what will have to be ascertained, and it depends on ascertaining the existence of one single life which outlives all the other descendants. I recognise that serious difficulty might well arise in the future in ascertaining the date when that life ceased.

B It is plain from the judgment of ASTBURY, J., that it was with reluctance that he decided that the provision in the will was valid. He said that, if he could have seen his way to say that the tying-up of the capital by the method adopted was invalid, he would gladly have done so. For myself, I share that view. Indeed, I think I may use the words of LORD ELDON in *Thellusson v. Woodford* (1), where he says (11 Ves. at p. 145):

C "If it were possible, speaking judicially, to say, you entertain a wish upon the subject, your Lordships may all concur in the regret that such a will should be maintained. But that goes no farther than as a motive to see whether it contains anything, resting upon which we may as judges say it is an attempt to make an illegal disposition."

D I join with LORD ELDON and ASTBURY, J., in regretting that a will may be validly made in terms which give rise to great difficulty at the present time, and probably still more so in the future, without any compensating advantage to anyone, except to give latitude to the vanity and mere caprice of the testator. But while I hold these views, it is necessary that I must set them aside when acting judicially and consider what is the law applicable to the case. In this respect, much assistance can be obtained from *Thellusson's Case* (1), in which SIR A. MACDONALD, C.B., in the House of Lords said (11 Ves. at p. 135) in reference to an observation of LORD NOTTINGHAM in *Howard v. Duke of Norfolk* (2):

E "When he declares, that he will stop, where he finds an inconvenience, he cannot, consistently with sound construction of the context, be understood to mean, where judges arbitrarily imagine, they perceive an inconvenience; for he has himself stated, when inconvenience begins; namely, by an attempt to suspend the vesting longer than can be done by legal limitations."

F And LORD ELDON says (11 Ves. at p. 146) that the decision to be reached cannot depend on the number of lives,

G "but the question always is, whether there is a rule of law, fixing a period during which property may be unalienable. The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that to which testimony can be applied, to determine, when the survivor of them drops."

H Applying the passages and the rules adhered to in *Thellusson v. Woodford* (1), we have to ask ourselves whether the testator has by his will offended against any rule of law. He has defined the period of restriction as a period lasting during the lifetimes of a number of ascertainable persons or the survivors or survivor of them. It is true that the number is considerable, amounting to 120 or 130, but they can be ascertained at the present time. It follows that the testator has selected a period of restriction during which division of the capital is postponed, which, inconvenient though it may be, offends against no canon of law at the present time.

I But it is said that the courts ought to take into consideration the difficulty that will arise in the future when, it may be 100 years hence, their successors will be faced with the problem of finding out who is the last survivor of this body of 120 or 130 persons and when he died. That is a difficulty which may arise by reason of the vicissitudes of life, but it may not. It is possible that, 120 years hence, the court may find a number of problems relating to the births, marriages and deaths of the various persons, but that appears to me not to be a matter which we are entitled to consider. The difficulties are not insurmountable, and they may arise, but one cannot say that they must arise. Therefore, I return to the view that the

only matter I have to consider is whether the residuary gift of the testator can be declared invalid on the ground that it has trespassed against some rule of law at the present time. The answer must be that it has not so transgressed, and, that being so, we cannot, by reference to difficulties that may arise hereafter, make a new will for the testator. A

I regret the decision, as there is no reason for such a fanciful disposition; but, testing it only by the rules which have to be applied, I can find no breach of the existing law, and the will must, therefore, stand. The appeal is based on an application to set aside the whole of the residuary gift, but, at the present time, there is no difficulty in dealing with the estate in the manner directed by the testator. It seems impossible to set aside a gift which can operate quite well at the present time, but which may in the future cause difficulty. I think that the decision of *ASTBURY, J.*, was right, and that the appeal must be dismissed. B C

LAWRENCE, L.J.—I agree. In my judgment the decision in *Thellusson v. Woodford* (1), which is binding on this court, affords a complete answer to the contention of the appellants that the testator's residuary gift is void as infringing the rule against perpetuities. In that case, *LORD ELDON* (11 Ves. at p. 145), after approving of the opinion expressed by *LORD THURLOW* in *Robinson v. Harcastle* (3) (2 Bro.C.C. at p. 30), that it is competent to a testator to give a life estate, to be appointed by the survivor of a thousand persons, stated that D

"the language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that to which testimony can be applied, to determine, when the survivor of them drops."

Much stress has been rightly laid by the appellants in the present case on the words "not exceeding that to which testimony can be applied," but, in my opinion, these words were intended to apply to cases such as *Re Moore, Prior v. Moore* (4), where it is obviously impossible, or proved definitely to be impossible, to ascertain the lives specified. Moreover, I think that, in cases of that kind, it is not a question of whether the rule against perpetuities has, or has not, been infringed, but of whether the gift is void for uncertainty. If it be impossible to ascertain the lives on the death of the survivor of which the vesting of the capital is to take effect, such vesting is not, in fact, postponed beyond the permitted limit, but the gift is void for uncertainty; that this was the opinion of *Joyce, J.*, is shown by his judgment in *Re Moore* (4), which which I agree. E F

In the present case, there is, in my opinion, no infringement of the rule against perpetuities. All that is said is that there will, or may be, great difficulty in ascertaining the lives on the death of the survivor of which the ultimate vesting depends. If it could now be established definitely that it is impossible to ascertain who were the descendants of *Queen Victoria* living at the death of the testator, and that any inquiry for the ascertainment of such descendants which might be directed by the court would necessarily prove abortive, there would be solid ground for holding that the gift was void for uncertainty. That, however, cannot be said in this case. The evidence shows that at most it is difficult at the present time to ascertain who are the lineal descendants in question, and that it may be probably more difficult in the future to ascertain who is the survivor of such descendants. But it cannot properly be said now that it is impossible to ascertain which of the lives mentioned by the testator were in existence at his death, and it is mere speculation whether it would be difficult or easy to ascertain the date of the death of the survivor of such lives. In my judgment, the evidence falls far short of proving that the number of lives exceeds that to which testimony can be applied to determine when the survivor of them drops. The mere fact that difficulties may hereafter arise in ascertaining which is the survivor of the lives mentioned by the testator is not, in my judgment, a ground for holding that the gift in question is void for uncertainty. G H I

For these reasons, although I share the regret expressed by the Master of the Rolls and by the learned judge at the result of our decision, I have come to the

A conclusion that the order appealed against was right and that the appeal must be dismissed.

RUSSELL, L.J.—I am of the same opinion. The property here in question is made to vest within legal limits; and I think, therefore, that it is impossible to say that it creates or tends towards a perpetuity. Then it is said that the residuary gift is void for uncertainty. In my opinion, we are unable to say that. All that can be said is that it may be, and probably will be, expensive and difficult to prove that the specified event has occurred, and for that the only authority is the affidavit of Mr. Butler, the Porteuill Pursuivant of Arms, who says:

C “In my opinion it is possible that as a consequence of the events which have happened since 1914 some of the continental descendants of Her late Majesty Queen Victoria who were living at the death of the testator and are still alive may fall into penury and obscurity, a state of things which may, and probably will, make it extremely difficult, if not impossible, to trace them and ascertain strictly the date of their deaths.”

D The case so made out cannot be put higher than that it may be difficult and expensive hereafter to prove who was the last survivor of the lineal descendants of Queen Victoria specified and when he or she died. In my opinion, this falls far short of what is required as a ground for saying that the residuary gift is void for uncertainty. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Church, Rendell, Bird & Co.*, for *Bird & Lovibond*, Uxbridge; *Gregory, Rowcliffe & Co.*, for *Thomas Broomhead*, Taunton.

[Reported by GEOFFREY P. LANGWORTHY, ESQ., Barrister-at-Law.]

F

WEDDLE, BECK & CO. v. HACKETT

G [KING'S BENCH DIVISION (Swift, J.), October 26, November 14, 1928]

[Reported [1929] 1 K.B. 321; 98 L.J.K.B. 243; 140 L.T. 303;
45 T.L.R. 67; 73 Sol. Jo. 13]

H Gaming—Stock Exchange transaction—Contract for “differences” between stockbroker's agent and defendant—Stockbroker's belief that transaction genuine—Purchase of shares from jobbers on defendant's behalf—Re-sale at a loss—Stockbroker's right to recover from defendant—Gaming Act, 1845 (5 & 6 Vict., c. 109), s. 18—Gaming Act, 1892 (55 & 56 Vict., c. 9), s. 1.

I The defendant agreed with a half-commission agent in the employ of the plaintiffs, a firm of stockbrokers, to enter into speculations on the Stock Exchange, the agent buying and selling shares, the settlement to be made on differences, no shares being taken up by the defendant. The plaintiffs, on the direction of the agent, acted as brokers and entered into contracts with jobbers for the purchase and sale of shares on behalf of the defendant, formal buying and selling notes being issued. After a time the defendant's account showed a debit balance and the plaintiffs closed it and sued for the balance as moneys paid on behalf of the defendant.

Held: as between the agent and the defendant there was no intention of doing any genuine business in the purchase and sale of shares, the only object they had in mind being speculation in differences, but there was no

evidence that the plaintiffs and the jobbers from whom they bought shares on behalf of the defendant did not believe the transactions to be genuine investments by the defendant, and, therefore, the contracts which the plaintiffs entered into with the jobbers were not gaming and wagering contracts and as such illegal, and the plaintiffs were entitled to succeed in their claim.

Notes. Referred to: *Woodward v. Wolfe*, [1936] 2 All E.R. 529.

As to contracts for "differences" on the Stock Exchange, see 18 HALSBURY'S LAWS (3rd Edn.) 183-185; and for cases see 42 DIGEST 833-836. For Gaming Acts, 1845 and 1892, see 10 HALSBURY'S STATUTES (2nd Edn.) 746, 777.

Cases referred to:

- (1) *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484; 61 L.J.Q.B. 696; 56 J.P. 665; 8 T.L.R. 680; 36 Sol. Jo. 628; affirmed, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 41 W.R. 210; 9 T.L.R. 124; 4 R. 176, C.A.; 25 Digest 394, 2.
- (2) *Grizewood v. Blane* (1852), 11 C.B. 538; 138 E.R. 578; sub nom. *Grisewood v. Blayne*, 19 L.T.O.S. 64; 42 Digest 834, 433.
- (3) *Thacker v. Hardy* (1878), 4 Q.B.D. 685; 39 L.T. 595; 43 J.P. 221; 27 W.R. 158; sub nom. *Thacker v. Hardy*, *Thacker v. Wheatley*, 48 L.J.Q.B. 289, C.A.; 42 Digest 834, 432.
- (4) *Blaxton v. Pye* (1766), 2 Wils. 309; 95 E.R. 828; 25 Digest 460, 472.
- (5) *Ironmonger & Co. v. Dyne* (1928), 44 T.L.R. 497, C.A.; Digest Supp.
- (6) *Universal Stock Exchange, Ltd. v. Strachan*, [1896] A.C. 166; 65 L.J.Q.B. 429; 74 L.T. 468; 44 W.R. 497; sub nom. *Strachan v. Universal Stock Exchange, Ltd.*, 60 J.P. 468, H.L.; 42 Digest 834, 430.

Action tried by SWIFT, J., without a jury.

The plaintiffs, Weddle, Beck & Co., members of the London Stock Exchange, sued the defendant, Leonard Hackett, for £317 19s. 6d., being the balance alleged to be due to them on account of the purchase and sale of shares made on the defendant's behalf. The facts appear in the judgment.

H. G. Robertson for the plaintiffs.

H. Salter Nichols for the defendant.

Cur. adv. vult.

Nov. 14. **SWIFT, J.**, read the following judgment.—In this case Messrs. Weddle, Beck & Co. claim as members of the London Stock Exchange a sum of £317 19s. 6d. alleged to be the balance owing by Mr. Leonard Hackett to them in respect of purchases and sales effected by the plaintiffs for and at the request of the defendant. The action came on for trial before me on Oct. 26 last and certain correspondence having been put in and evidence given on behalf of the plaintiffs, I reserved my decision in order that I might more fully consider whether on the state of facts which I was of opinion had been proved, the plaintiffs were entitled in law to recover, or whether their action was barred as being one contrary to law inasmuch as it was an action endeavouring to enforce a wagering contract.

The evidence proved to my mind, and I find as facts, that at the beginning of the year 1927 Mr. Leonard Hackett, the defendant, and Mr. C. T. Bonnard were fellow-members of a golf club. Mr. Hackett was entirely ignorant of the methods of business on the Stock Exchange, but he had heard that some of his friends had made some money by speculating on the Stock Exchange through the medium of his fellow-member of the golf club, Mr. Bonnard, and he approached Mr. Bonnard with a view to following the example of his successful friends and making money for himself by speculating. Mr. Bonnard was a half-commission man with the plaintiff firm, that is to say, he was employed by them as a clerk, his agreement with them being that he should receive half the commission which was earned on any transactions for clients introduced by him and should pay half the loss on any

A bad debts contracted by them in consequence of dealing with clients introduced by him. When Mr. Hackett approached Mr. Bonnard he told him he would like to take a hand in a speculation and that he had got £30 to £50 which he could lose, and the arrangement was made between them that Mr. Bonnard should buy and sell shares on Mr. Hackett's behalf in order that Mr. Hackett should make money if successful, but should not lose more than £50 if by any chance, which

B neither of these parties ever seems to have contemplated, he should be unsuccessful. The method by which the speculation was to be carried out was undoubtedly that Mr. Bonnard through his firm should purchase shares on behalf of Mr. Hackett, and if those shares increased in value between the time that their purchase was made and the time that delivery of them should have been taken, they should sell at a profit, but if, in their view, the unlikely contingency of the shares depreciating in value happened, they should sell at a loss and re-invest the proceeds in other undertakings. I am satisfied and I find as one of the facts that the defendant, Mr. Hackett, never contemplated the possibility of losing more than at the most £50. In pursuance of the arrangement thus made between them, Mr. Bonnard, acting as clerk to the plaintiff firm, Messrs. Weddle, Beck & Co., purchased from Messrs. Isaacs and Bray, a firm of stock jobbers, 250 United British Oil Fields of Trinidad shares at 14s. 1½d. each, the purchase price of which, including stamps, registration fee and brokerage, amounted to £180 0s. 6d. That purchase was duly intimated to the defendant by a bought note which was sent to him with a covering letter signed by Mr. Bonnard. On Feb. 24 those shares had depreciated in value, and Mr. Hackett paid a sum of £9 8s. 6d. in respect of them. There were apparently conversations between Mr. Bonnard and Mr. Hackett after that payment, and on Mar. 8 Mr. Bonnard made a purchase of 200 V.O.C. shares at 4 1/16 on behalf of Mr. Hackett. On Mar. 15, Mr. Hackett paid a sum of £22 8s. 9d. to the plaintiffs, which was credited to his account, but at the end of March that account showed a balance of £59 13s. 1d. owing by the defendant to the plaintiff firm. Interviews between Mr. Bonnard and the defendant took place, and I find as a fact upon the evidence that the defendant was not ready or willing to find any more money. Mr. Bonnard, however, offered to finance Mr. Hackett, assuring him that he would be able to get him out of his difficulties without loss, and that ultimately, guided by his, Mr. Bonnard's, advice, he would make a profit out of his transactions on the Stock Exchange. Mr. Hackett yielded to the persuasions of Mr. Bonnard to allow the account to remain open and to leave everything in Mr. Bonnard's hands in order that the latter might, by continuing to speculate, retrieve the losses which Mr. Hackett had already incurred.

G To use Mr. Bonnard's own language: "Mr. Hackett left it absolutely in my hands to deal for him." From the end of March Mr. Bonnard financed the transactions. For the account, which showed a debit of £59 13s. 1d., Mr. Bonnard paid his firm, and subsequently recovered a part of it back from the defendant, and he went on buying and selling shares on behalf of Mr. Hackett until the firm eventually closed the account, leaving a balance due to them from the defendant of £317 19s. 6d.

H I am quite satisfied, and I find as a fact that as between the defendant and Mr. Bonnard the arrangement was that the former should not be obliged to take up and was not expected to take up, any shares. It was a pure gambling transaction recognised by both as such, and spoken of quite openly in their conversations and correspondence as being such. The arrangement was that Bonnard should buy shares on behalf of the defendant, and before they became due for delivery sell them again and receive the profit or pay the loss which their rise or fall had entailed. I have no evidence at all as to what knowledge the plaintiffs had of this arrangement, and I must assume that as far as they were concerned, except inasmuch as they are affected by the knowledge of Bonnard, their clerk and agent, that they believed the transactions to be genuine investments on the part of the defendant. I am satisfied on the evidence that the plaintiffs, either through one of their partners or their representative, or Bonnard, entered into contracts with stock-jobbers for the purchase of shares, and I have no reason to suppose that the

jobbers from whom the shares were agreed to be bought did not believe that they were genuine transactions, and that in due course the shares would be taken up on behalf of the plaintiffs' client. The plaintiffs bought and sold shares on behalf of the defendant, debiting him with the amounts which they paid for the shares and crediting him with the amounts which they received for them, with the result that when they closed the account there was a balance of £317 19s. 6d. alleged to be due from him to them. It is for that balance accruing in the way which I have described that this action was brought by specially endorsed writ and an application was made for summary judgment under Ord. 14. In answer to that summons the defendant filed an affidavit which contains the grounds of his defence; upon that affidavit leave to defend was given to him, and I have to determine upon evidence before me whether the allegations made in that affidavit afford any answer to the plaintiffs' claim or whether they have made out their case and are entitled to judgment.

The points which are raised by the defendant's affidavit and in argument by his counsel are: (i) That he never employed the plaintiffs at all to enter into transactions on his behalf. (ii) That he never authorised Mr. Bonnard to enter into any transactions beyond a limit of £50. (iii) That there was no evidence of any real transactions between the plaintiffs and third parties upon which they would have been held to have been obliged to pay money on behalf of the defendant for shares which they had purchased for him and so become entitled to recover it from him. (iv) That the transactions are void and unenforceable under the Gaming Acts, and, further, that under the said Acts the plaintiffs are not entitled to recover any moneys which they have paid away ostensibly on his behalf or in commissions.

(i) As to the first of these contentions I am of opinion that from the first the defendant knew that the plaintiffs were acting as stockbrokers on his behalf. It is perfectly true that he imagined that they were only acting as brokers for the purpose of enabling him to speculate in differences, but I am quite satisfied that he knew, recognised, and approved of the fact that in order to carry out the scheme of speculation which he and Bonnard had agreed upon between them, the plaintiffs were being employed on his behalf to act as brokers. The first transaction, as, indeed, every subsequent one, was carried through by means of the bought note which I have read, and it is quite impossible to hold that the defendant did not well know that the plaintiff firm was acting on his behalf as brokers and I therefore disregard this contention.

(ii) I am satisfied that at the beginning of the transactions the defendant did not authorise Bonnard to incur any liability on his behalf beyond the sum of £50, but I am also satisfied that when that sum had been exceeded he agreed under the persuasions of Bonnard to allow Bonnard to keep the account open and to further pledge his credit in the hope of getting out of his difficulties and recovering his losses. The letter of July 4, 1927, satisfies me that some arrangement had been made by which Bonnard was to finance the transactions and the subsequent payment of £20 by the defendant shows that the original arrangement to limit his liability to £50 had gone. I think, and on the evidence of Mr. Bonnard I find as a fact, that, as he had lost his £50, he agreed that Bonnard should finance him to get him out of the trouble, and I understand that to mean that until either he, the defendant, or the plaintiffs closed the account, Bonnard might go on speculating on the defendant's behalf. It was a foolish and improvident bargain but, on the face of the evidence, I cannot say it was not made and, indeed, I think and hold as a fact that it was.

(iii) At the trial counsel for the defendant submitted to me that there was no evidence of any real transactions of the plaintiffs and third parties upon which they could be held to have been obliged to pay money on behalf of the defendant for shares which they had purchased for him and so entitle them to recover it from him. I do not think this contention is sound. Mr. Bonnard swore, and I have no reason for doubting it, that in fact the plaintiff firm did buy from jobbers and

A were under a liability to take up from them shares in respect of each of those transactions. The contract note was produced in each case and he swore that the business was carried through in exactly the same way in all the subsequent ones, and I accept this. I find that there was a real transaction entered into by the plaintiffs with third parties for the purchase and sale of shares by them on behalf of the defendant.

B (iv) The point which was raised under the Gaming Acts is a point which has given me real difficulty in this case. As between Bonnard and the defendant there is no doubt, as I have said above, that these were gambling transactions. There was no intention of doing any genuine business in the purchase and sale of shares—the only object they had in mind was speculation in differences and what I have to determine is whether there is in such an arrangement anything which is illegal so
C as to prevent the plaintiffs from recovering money which they have expended on behalf of the defendant in furtherance of such a scheme. I am of opinion that, unless it can be shown that the contracts which the plaintiffs entered into on behalf of the defendant were wagering contracts so as to be void within the Gaming Act, 1845, and so as to make the agent incapable of recovering his money under the provisions of the Gaming Act, 1892, there is nothing which is illegal in what
D the plaintiffs did and nothing to prevent them from recovering from the defendant moneys which they have expended on his behalf and in pursuance of these contracts. The question which seems to me to fall to be determined is whether the contracts formed between the jobbers and the defendant through the agency of the plaintiffs were or were not wagering contracts. If they were wagering contracts, then they were void and the plaintiffs should not have paid money under them to
E the third parties and cannot recover it from the defendant on whose behalf they paid—I think the Gaming Act, 1892, would be clearly applicable. But if, on the other hand, they are not wagering contracts then it seems to me that, whatever the intention of the defendant may have been as to taking up the share or not, he is bound to pay the moneys which have been advanced for him by the plaintiffs for payment of the money due under those contracts.

F A wager or wagering contract was defined by HAWKINS, J., in *Carlill v. Carbolic Smoke Ball Co.* (1) in quite clear terms which, so far as I am aware, has never been questioned. In that case he said ([1892] 2 Q.B. at p. 400):

G “The third question is whether the contract I have found to exist is a contract by way of gaming or wagering within the meaning of the Gaming Act, 1845, s. 18, which renders such contracts null and void, and, therefore, not enforceable by action. I think it is not. It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering from an ordinary contract; but, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other,
H and that other shall pay or hand over to him a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event,
I and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract. It is also essential that there should be mutuality in the contract. For instance, if the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance, those of one party being such as if agreed in by the other would make the contract a wagering one, whilst those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract

and leave it enforceable by law as an ordinary one: see *Grizewood v. Blane* (2), *Thacker v. Hardy* (3), *Blaxton v. Pye* (4)."

Accepting that definition of a wagering contract I find it impossible to come to the conclusion that the contracts which the plaintiffs entered into with third parties on behalf of the defendant were in any sense wagers. It is perfectly true that they were contracts entered into in order to enable the defendant to gamble in differences. The defendant never intended to take up the shares, his only object in entering into the contracts was to speculate in the difference of their values at different dates. There is no evidence whatever before me, and, indeed, the evidence is the other way, that the third parties had any such intention. They entered into the contracts as genuine transactions for the sale and purchase of shares which they were bound to deliver or to take up when called upon to do so, and there is a complete lack of that mutuality which is essential before the wagering element can enter into a contract so as to render it void and unenforceable. I am fortified in this view by a passage which was cited to me from SCHWABE AND BRANSON ON THE LAW OF THE STOCK EXCHANGE (2nd Edn.), p. 249, which I accept and adopt:

"It may, then, be stated as a general rule that, apart from very unusual circumstances, a contract made on the Stock Exchange, or upon any provincial stock exchange, with similar rules and usages, and whether between principals direct or through an agent, is not made by way of gaming and wagering. The mere fact that a contract purports to be subject to such rules is not conclusive, and will not exclude evidence that there was in fact a tacit understanding that, in spite of the form of the contract, there should be no obligation on either party to take or deliver but that in any event differences only should be payable. If such an understanding were established by the evidence, the contract would be null and void."

I cannot find that there was any understanding established by evidence, or, indeed, any evidence, that the third parties entered into any tacit understanding that in spite of the formal contract there should be no obligation on either party to take or deliver, but that in any event differences only should be payable as between the defendant and the third parties. I think they were genuine contracts, although those genuine contracts were only intended by the defendant and by Mr. Bonnard to be a means by which the defendant might gamble.

It was then contended by counsel for the defendant that, if there was an arrangement such as I have in fact found between Bonnard and the defendant, the defendant should not be obliged to take up the shares, but should only pay differences, the contracts would be unenforceable and the plaintiffs not entitled to recover the money which they had advanced. I do not think that this is right. There is no law in this country against betting or wagering generally, and it is not illegal for two people to agree together that they should carry out transactions with an innocent third party, which they intend shall really amount to no more than speculative transactions, but which from the point of view of the third parties are genuine. For example, for two people to agree that one shall buy a horse for the other from a third party with the intention of selling it next day at a higher price if they can get it and a lower one if they cannot, is not illegal, nor is it betting or wagering within the meaning of the statutes which would render wagering contracts void. It is an agreement to speculate, and, so far as I can ascertain, such an agreement is not illegal. In *Ironmonger & Co. v. Dyne* (5) (44 T.L.R. at p. 498), SCRUTTON, L.J., said that

"the question in the case might be stated very shortly. The action was brought on twelve contracts of purchase of foreign exchange. The defence set up was that these were gaming contracts unenforceable under the Gaming Act. The transactions between the plaintiffs and the defendant extended over three years, although the particular amount sued for covered only the period

A of two months in 1926 and 1927. In considering the summing-up one must have regard to the course which the case took at the trial. He was not going to attempt exhaustively to define what was a gaming or wagering contract. COTTON, L.J., had attempted a definition in *Thacker v. Hardy* (3), when he said (4 Q.B.D. at p. 695):

B 'The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win.'

C With great respect he thought that that definition was not exhaustive. If goods were sold to be delivered three months hence at a fixed price and the price fell below or went above that figure, the price at the date fixed would determine whether there was a profit or a loss; but that was not a gaming or wagering contract. COTTON, L.J., had omitted any such consideration as that. Assume the case of the Grand National and a horse called Tipperary Tim, and A. and B. agreed that if Tipperary Tim did not win A. would pay £1 to B., but if it did B. would pay £100 to A.; that was a bet, because neither of them had any interest in the horse except their agreement about the money to be paid if the horse should win or lose. But if the contract was that A. said he would buy Tipperary Tim for £200 and, if he won the Grand National, he would pay another £800, a matter which depended upon a future event, that was not a gaming transaction because they had a proprietary interest in the subject-matter—Tipperary Tim—which passed from one to the other."

E A number of similar examples might be given in commercial matters. The learned lord justice then went on to say that

F "the question to be considered there was whether the transactions were such that nothing was to happen except payment of differences, or whether currency was to be delivered. That depended on the agreement between the parties, and it had been agreed by counsel in the court below that the question to be left to the jury was that which had been put by CAVE, J., in *Universal Stock Exchange, Ltd. v. Strachan* (6), to the jury and was approved in the House of Lords. What CAVE, J., said was this ([1896] A.C. at p. 167):

G 'The question which you have to try is whether these transactions were real bargains for purchase of stock or whether they were simply gambling transactions intended to end in the payment of differences. . . . A man goes to a broker and directs him to buy and sell so much stock, as the case may be. That may be, in the eye of the purchaser, a gambling transaction or it may not. If he means to invest his money in the purchase of the stock which he orders to be bought, that undoubtedly is a perfectly legitimate and real business transaction.'

H After referring to the 'terms of business' that judge concluded thus:

I 'Notwithstanding those ostensible terms of business, was there a secret understanding that the stock should never be called for or delivered, and that differences only should be dealt with? If there was that secret understanding then the plaintiff is entitled to recover his securities. If there was not that secret understanding, then he is not entitled to recover them, and that is the only question with which I need trouble you.' "

Here, as I say, I think that the contracts which were made between the defendant and the third parties were genuine contracts because, although the defendant did not intend to take up the shares, the jobbers who contracted were, as far as I know, and, indeed, I have so found, genuinely under the impression that he was bound to take them when the time for delivery came. In these circumstances I have come to the conclusion that the defendant has no answer to the claim which is made upon him by the plaintiffs; on the contrary I think that they have

established the fact that he is indebted to them in the sum of £317 19s. 6d. I A
give judgment for the plaintiffs accordingly with costs.

Judgment for plaintiffs.

Solicitors: *Smallman & Son; Corsellis & Berney.*

[*Reported by R. A. YULE, Esq., Barrister-at-Law.*] B

JENKINS v. JENKINS C

[KING'S BENCH DIVISION (Salter and Talbot, J.J.), March 20, 1928]

[Reported [1928] 2 K.B. 501; 97 L.J.K.B. 400; 139 L.T. 119;
44 T.L.R. 483; 72 Sol. Jo. 319]

Executor—Debtor of testator appointed executor—Release of debt—Executor one of several joint debtors. D

In law the effect of the appointment by a creditor of his debtor to be executor of his will is to release the debt on the death of the testator, because a debt is a right to sue and the executor cannot sue himself. In equity the debt is treated as an asset in the executor's hands and so he is held liable to pay it if the interests of the creditors require it, unless he can show a continuing intention on the part of the testator to make him a gift of the debt. The result is that, if the executor is not liable in equity to pay the debt, it is discharged by release at the date of the death of the testator; if he is liable in equity, the debt is discharged by payment at the date of probate. Where the executor is one of a number of persons jointly and severally indebted to the testator the effect in law of the appointment of the executor and the death of the testator is to release the debt as between the testator and all and each of the debtors. E

Notes. As to the appointment of a debtor as executor, see 16 HALSBURY'S LAWS (3rd Edn.) 128, 129; and for cases see 23 DIGEST (Repl.) 32–34. F

Cases referred to: G

- (1) *Cheetham v. Ward* (1797), 1 Bos. & P. 630; 126 E.R. 1102; 23 Digest (Repl.) 32, 156.
- (2) *Wangford v. Wangford* (1704), 1 Freem.K.B. 520; 11 Mod. Rep. 38; 89 E.R. 390; sub nom. *Wankford v. Wankford*, 1 Salk. 299; 3 Salk. 162; Holt, K.B. 311; 23 Digest (Repl.) 41, 269.
- (3) *Freakley v. Fox* (1829), 9 B. & C. 130; 4 Man. & Ry.K.B. 18; 7 L.J.O.S.K.B. 148; 109 E.R. 49; 23 Digest (Repl.) 32, 157.
- (4) *Strong v. Bird* (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 22 W.R. 788; 23 Digest (Repl.) 32, 158.
- (5) *Re Applebee, Leveson v. Beales*, [1891] 3 Ch. 422; 60 L.J.Ch. 793; 65 L.T. 406; 40 W.R. 90; 23 Digest (Repl.) 33, 159.
- (6) *Re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697; 75 L.J.Ch. 474; 94 L.T. 750; 22 T.L.R. 417, C.A.; 5 Digest 1028, 8408.
- (7) *Beecham v. Smith* (1858), E.B. & E. 442; 27 L.J.Q.B. 257; 31 L.T.O.S. 176; 4 Jur.N.S. 1018; 6 W.R. 627; 120 E.R. 574; 6 Digest 467, 2976.
- (8) *Nicholson v. Revill* (1836), 4 Ad. & El. 675; 1 Har. & W. 756; 5 L.J.K.B. 129; 111 E.R. 941; sub nom. *Nicolson v. Revell*, 6 Nev. & M.K.B. 192; 6 Digest 389, 2553.
- (9) *North v. Wakefield* (1849), 13 Q.B. 536; 18 L.J.Q.B. 214; 13 L.T.O.S. 115; 13 Jur. 731; 116 E.R. 1368; 6 Digest 390, 2559.

- A** (10) *King v. Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 26 Digest 201, 1570.
- (11) *Nash v. De Freville*, [1900] 2 Q.B. 72; 69 L.J.Q.B. 484; 82 L.T. 642; 48 W.R. 434; 16 T.L.R. 268, C.A.; 6 Digest 362, 2391.
- (12) *Everett v. Everett* (1877), 7 Ch.D. 428; 47 L.J.Ch. 367; 38 L.T. 580; 26 W.R. 393, C.A.; 23 Digest (Repl.) 445, 5143.
- B**

Appeal from Swansea County Court.

By his will, dated Feb. 24, 1912, the testator, Joseph Elliott, appointed the plaintiff, Lewis Jenkins, to be his sole executor. On Dec. 1, 1923, the plaintiff, the defendant Isaac Jenkins, and two others made a promissory note by which they jointly and severally promised to pay Joseph Elliott the sum of £100. Joseph Elliott died on Mar. 18, 1924, and probate of his will was granted to the plaintiff on May 9, 1924. On Aug. 15, 1927, the plaintiff began these proceedings in the county court, suing as executor and claiming on the promissory note. He obtained judgment, and the defendant appealed.

Morle for the defendant.

D *Roland Burrows* for the plaintiff.

Cur. adv. vult.

Mar. 29. The following written judgments were read.

SALTER, J., stated the facts and continued: In my opinion, the claim should have been dismissed on the ground that the debt sought to be recovered had been discharged before action. By the common law the effect of the appointment by a creditor of his debtor to be executor of his will is to release the debt on the death of the testator, because a debt is a right to sue and the executor cannot sue himself. Where, as in this case, the executor is one of a number of persons jointly and severally indebted to the testator, the effect in law of the appointment of the executor and the death of the testator is to release the debt as between the testator and all and each of the debtors.

The present case is the same as the case cited from 21 Edw. 4, 81b, in the report of *Cheetham v. Ward* (1) (1 Bos. & P. at p. 632 n.):

"Copley, prothonotary, asked of Brian (Chief Justice), if three be bound to a man in an obligation jointly and severally, and the obligee make one of the obligors his executor and die, whether he who is made executor shall have an action against any of the others? And Brian said that he should not, for if one was discharged, all shall be discharged; because the making one of them executor is as perfect a discharge in law, as if he had released to one in deed. Copley: Sir, the obligation is several. Brian: This does not matter; for a recovery against one of them and execution sued, will be a discharge to the others. And so of a discharge made to one of them."

This was approved and followed in *Wankford v. Wankford* (2) and in *Cheetham v. Ward* (1). A century ago, when *Freakley v. Fox* (3) was decided, the rule was so well settled that counsel confined himself to arguing, unsuccessfully, that the doctrine did not apply to negotiable instruments. In that case the payee and holder of a promissory note appointed the maker the executor of his will. The executor endorsed the note to the plaintiff, and it was held that the plaintiff could not recover because the debt had been released from the date of the death of the testator. In equity the executor is held liable to pay the debt if the interests of the creditors require it, unless he can show a continuing intention on the part of the testator to make him a gift of the debt: *Strong v. Bird* (4); *Re Applebee, Leveson v. Beales* (5). When the executor is thus held liable, equity enforces payment by treating the debt as assets in his hands. He can be declared accountable in an administration action and ordered to pay, and on default he may be liable to attachment. In equity, therefore, it is plain that his debt to the estate

has been paid: see *Re Bourne, Davey v. Bourne* (6). In that case ROMER, L.J., A said of the executor-debtor who was sought to be made liable:

"He was indebted to the testator in his lifetime, and by the will he was appointed executor, and he proved the will. The effect of that was that at law the debt was extinguished because there was no one to sue or be sued, but in equity he as debtor is held to have paid himself as executor, and, therefore, as executor to have in his possession the full amount of the debt as having been paid to him as executor. That is the view of equity, and it is on that view that he can be made liable in an action to administer the estate of the testator." B

The result is that, if the plaintiff was not liable in equity to pay the debt, it was discharged by release at the date of the death of the testator; if he was liable in equity, then it was satisfied and discharged by payment at the date of probate. C In either case, the debt now sought to be recovered had ceased to exist before action brought. For the plaintiff reliance was placed on *Beecham v. Smith* (7). In that case A., B., and C. promised jointly and severally to pay £1,000 to C. and D. on demand, and it was held that C. and D. could enforce against A. his several promise. In that case, however, the debt was in existence when the action was brought; in this case it was not. Reference was also made to the Bills of Exchange Act, 1882, s. 61, to the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 42, 43, 44, and 202, and to R.S.C., Ord. 18, r. 5, and Ord. 16, r. 8. I can find nothing in those statutes and rules to alter the view which I have expressed. The appeal must be allowed and the judgment for the plaintiff set aside and judgment entered for the defendant. D

TALBOT, J.—I am of the same opinion. I need not re-state the facts. If a creditor makes his debtor his executor he thereby releases the debt. It is "sanctioned by unquestionable authority that the debtee's discharge of one joint and several debtor is a discharge of all": see *Nicholson v. Revill* (8). The reason is that otherwise the co-debtors, if not released, could, by recovering contributions from the one who was released, defeat his release: see *North v. Wakefield* (9). E Therefore, if an obligee makes one of two or more joint and several obligors his executor all are released: see *Cheetham v. Ward* (1), following a case in the YEAR Book of Edw. 4. And in the case of a negotiable instrument such a release is a good defence to an action, not only by the executor, but by his endorsee, because the note or bill is discharged and the debt gone: see *Freakley v. Fox* (3). The release is, as is said in the YEAR BOOK, equivalent to a release by deed. *Beecham v. Smith* (7), on which the learned judge appears to have founded his judgment, has, I think, really nothing to do with this case. It mainly decides that one of joint and several obligors may be sued alone on his several debt; in other words, that the debt is several as well as joint: see *King v. Hoare* (10). The defence here is not that the note is joint and several, but that the plaintiff who sues as executor is one of the makers of the note, and has been released by the payee, his testator. In *Beecham v. Smith* (7) there was no question of a release. It was argued for the plaintiff that the effect of s. 61 of the Bills of Exchange Act, 1882, is that the fact that one of the makers of a note is holder as executor does not discharge it, though if he were holder in his own right the note would be discharged. G It appears, however, from *Nash v. De Freville* (11) that the words "in his own right" in the section are not used by way of contrast with "in a representative capacity." I do not think that this section has anything to do with discharge by release. I

There is another ground upon which, in my opinion, there was a good defence to the action. Where a debtor is released by being made his creditor's executor, the effect in equity, and perhaps at law, is that the debt is deemed to have been paid by the debtor to himself as executor, and, therefore, he is deemed to have assets of the testator in his hands: see *Wankford v. Wankford* (2), per HOLT, C.J., and *Re Bourne, Davey v. Bourne* (6). If the debt has been paid, it clearly cannot

A be sued for by the executor as such, though he may have a right personally to recover contributions from his co-debtors.

In the case before us the will was made before the note, but I think this makes no difference, though at first sight it seems strange that by the appointment of an executor the testator should release a debt which was not then in existence. But an executor is not executor until the testator's death. Until then the will may be
B revoked or altered, and until then, therefore, it is not known that it is the testator's last will. It is then, therefore, that the executor is really appointed, and that the release effected by the appointment operates. Where debts are expressly released by a will it is at the testator's death that it is to be ascertained what debts, if any, are so released: see *Everett v. Everett* (12). The same must be true of the implied
C release effected by making the debtor executor. In my opinion, judgment ought to have been entered for the defendant, and I agree that the appeal should be allowed.

Solicitors: *T. D. Jones & Co.*, for *Edward Harris*, Swansea; *F. C. Mathews & Co.*, for *Beor, Wilson & Lloyd*, Swansea.

[*Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.*]

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E

STOTT AND ANOTHER v. SHAW AND LEE, LTD.

[COURT OF APPEAL (Scrutton and Sankey, L.JJ., and Tomlin, J.), March 19, 20, 1928]

F

[*Reported* [1928] 2 K.B. 26; 97 L.J.K.B. 556; 139 L.T. 302; 44 T.L.R. 493; [1928] B. & C.R. 24]

Bill of Sale—Defeasance or condition—Collateral mortgage—Provision in bill for repayment of sum secured on specified date—Provision in mortgage for repayment by instalments—Bills of Sale Act, 1878 (41 & 42 Vict., c. 31), s. 10 (3).

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H

I

On May 30, 1913, one T., who was indebted to one S. in a sum of £1,000, gave S. a bill of sale on certain machinery and chattels in a laundry for that amount. In 1925 T. was being pressed by creditors in respect of a debt of £600, loans made by them to him, and S. agreed to pay £600 to the creditors and to take from T. a new bill of sale for the total sum of £1,600, the former bill being withdrawn. The bill of sale, which was dated July 1, 1925, contained the following clause: "In consideration of the sum of £1,600 paid to [T.] by [S.] on the 24th day of June, 1925, (the receipt of which sum [T.] hereby acknowledges), [T.] doth assign unto [S.], his executors, administrators and assigns, all and singular the several chattels and things specifically described in the schedule . . . and [T.] doth further agree and declare that he will duly pay to [S.] the principal sum aforesaid with the interest then due on the 24th day of December, 1925." On the same date, and as part of the same bargain, T. gave S. a collateral mortgage on the building for the same sum, the mortgage instrument containing the following clause: "In consideration of the sum of £1,600 paid by the mortgagee to the mortgagor on the 24th day of June, 1925, being the amount already advanced by the mortgagee to the mortgagor on the security of a bill of sale dated the 1st day of July, 1925 . . . the mortgagor hereby covenants with the mortgagee to pay to him on the 24th day of December next the sum of £1,600 with interest thereon . . . and it is hereby agreed and declared that (subject to the right of the mort-

gagee to require repayment of the said principal sum on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter) the principal money hereby secured shall be repaid by instalments of not less than £20" on agreed dates. Creditors, having obtained a judgment against T. for £157, seized the chattels covered by the bill of sale.

Held: on construction the provision in the mortgage deed relating to the repayment by instalments of the mortgage debt appeared to be obscure, but it could not be read as in any way affecting the covenant to pay the debt in the bill of sale, and, therefore, it was not a "defeasance or condition or declaration of trust not contained in the body" of the bill within s. 10 (3) of the Bills of Sale Act, 1878, so as to avoid the bill, which remained good as against the execution creditors.

Notes. As to the form of a bill of sale and defeasances, see 3 HALSBURY'S LAWS (3rd Edn.) 287-298; and for cases see 7 DIGEST 51-81. For Bills of Sale Act, 1878, see 2 HALSBURY'S STATUTES (2nd Edn.) 557.

Cases referred to:

- (1) *Edwards v. Marcus*, [1894] 1 Q.B. 587; 63 L.J.Q.B. 363; 70 L.T. 182; 10 T.L.R. 255; 38 Sol. Jo. 234; 1 Mans. 70; 9 R. 337, C.A.; 7 Digest 80, 453.
- (2) *Pettit v. Lodge and Harper*, [1908] 1 K.B. 744; 77 L.J.K.B. 413; 98 L.T. 771; 24 T.L.R. 329; 15 Mans. 136, C.A.; 7 Digest 78, 442.
- (3) *Re Leber, Ex parte Trustee* (1908), 52 Sol. Jo. 483; 7 Digest 78, 439.
- (4) *Re Southam, Ex parte Southam* (1874), L.R. 17 Eq. 578; 43 L.J.Bey. 39; 30 L.T. 132; 22 W.R. 456; 7 Digest 80, 449.
- (5) *Hetherington v. Groome* (1884), 13 Q.B.D. 789; 53 L.J.Q.B. 576; 51 L.T. 412; 33 W.R. 103, C.A.; 7 Digest 65, 373.
- (6) *Counsell v. London and Westminster Loan and Discount Co.* (1887), 19 Q.B.D. 512; 56 L.J.Q.B. 622; 36 W.R. 53; 4 T.L.R. 2, C.A.; 7 Digest 77, 435.

Appeal from an order of the Divisional Court on an appeal from Salford County Court.

In an interpleader issue in the county court the claimants, Stott and another, were the executors of one Albert Stott (hereinafter called "the deceased") and the respondents, Shaw and Lee, Ltd., were a firm of moneylenders who were execution creditors under a judgment against one Robert Thornley. In 1910 Thornley had been desirous of building a laundry at Flixton, Lancashire, and had bought land from the deceased for that purpose. It was agreed that £150, the unpaid balance of the purchase price, should be secured by a mortgage on the land in favour of the deceased. Between 1910 and 1913 the deceased made a series of loans to Thornley, and on May 30, 1913, Thornley gave the deceased a bill of sale on certain machinery and chattels in the laundry for £1,000, which was the amount of his indebtedness at that time. In 1925 Thornley was being pressed by Shaw and Lee, Ltd., in respect of certain loans made by them to him on various occasions, and approached the deceased for further financial assistance. The deceased at first refused, but ultimately agreed to pay direct to the firm of moneylenders the sum of £600, which they were claiming from Thornley, and to take from Thornley a new bill of sale for the total sum of £1,600, the former bill being withdrawn. The bill of sale, which was dated July 1, 1925, contained the following clause:

"In consideration of the sum of £1,600 paid to [Thornley] by [Stott] on the 24th day of June, 1925 (the receipt of which sum Thornley hereby acknowledges), [Thornley] doth assign unto [Stott] his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule . . . and [Thornley] doth further agree and declare that he will duly pay to [Stott] the principal sum aforesaid with the interest then due on the 24th day of December, 1925."

A On the same date, and as part of the same bargain, Thornley gave the deceased a mortgage on the building for the same sum by way of collateral security. The mortgage instrument contained the following clause:

B "In consideration of the sum of £1,600 paid by the mortgagee to the mortgagor on the 24th day of June, 1925, being the amount already advanced by the mortgagee to the mortgagor on the security of a bill of sale dated the 1st day of July, 1925, . . . the mortgagor hereby covenants with the mortgagee to pay to him on the 24th day of December next the sum of £1,600 with interest thereon . . . and it is hereby agreed and declared that (subject to the right of the mortgagee to require payment of the said principal sum on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter) the principal money hereby secured shall be repaid by instalments of not less than £20."

C on agreed dates. On Dec. 10, 1926, Stott died. In January, 1927, Shaw and Lee, Ltd., seized the chattels of Thornley as execution creditors upon a judgment which they held against him for £157 9s. 6d. The executors of the deceased paid that sum into court, and on an interpleader summons being taken out by Thornley that sum were made claimants and Shaw and Lee, Ltd., respondents. It was contended on behalf of the respondents that the bill of sale under which the executors of the deceased claimed was invalid on two grounds, first, because the consideration for the bill was not truly stated therein, and, secondly, because the collateral mortgage constituted a "defeasance or condition," which was not written on the same paper or parchment as the bill before registration, as required by statute. D The county court judge held that the bill was not invalidated on either ground, and gave judgment for the claimants. The respondents, the execution creditors, appealed to the Divisional Court (SHEARMAN and FINLAY, JJ.) who dismissed the appeal. The execution creditors appealed to the Court of Appeal. E

F By s. 10 (3) of the Bills of Sale Act, 1878: "If the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

G *Wingate-Saul, K.C.*, and *J. C. Jolly*, for the execution creditors, referred to *Edwards v. Marcus* (1); *Pettit v. Lodge and Harper* (2); *Re Leber, Ex parte Trustee* (3); *Re Southam, Ex parte Southam* (4); and *Hetherington v. Groome* (5).

Cyril Atkinson, K.C., and *J. Lustgarten*, for the claimants, were not called on to argue.

H **SCRUTTON, L.J.**—This case comes before us on appeal from the Divisional Court, affirming a decision of the county court judge on an interpleader issue. The execution creditors having recovered judgment against Thornley, put in execution, seizing certain chattels, whereupon Stott's executors claimed those chattels as their property under a bill of sale. Before the county court judge two points were taken on behalf of the execution creditors. The first point was that the consideration for which the bill of sale was made or given was not truly stated in it. The county court judge decided that the consideration was truly stated in the bill of sale and the Divisional Court affirmed the judgment of the county court judge. I In this court, counsel for the execution creditors has abandoned that point and we are not troubled with it in this court.

The second point that was taken against the bill of sale arises under s. 10 (3) of the Bills of Sale Act, 1878. What is said in this case is that in the mortgage, which secures payment of the same debt as that secured by the bill of sale, there is a provision which adds to or contradicts the provisions of the bill of sale, and as that provision is not set out in the bill of sale, but has to be sought in another document—the mortgage—the bill of sale is void. It is a pity that "defeasance" and "declaration of trust" are the expressions used in s. 10 (3) of the Bills of

Sale Act, 1878, but what I understand to be the principle which underlies their use is that, if for the same debt there are varying provisions or a number of provisions, they must all be in the same document. If, therefore, there are two documents, one of which contains a covenant to pay the debt, and another document purporting to refer to the same debt varies the provision contained in the first document, the provision in the second document is a defeasance of the provision in the first document. The intention of the legislature, as indicated by the section, is that if anyone wants to know what the debt is for which personal chattels are secured by a bill of sale, he should be able to obtain the information from one document only—namely, the registered bill of sale—and not have to inquire whether another document may not contain a different provision. In this case the bill of sale, which relates to a debt of £1,600, contains a covenant by the grantor that he will duly pay the grantee “the principal sum aforesaid with the interest then due on the 24th Dec., 1925.” The same debt of £1,600 is also secured by a mortgage of the premises in which were the chattels in respect of which the bill of sale was granted, and by the mortgage, which is dated the same day as the bill of sale, the mortgagor covenants with the mortgagee to pay him on Dec. 24 next the sum of £1,600 with interest thereon. So far, the obligation is the same as that contained in the bill of sale. Then comes the clause which raises the difficulty:

“And it is hereby agreed and declared that (subject to the right of the mortgagee to require payment of the said principal on the 24th day of Dec. next according to the foregoing covenant by the mortgagor or at any time thereafter) the principal sum hereby secured shall be repaid by instalments of not less than £20, such instalments to be paid by the mortgagor to the mortgagee on the 24th day of March, the 24th day of June, the 24th day of Sept., and the 24th day of Dec. in every year, the first payment of the said instalments to be made on the 24th day of Sept., 1926.”

I find it very difficult to give any intelligible meaning to that clause unless it can be said that if the money has not been paid on Dec. 24, because it has not been required to be repaid on that date, the mortgagee cannot claim the whole sum, but only the specified instalment quarterly. If that is the meaning of the deed, I think it would be a variation of the obligation with regard to the repayment of the principal debt; it would have ceased to be an obligation to pay £1,600 on Dec. 24, 1925, and would have become an obligation to pay by instalments of £20 quarterly, and would have amounted to a defeasance of the covenant in the bill of sale, because it was decided in *Edwards v. Marcus* (1) that the defeasance may be a variation either in favour of the grantor or against him. I am, however, unable to read the clause relating to repayment by instalments in the mortgage as in any way defeating the original personal covenant to pay £1,600 on Dec. 24 or at any time afterwards. The personal covenant to repay appears to me to be expressly reserved. It may be that the provision with regard to instalments is not to affect the personal covenant to pay, but only to affect the right to foreclose on the real property which is the security for the mortgage. It may possibly have that effect—I am not sure that it has—but, if it has, it is dealing, not with the debt, but with the security for the debt. It may be that that fits in with the decision of BIGHAM, J., in *Re Leber* (3), a case which is not very fully reported, and on that account it is somewhat difficult to make out what it exactly decided. Some of the phrases are there inaccurately used, but I understand that the provision in the mortgage was that if the mortgagee had to repair the premises, which the mortgagor had covenanted to do, he should be entitled to add the cost of doing that to his security or charge. It may be that this is on the same footing as the suggestion made with regard to the payment by instalments clause in this case. I am not sure whether or not the meaning suggested is that which the instalment clause bears, and I reserve my right to consider the validity of BIGHAM, J.’s decision in *Re Leber* (3), in a case which comes nearer to it on

A its facts than the present case, as I am not sure that it fits with the decisions of the Court of Appeal. In the present case, as the instalment clause in the mortgage does not vary or, in my view, affect the personal covenant to pay the debt for which there is a right to seize under the bill of sale, that clause is not a defeasance of the personal covenant in the bill of sale. The appeal must therefore be dismissed.

B **SANKEY, L.J.**—I agree. The execution creditors have endeavoured to defeat the bill of sale and they rely on s. 10 (3) of the Bills of Sale Act, 1878, on the ground that in a contemporaneous mortgage there is a clause which operates as a defeasance, or condition, or declaration of trust which, not being in the bill of sale, avoids it.

C It is clear from *Edwards v. Marcus* (1) that we have to regard those two documents as one. In that case A. L. SMITH, L.J., said this ([1894] 1 Q.B. at p. 597):

E “The Special Case finds that the mortgage and the bill of sale were executed on the same day [that is also the case here], and that they were made to secure the same debt, and that they were both given as part of the same transaction; so that as I read it, the claimant has one contract in two documents; and if that be the finding, it comes directly within what was said by this court in *Counsell v. London and Westminster Loan and Discount Co.* (6), that if there is one contract in two documents, and there is anything in either which sins against the Bills of Sale Act, the contract in two documents cannot stand, and the bill of sale must be set aside. LORD ESHER, in the case referred to, says that such a contract as the present does sin against the Bills of Sale Act; because, when the one contract in the two documents is read, there is a condition in the contract which does not appear in the bill of sale.”

F In the present case, therefore, the only point for determination is whether there is in the mortgage a clause which operates as a condition or defeasance within the meaning of sub-s. (3) of s. 10 of the Bills of Sale Act, 1878. It will be observed that with regard to the amount to be secured and the rights with regard to payment of the principal sum the clauses are the same in both documents. Then comes the clause in the mortgage which creates the difficulty and which is relied on as invalidating the bill of sale. It reads as follows:

G “It is hereby agreed and declared that (subject to the right of the mortgagee to require payment of the said principal on the 24th day of Dec. next according to the foregoing covenant by the mortgagor or at any time thereafter) the principal money hereby secured shall be repaid by instalments of not less than £20, such instalments to be paid by the mortgagor to the mortgagee on the 24th day of March, the 24th day of June, the 24th day of Sept., and the 24th day of Dec. in every year, the first payment to be made on the 24th day of Sept., 1926, and the aforesaid interest shall be payable only on the balance of the principal money remaining owing on this security.”

I The difficulty is to ascertain the real meaning of that clause. I suppose it must have some meaning although it is extremely difficult to discover it, because the clause providing for payment by instalments is subject to the right by the mortgagee to require repayment of the principal sum on Dec. 24 or at any time thereafter. Personally, I have great doubt whether the clause has any meaning at all. It is possible that it merely affects the mortgagee's right of foreclosure and that it has no effect on his right to sue under the personal covenant. Whether it means that or not I do not think that it in any way affects the bill of sale. There is nothing in the mortgage which affects the rights and liabilities under the bill of sale, and, that being so, I am of opinion that the mortgage does not contain any defeasance, condition, or declaration of trust which ought to have appeared in the bill of sale. I think that was probably the ratio decidendi of BIGHAM, J., in *Re Leber* (3), although, owing to the somewhat meagre report of the case, this is not quite easy to determine. I am of opinion that the transaction

in question did not come within the mischief of s. 10 (3) of the Bills of Sale Act, 1878, and I think that the decision of the judges of the Divisional Court was right and the appeal must be dismissed.

TOMLIN, J.—I agree. It appears to me that the question we have to decide can only be answered when a conclusion has been arrived at with regard to the true construction of the mortgage. Its language is certainly obscure, but it appears to me to be clear that the original right of the mortgagee to enforce the covenant for payment in full is kept alive. If that is so, the provision relating to repayment by instalments has no practical effect at all. The suggestion that some effect may be given to the provision with regard to repayment by instalments by holding that it limits the mortgagee's right in respect of foreclosure so long as the instalments are paid, is, I think, somewhat difficult to arrive at, but, even assuming that that is the true effect of the clause, it in no way affects the debt or the security given by the bill of sale; it is something which merely limits the mortgagee's right of foreclosure of the real estate the subject-matter of the mortgage. It is difficult to see how the clause in question can vary the terms of the bill of sale, or amount to a defeasance, condition or declaration of trust subject to which the bill of sale was made. It seems a dilemma; either the instalment clause means nothing, or it means that it merely limits the mortgagee's rights of foreclosure, in which case it is something which does not affect the bill of sale at all. In either case the rights of the grantee of the bill of sale remain intact. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *A. R. Lord*, for *B. Kuit & Co.*, Manchester; *Peacock & Goddard*, for *Barlow, Barker & Co.*, Manchester.

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

DEE CONSERVANCY BOARD AND OTHERS *v.* McCONNELL AND ANOTHER

[COURT OF APPEAL (Scrutton and Sankey, L.JJ., and Russell, J.), February 21, 22, 23, 1928]

[Reported [1928] 2 K.B. 159; 97 L.J.K.B. 487; 138 L.T. 656;
92 J.P. 54; 26 L.G.R. 204; 17 Asp.M.L.C. 433]

Harbour—Obstruction—Removal—Wreck—Vessel sinking through negligence of owners—Abandonment by owners to underwriters—Removal by harbour authority—Liability of owners for cost of removal.

A ketch, which was lying heavily laden in the river Dee, the bed of which was vested in the plaintiff Board who were under a duty to maintain the river in a navigable condition, alongside a wharf of which the second plaintiffs were the licensees, sank as a result of the negligence of the servants of the defendants, the owners of the ketch, thereby obstructing the navigation of the river and rendering access to the wharf impossible. Both plaintiffs entered into a contract with third parties to have the wreck removed, but before any expenses had been incurred in connection with the removal of the obstruction, the defendants gave notice of abandonment to their underwriters, which was not accepted. In an action brought by the plaintiffs to recover from the defendants the expense of removing the obstruction,

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Held: as the sinking of the ketch and the consequent expenditure by the plaintiffs was caused by negligence for which the defendants were responsible, the defendants could not, by abandoning the ketch, escape their common law liability for the plaintiffs' loss.

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Notes. Referred to: *Stonedale No. 1 (Owners) v. Manchester Ship Canal Co.*, [1955] 2 All E.R. 689.

As to liability in case of collision with a wreck and powers to remove wrecks, see 30 HALSBURY'S LAWS (2nd Edn.) 852, 877-879; and for cases see 41 DIGEST 818 et seq.

Cases referred to:

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(1) *Arrow Shipping Co., Ltd. v. Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 63 L.J.P. 146; 71 L.T. 346; 10 T.L.R. 551; 7 Asp.M.L.C. 513; 6 R. 258, H.L.; 41 Digest 822, 6807.

(2) *River Wear Comrs. v. Adamson* (1877), 2 App.Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 41 Digest 974, 8643.

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(3) *Great Western Rail Co. v. Mostyn (Owners), The Mostyn*, [1928] A.C. 57; 97 L.J.P. 8; 138 L.T. 403; 92 J.P. 18; 44 T.L.R. 179; 72 Sol. Jo. 16; 26 L.G.R. 91; 17 Asp.M.L.C. 367, H.L.; 41 Digest 974, 8645.

(4) *The Ella*, [1915] P. 111; 84 L.J.K.B. 97; 30 T.L.R. 566; 41 Digest 820, 6797.

(5) *The Solway Prince*, [1896] P. 120; 65 L.J.P. 45; 74 L.T. 32; 12 T.L.R. 184; 8 Asp.M.L.C. 128; 41 Digest 932, 8227.

E

(6) *Utopia (Owners) v. Primula (Owners), The Utopia*, [1893] A.C. 492; 62 L.J.P.C. 118; 70 L.T. 47; 9 T.L.R. 542; 7 Asp.M.L.C. 408; 1 R. 394, P.C.; 41 Digest 820, 6794.

(7) *The Snark*, [1899] P. 74; 68 L.J.P. 22; 80 L.T. 25; 47 W.R. 398; 15 T.L.R. 170; affirmed [1900] P. 105; 69 L.J.P. 41; 82 L.T. 42; 48 W.R. 279; 16 T.L.R. 160; 44 Sol. Jo. 209; 9 Asp.M.L.C. 50, C.A.; 41 Digest 820, 6796.

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(8) *The Douglas* (1882), 7 P.D. 151; 51 L.J.P. 89; 47 L.T. 502; 5 Asp.M.L.C. 15, C.A.; 41 Digest 790, 6504.

(9) *Mersey Docks Trustees v. Gibbs, Mersey Docks Trustees v. Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 41 Digest 977, 8665.

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(10) *Parnaby v. Lancaster Canal Co., Lancaster Canal Co. v. Parnaby* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex.Ch.; 36 Digest (Repl.) 57, 311.

(11) *White v. Crisp* (1854), 10 Exch. 312; 2 C.L.R. 1215; 23 L.J.Ex. 317; 23 L.T.O.S. 300; 2 W.R. 624; 156 E.R. 463; 41 Digest 790, 6499.

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(12) *Brown v. Mallett* (1848), 5 C.B. 599; 17 L.J.C.P. 227; 11 L.T.O.S. 64; 12 Jur. 204; 136 E.R. 1013; 41 Digest 790, 6501.

(13) *Barracrough v. Brown*, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249, H.L.; 44 Digest 125, 1007.

(14) *Winterbottom v. Lord Derby* (1867), L.R. 2 Exch. 316; 36 L.J.Ex. 194; 16 L.T. 771; 31 J.P. 566; 16 W.R. 15; 26 Digest 293, 251.

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Appeal from Liverpool Court of Passage.

The first plaintiffs, the Dee Conservancy Board, were constituted by the Dee Conservancy Act, 1889, which, by s. 6, incorporated, inter alia, s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847. By their Act the plaintiffs had by s. 66 power to make, maintain, and use wharves, stages, landing-places, jetties, and to grant licences to persons doing the same. The second plaintiffs, John Summers & Sons, Ltd., were licensees of a wharf at Connah's Quay on the river Dee. The defendants were the owners of the wooden ketch *William Shepherd*, which was sent to Messrs. Summers' wharf to load some rubbish, and sank

alongside the wharf. The plaintiffs brought the present action against the defendants to recover the expense incurred by them in removing the wreck, whereby, as the plaintiffs alleged, the navigation of the river and access to the wharf was obstructed. In the alternative, the plaintiffs claimed damages for nuisance. Before any expenses in connection with the removal of the wreck had been incurred, the defendants gave notice of abandonment to their underwriters, but that notice was not accepted. At the trial the learned judge found that the ketch had sunk owing to the negligence of the defendants, and he held that the Board were entitled to recover their expenses of removing the obstruction. As to Messrs. Summers, he held that as no physical damage had been caused to the wharf and no loss had been proved they were not entitled to recover damages. The defendants appealed, and there was a cross-appeal by John Summers & Co., Ltd.

Trapnell (Dunlop, K.C., with him) for the defendants.

Eastham, K.C., and R. E. Gething for both plaintiffs.

SCRUTTON, L.J.—Counsel for the defendants has argued this case with a clearness and ingenuity worthy of a better cause, but I am afraid that on the facts I do not see my way to accede to his argument.

The facts are rather curious. Two gentlemen living in Ireland were the fortunate or unfortunate owners of a very venerable wooden ketch. The ketch was over sixty years old, it had been last surveyed twenty-two years before, it was in such a condition that it would not keep afloat unless it was regularly and steadily pumped—and the owners knew it. They sent it to a wharf on the river Dee “belonging” (and I use the word “belonging” although it is not quite clear what it was) to Messrs. Summers, one of the plaintiffs, to load some rubbish which was being taken away while the wharf was being altered. There was a master, a mate, and two hands on board. The two hands were not paid wages, but were paid by shares of freight. These two sharing members did not like the vessel, not unnaturally, considering the way she was leaking, and they did not like only having a share of the profits, so they went, and that left the master and the mate. On July 15, 1926, the master went home leaving the mate. On July 16 the mate thought he had had enough of it, and he went home, and there was this elderly ketch that wanted pumping regularly every day left with nobody on board. The agent for the owners of the ketch—some complaint being made to him by the owners of the wharf—wired to the master at his home in Ireland that nobody was looking after the ketch, and somebody must look after it. The learned judge, having heard the statements from the master and one of the owners, disbelieves both of them, and finds that the master and the owner both knew of that telegram, and neither of them did anything; neither of them took the slightest steps to have anything done to this leaky vessel which was lying alongside the wharf, and the elderly ketch did the only thing she could be expected to do—she slowly settled down until the water came to the big leaks above her Plimsoll line, and then she went to the bottom heavily laden with this rubbish. Consequently, she was a very difficult ship to deal with, because she was just a heavy mass lying on the bottom, a navigable channel of which the Dee Conservancy Board owned the soil, for the use of which they took tolls, and which they had a duty to maintain in a navigable condition. The ketch was lying against one of the berths of the wharf of Messrs. Summers, completely blocking the use of the wharf to Messrs. Summer. What was to happen? I have not seen the documents, but so far as I can gather the ketch was insured. I am rather surprised to find that anybody would insure her; they cannot have known much about her seaworthiness but she was insured in two ways. She had the ordinary Lloyd’s policy with the London Insurance Corporation, and that policy would cover the vessel against total loss, constructive or otherwise. She was also insured in a protection club which insures various liabilities outside the loss covered by the marine policy. She was insured by a well-known firm of whom one can say that there is nothing about insurance that they are not fully acquainted with. The owners, when they

A heard the vessel had sunk, gave notice of abandonment to the London Insurance Corporation, who, not knowing anything about it, took the usual steps. They said "We decline to accept; we put you in the same position as if you had issued a writ"—to do which is the regular form in insurance cases. That was somewhere about July 20.

B It so happens that in the case of most harbour authorities there are statutes which provide for a case not covered by common law—for the case of damage done, and the stranding of ships, where there is no negligence on the part of the owners. In such a case there was no common-law liability, and so a statutory liability is placed in certain events on owners of ships which strand or do damage to dock property without any negligence on the part of their owner. The wording of those sections renders the owners liable to pay, and there was a well-known decision in the House of Lords in *Arrow Shipping Co., Ltd., v. Tyne Improvement Comrs., The Crystal* (1), a case in which I was counsel, in which it was held that the expression "owner" means owner at the time when the expenses have been incurred and not owner at the time when the stranding takes place; and it was also held that if the owner at the time of the stranding has then abandoned the ownership so that he is not in possession or has no ownership, he is not liable.

D Somebody told the owners and their Irish solicitors that—without they knew it of their own knowledge—I suspect that the protection association told them, because probably the cost of removal, if it fell upon anybody, would fall on the protection association and not under the ordinary marine policy. On Aug. 3, the abandonment not having been accepted on July 20, the solicitors for the owners said to the Dee Conservancy: "We have abandoned" and from that time they

E took up the position "If you incur expenditure we are not liable; under the case of *The Crystal* we abandon." However, the solicitors for the Dee Conservancy, as to whom there is not much about insurance that they do not know, said "You have mistaken your position. This is a case where we are claiming for negligence at common law," and the parties stood at arm's length from that time. The question now arises, which of them was right?

F The position before certain statutes were passed was, as I have said, that the owner was liable for negligence. I say nothing about nuisance at present for reasons which will appear hereafter. The owner of the ship which caused damage was liable for it. He did not escape liability for damages arising through his negligence by saying: "I abandon." Take the two cases I have put. If I own a dog which bites mankind, and I know it bites mankind, and it bites a postman,

G I do not escape liability to the postman by saying: "I abandon the dog." The liability remains at common law for my negligence in keeping a dog which bites mankind, and which I know bites mankind. Or, to take another case, if I negligently drive a motor car which crashes off the highway over a private person's lawn and stops on the only drive to his house and obstructs it, and the owner of the private lawn says: "You have damaged my lawn, and you have blocked

H the access to my house, and I have had to spend money in removing the car to give me access to my house because you will not remove it," the owner of the motor car does not escape liability by saying: "I abandon the car, it is quite true it is across your front drive blocking your access, but I abandon it, and there is an end of it." In that state of common law, statutes were passed which gave certain remedies in cases where the owner of the ship was not liable at common

I law, namely, in cases where the ship was under the control of the owner's servants, but none of them was guilty of negligence—where it stranded by the act of God. The language of the sections, which give the owners of docks and harbours a right to claim for damage done to their works without negligence, and entitled them to apply to recover the cost of removing a cause of obstruction to their harbours, was in each case rather ambiguous. The well-known case of *River Wear Comrs. v. Adamson* (2) did nothing to remove that ambiguity, but considerably increased it; and it is only in *Great Western Rail. Co. v. Mostyn (Owners)*, *The Mostyn* (3), recently decided in the House of Lords, that it has

authoritatively been laid down that the statutory liability extends to cases where the ship is under the control of the servants of the owner, although they are not negligent, but does not extend to cases where no one is on board the ship when it does the damage. That leaves the original liability at common law untouched. The new liability is only given on the statutory terms in cases where nobody is negligent. The old common-law liability remains in cases where the damage is done by the negligence of the owner's servants, and it appears to me that LORD HERSCHELL's language in *Arrow Shipping Co., Ltd. v. Tyne Improvement Comrs. The Crystal* (1), although not having that crystal lucidity which LORD HERSCHELL's language generally has, makes that clear. LORD HERSCHELL in that case says this ([1894] A.C. at p. 516):

"Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law."

Stopping there, LORD HERSCHELL seems pretty clearly to say that, if there had been negligence, the appellants in that case would have been liable. But he goes on:

"for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of s. 56 [of the Harbours, Docks, and Piers Clauses Act, 1847], which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law"

and the cases in which liability would exist at common law are the cases referred to at the beginning of the paragraph—disaster due to the negligence either of the appellants or their servants. The view of the liability at common law is the view which was taken in the case on which the plaintiffs rely, *The Ella* (4) ([1915] P. at p. 116), where SIR SAMUEL EVANS, P., held that persons who had by their negligence sunk in the harbour at Southampton another vessel, which thereby became an obstruction to the harbour, and which the harbour authority therefore removed, were liable at common law for damages to the extent of the cost of removing the vessel which owing to their negligence had been sunk so as to become an obstruction to the harbour. If that case is good law it governs this case. In *The Solway Prince* (5) a little later SIR SAMUEL EVANS followed his own decision, and neither in *The Ella* (4) nor *The Solway Prince* (5) did the counsel for the parties who were held liable for damages think they had a sufficiently good case to take the matter to the Court of Appeal. It is obviously open to the Court of Appeal to consider that case.

The only matter which has caused me any doubt is an obiter expression of SIR FRANCIS JEUNE, P., in giving the judgment in *The Utopia* (6), which language is repeated by SIR GORELL BARNES sitting as a judge of the Admiralty Division in *The Snark* (7). That was not a case where there was any negligence. A vessel had sunk in the Straits of Gibraltar without any negligence, and the question raised was whether people who subsequently ran on her as she lay there could recover damages from the owners of the sunken vessel. There was no question, therefore, at all of what the liability of the owners of the sunken vessel, the *Utopia*, would have been if she had sunk through their negligence, but SIR FRANCIS JEUNE, in giving the judgment of the Privy Council, states a general proposition, part of which it was not necessary for him to refer to because the facts did not raise it. He says ([1893] A.C. at p. 498):

"The result of the authorities may be thus expressed. The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her."

A He does not say, it will be noticed, that the owner of a vessel sunk by his default is under no liability to the people who are damaged by the sinking. He does not say that, but he does say that whether sunk by his default or not, he is not under a responsibility to remove her (and bear in mind he is talking about the Straits of Gibraltar and trying to speculate to whom the soil in the Straits of Gibraltar belongs) or to protect other vessels from coming into collision with her if he has abandoned her.

B There has been a great number of cases which have dealt with the liability after the vessel has sunk to vessels which come into collision with her, one of which is *The Douglas* (8), in which the vessel was sunk through negligence, but the only question argued was whether there was negligence after the vessel had been sunk, and the Court of Appeal held that as immediately she was sunk the owners of the vessel had given notice to the Thames Conservancy that she was sunk, that was all they were bound to do, and they were entitled to assume that the Thames Conservancy would light her, and were, therefore, not liable to light and buoy her, or warn other vessels away. With regard to those words, "by his default,"

C if they are to be taken as meaning that if the owner abandons he is under no liability for damage caused by his default—if SIR FRANCIS JEUNE meant that (I do not think he did from the language of the passage)—I respectfully disagree, and I think it is contrary to LORD HERSCHELL's view in principle. I do not understand how one can wipe out one's common-law liability for negligence by abandoning the property which has done the damage. That has been the only difficulty which I have had. I doubt whether SIR FRANCIS JEUNE was talking about this point at all. If he was, it was certainly obiter dictum; it was not the matter which was

D argued before him, and, with the greatest respect, one is not technically bound in the Court of Appeal to follow it. Therefore, I see no difficulty whatever in the present plaintiffs, one of whom is the owner of the soil with the right to take tolls for navigation and the duty to keep the navigation open, and the other of whom are licensees with an interest in a wharf, the use of which is prevented by this vessel having grounded alongside the wharf in a berth, and so stopping the access to the berth—I see no difficulty whatever in their recovering damages directly caused by the negligence. What damages are directly caused by a person who negligently deposits an obstruction on your soil, blocking your right of way? I should have thought it was obvious that if the person who deposits the obstruction declines to remove it, which is the position here, the damages arising from that negligence would be the reasonable costs of removing the obstruction. Messrs.

E Summers are not bound to allow this obstruction to remain blocking one of their berths for all time. They surely have the right to remove it, to minimise the damage, and prevent their wharf being stopped for all time by this old ketch, and they incurred expense which the judge has found to be reasonable in removing it. The Dee Conservancy Board were, undoubtedly, according to the statute, the owners of the soil where the vessel sank; they are the owners of the soil in a navigable channel which they have the duty to maintain—a duty for which they take tolls, and a duty for which they would be liable to vessels from whom they took tolls if damage resulted from an unmarked obstruction in the channel. It seems to me that they have a common-law right to remove the obstruction caused by negligence. Some point which appears to be rather technical was raised as to who can recover the damages. Here is a property deposited by the negligence

G of its owner in a place which affects both plaintiffs. They jointly make a contract to have it removed with the Liverpool Salvage Association. The letters mention that they are acting jointly, although the actual acceptance of the contract is made in the name of the Dee Conservancy, and when the salvage association ask to be paid, the Dee Conservancy pay part and Messrs. Summers pay another part. In those circumstances it appears to me that judgment ought to have been entered for both of them for the one sum; the satisfaction of one would be a satisfaction of the other, and the two joint plaintiffs are entitled to recover from the defendants that sum once, but not twice. Therefore, it appears to me that the appeal should

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be dismissed with costs, the cross-appeal of Summers allowed, and judgment entered for the Dee Conservancy Board and Summers as joint plaintiffs for £1,569 8s. 9d. with costs, and in view of the somewhat technical character of this particular point that has not involved any extra costs, because in fact no costs were given in the court below on this matter, I think there should be no costs of the cross-appeal.

SANKEY, L.J.—I agree, and with regard to the facts I do not wish to say anything more than what my Lord has already said, except to draw attention to the finding of the learned judge in the court below that the defendants were guilty of negligence.

What are the duties of the Dee Conservancy Board and of the defendants in a case of this character? The duty of the Conservancy Board is best laid down in the well-known case of the *Mersey Docks Trustees v. Gibbs*, *Mersey Docks Trustees v. Penhallow* (9), in the judgment of LORD CRANWORTH, L.C., where he says (L.R. 1 H.L. at p. 93):

“Where such a body is constituted by statute, having the right to levy tolls for its own profits, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair. This was decided by the Court of Queen’s Bench, and decision was affirmed in the Court of Error in *Parnaby v. Lancaster Canal Co.* (10). The ground on which the Court of Error rested the decision in that case is stated by TINDAL, C.J., to have been that defendants there who constituted the company, made the canal for their profit, and opened it to the public upon payment of tolls. And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property.”

That being the duty of the Dee Conservancy Board, what is the duty of the defendants in regard to their vessel? That was laid down in *White v. Crisp* (11) ALDERSON, B., says (10 Exch. at p. 320):

“This subject was discussed by MAULE, J., in an elaborate judgment, in the case of *Brown v. Mallett* (12), and from the principles there laid down by him (which, however, were not all absolutely necessary for the decision of that individual case), we do not disagree at all. He there lays it down thus—that it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others; and he adds that his liability is the same, whether his vessel be in motion or stationary, floating or aground, under water or above it. For in all these circumstances, the vessel may continue to be in his possession and under his management and control. This duty arises out of the possession and control of the vessel being in him.”

Those being the duties respectively of the Dee Conservancy Board and of the defendants, what are the rights of the Board? As I understand the argument on behalf of the defendants, it is that in such a case as the present the rights of the Board are regulated sometimes by a special section in a private Act of Parliament referring to such a company, and sometimes by reason of the adoption of the Harbours, Docks, and Piers Clauses Act, 1847. The Dee Conservancy Board was constituted by the Dee Conservancy Act, 1889, s. 6 of which Act incorporated the Harbours, Docks, and Piers Clauses Act, 1847, with certain exceptions, but including s. 56, which contains a power in the harbour master to remove wrecks.

In effect what the argument for the defendants comes to is this, that in the case of a wreck s. 56 constitutes a code, and it is only in accordance with the provisions of that code that a person who suffers damage from the presence of a wreck can obtain his remedy. I do not agree with the contention that s. 56 constitutes a

A code to govern all cases. To begin with, it was pointed out by SIR SAMUEL EVANS, P., in *The Ella* (4) that the words there are not exhaustive. He says ([1915] P. at p. 120):

B "It was contended that the remedies of the plaintiffs were confined to those given by s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847. Those remedies are clearly not exhaustive. The clause only deals with the owner of the wreck, and makes him liable, while he remains in law the owner, whether he had been innocent or at fault."

C Before that section was passed it is quite possible that there may have been two different cases—first of all the case where there had been a wreck without any fault of the owner, and, secondly, a case where there might have been a wreck owing to the owner's default. In the first of those two cases there would be no liability at common law before the Act. In the second of those two cases where the owner was at fault and had been negligent there would have been a liability at common law. The effect of the section is to give a remedy even where the owner has not been in default, and I quite agree that in a case where the owner has not been in default one can only follow the prescribed remedy given by s. 56 to the prescribed tribunal: see *Barraclough v. Brown* (13). But this does not appear to me to touch the other case of where the owner was in default, and I think it would be a wrong construction of the statute to hold that s. 56, while giving a remedy in cases where there was no action before, takes away a remedy in cases where there was an action which existed before at common law. I think one would want express words to do that. I am confirmed in that opinion by the words of LORD HALDANE in *Great Western Rail. Co. v. Mostyn (Owners)* (3). I agree, however, with counsel for the defendants, that in a number of cases there are expressions which would appear to be in his favour, and, therefore, I think it becomes necessary to look at those cases, and to endeavour to distinguish them.

E First of all, with regard to *The Douglas* (8), one must, in considering cases, always have regard to the matter which was under discussion. In *The Douglas* (8), in consequence of the sole default of her master and crew, the vessel had sunk in the Thames. Her mate sent a message to the harbour master to inform him of the accident, who said he would cause the wreck to be lighted. It was not lighted, and the result was that another vessel ran into the wreck, and an action for damages having been instituted on behalf of the owner of the damaged vessel against the owner of the *Douglas*, the judge at the trial refused to admit evidence showing that the mate of the *Douglas* had sent a message to the harbour master, who had promised to light the wreck. It was held that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. In the judgment of BRETT, L.J., of which the headnote is in effect a résumé, he says (7 P.D. at p. 160):

H "As to the mate, he gave instructions to the captain of the tug *Endeavour* to inform the harbour master. The latter evidently took it as a piece of information upon which he was to act, for he in effect promised to send lights within an hour. The mate of the *Douglas* had a right to assume that the harbour master would do what he promised. Upon the evidence before us there was no negligence and no liability upon the defendants."

I That was a question of failure to light the wreck, and it was held that the owners of the *Douglas* were not liable because they had taken the proper steps after the wreck.

The Utopia (6) is of a similar character. There the owner of the wreck remained in possession, but the port authority undertook and neglected the duty of indicating its position so as to secure ships entering the harbour from the danger of collision with her. It was held that neither the owners nor the wreck were liable for the collision since the control and management of the wreck had been legitimately transferred by the owner to the port authority. It was a case, therefore,

proceeding on the question whether the owners had neglected the duty of indicating the position of the wreck, and it was held that, in the circumstances, they had not. It is true that SIR FRANCIS JEUNE, giving the judgment of the Privy Council, says : A

"The result of the authorities may be thus expressed : The owner of a ship sunk, whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her." B

Those two words "or not" were not necessary for the decision of the case. Over and above that, the learned judge was not dealing with the problem which confronts us. Those words were referred to and followed by GORELL BARNES, J., in *The Snark* (7). He uses the identical words : C

"The owner in whose possession she was at the time of the sinking, and whether the sinking has occurred by his default or not (wilful misconduct as stated in the above passage probably giving rise to different considerations), may, however, abandon the wreck." D

It was a case of the same class as *The Utopia* (6). He says that the vessel had been negligently loaded and became a wreck, but the owners had not abandoned possession, and he held that the owners were liable for damage to a vessel which came into collision with it as they had a duty to perform, namely, to use reasonable care to warn other persons of the position of the wreck. That judgment was affirmed and turns upon the same facts as *The Utopia* (6) turned upon. But in *Arrow Shipping Co., Ltd., v. Tyne Improvement Comrs., The Crystal* (1), LORD E E

"Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of s. 56, which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law." F

Those words seem to me clearly to contemplate a case like the present.

With regard to the last of the material cases cited on behalf of the defendants, *Barracrough v. Brown* (13), I agree that it is a case which it is somewhat difficult to follow, but, in my view, it is only an authority as to the tribunal to which a person must resort who seeks to enforce his rights under the private Act there in question, viz., s. 47 of the Aire and Calder Navigation Act, 1887. It is said in the headnote : G

"Where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a court of summary jurisdiction; he can only take proceedings in the latter court." H

It appears, [1897] A.C., at p. 617 of the report in the House of Lords, that the question there was set down for trial, under, I suppose, Ord. 25, r. 2, but it is said I I

in the statement of facts which is taken from the judgment of LORD WATSON :
 "The order did not specify what the point of law referred to was, but it seems to have been, practically speaking, confined to the question what was the true construction of s. 47 of the Aire and Calder Navigation Act, 1889. The claim was preferred upon two separate grounds : the first being that the respondents, as owners of the ship at the time when she sank, are, at common law, responsible to the undertakers for the injury thereby done to the navigation of the River Ouse, and for all costs necessarily and reasonably incurred by them

- A** in repairing such injury, and the second, that s. 47 of the Act of 1887 makes the persons who were the owners of the vessel at the time when she sank liable to repay such costs to the undertakers."

No reference was made in the Court of Appeal to the appellant's common-law claim, but it was raised and insisted upon by him at the Bar of the House of Lords. LORD DAVEY says:

- B** "I agree with your Lordships that there is no common-law right of action in this case."

What I think he meant there was that in a case properly coming within s. 47 of the Aire and Calder Act, 1887, you have to go to the proper tribunal, namely, the justices. LORD WATSON said:

- C** "At present I make this observation upon the plaintiffs' alternative claims, that, whilst it appears to me that the first of them might be legitimately pursued before the Queen's Bench Division, I am not satisfied that the second of them could be competently entertained, except by a court of summary jurisdiction as is prescribed by s. 47."

- D** Those being the cases referred to by counsel for the defendants, the last case to be considered is *The Ella* (4), and I think in fairness that, if that case is rightly decided, the defendants in this case are liable. The President in giving his judgment says:

- E** "Negligent navigation of the defendants' vessel was admitted. This, in my opinion, was a breach of duty towards the plaintiffs, which caused them damage, to be measured by the expenses which they had a right to incur, and which, I think too, they were bound to incur."

If that case is right it seems to me that it answers both points made by counsel for the defendants—both the point as to liability, and the point as to the measure of damages. I quite appreciate the number of cases cited on the latter point, of which *Winterbottom v. Lord Derby* (14) is an example, but I cannot see that the

- F** measure of damages as applied by the learned judge in the court below was the wrong one. As pointed out by my Lord, it is the duty of the plaintiff in such a case to show that he has minimised the damage. In this case I have already said what the duty of the Dee Conservancy Board was with regard to the public, namely, to keep the navigable river free from obstruction which might have caused damage. Here they were the owners of the soil. Messrs. Summers had a licence by which they were entitled to use the wharf, the approach to which and the occupation of which was obstructed by the wreck in question. What is it suggested the Board ought to have done if their rights are, as I have said, namely, to keep the river in a properly navigable condition, and to have the wharf accessible to vessels which desired to use it? Are they to leave the wreck there for ever, or are they to do what would probably minimise damages in the future, namely, to remove the wreck so as to free the channel from obstruction, and allow the wharf to be occupied in the future? In my view, the learned judge was right in both conclusions at which he has arrived, and for the reasons given by my Lord I think judgment ought to be entered for the two respondents as joint plaintiffs for the amount found due by the learned judge.

- H** **RUSSELL, J.**—In my opinion, this case is covered by the decision in *The Ella* (4), if that case was rightly decided. So far as it bears upon negligence, one of the points decided in *The Ella* (4) is that the owners of a vessel which by negligence sank a barge which obstructed the navigation were held liable at common law to repay the harbour authorities the sum which they incurred in removing the obstruction, and they were held entitled to recover the expenses as damages arising from negligence. In that case the amount was directed to be assessed by the registrar, but in the present case there has been no suggestion put forward that the amount involved, namely, £1,569, was an unreasonable sum. I may say, as regards *The Ella* (4), in passing, that an appeal was brought and entered, but
- I**

was subsequently withdrawn. I see no reason to suppose that *The Ella* (4) was otherwise than rightly decided upon that point, but I prefer to keep an open mind upon the question as to how far it was rightly decided on the point as to nuisance, because I appreciate that there are passages in *Barraclough v. Brown* (13) which would require careful consideration when that point arises. Here the negligence complained of, namely, the negligence which caused the sinking of the barge, is negligence which in its results affects both plaintiffs. In my opinion, the proper course to pursue is that indicated by my Lord, namely, to enter judgment for the sum of £1,569 in favour of both plaintiffs, to dismiss the appeal with costs and on the cross-appeal to enter judgment for both plaintiffs for that sum and give no costs on the cross-appeal.

Appeal dismissed; cross-appeal allowed.

Solicitors: *Holman, Fenwick & Willan; Alfred Bright & Sons, for Batesons & Co., Liverpool.*

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]

WELD-BLUNDELL v. PETRE

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Sankey, L.JJ.), June 29, July 2, 3, 16, 1928]

[Reported [1929] 1 Ch. 33; 97 L.J.Ch. 399; 139 L.T. 596;
44 T.L.R. 739; 72 Sol. Jo. 569]

Mortgage—Redemption—Mortgage of personalty—Limitation of action for redemption—Acquiescence—Laches—Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57), s. 8.

In 1900, B., who died in 1901, mortgaged shares in a company to L. to secure the repayment of £1,000 within three months with interest at 6 per cent. The dividends received by L. cleared the interest up to 1908, in which year L. last stated that he wished to have the loan repaid. Between 1908 and 1916 no dividends were paid, but L. neither sold, foreclosed, nor obtained release of the equity of redemption. During the 1914–18 war the shares appreciated in value, large dividends were paid and bonus shares allotted, and by June 13, 1921, L. had received in dividends a sum equal to the amount of the loan and interest due thereon. On L.'s death in 1923 he had received dividends more than sufficient to repay him the £1,000 principal and all arrears of interest. From 1927 B.'s executors made no payments of principal or interest nor did they in any way assert their right to redeem. On Oct. 4, 1926, the solicitors to B.'s executors wrote to the solicitors to L.'s executors claiming to redeem the security, and on July 30, 1927, B.'s executors issued an originating summons asking that they should be allowed to redeem on payment of what should be found due and for payment to them of any moneys received over and above the due amount of principal, interest, and costs.

Held: there being no statute of limitation applicable to a redemption action in the case of a mortgage of personalty, the court would not by analogy apply the twelve years limitation imposed by s. 8 of the Real Property Limitation Act, 1874, on actions to redeem land the subject of mortgage, nor would the court refuse B.'s executors relief on the ground of either acquiescence or laches on their part, for neither L. during his life nor his executors after his death had been prejudiced by the failure of B.'s executors to seek to redeem earlier.

- A** Per LAWRENCE, L.J.: The fact that a mortgagee is in receipt of the income of the mortgaged property (be such income large or small) and that in case of redemption he is bound to give credit for such income against the amount owing on his security does not prevent time running against an owner of the equity of redemption who neither pays any principal or interest in respect of the mortgage debt nor asserts his right to redeem. Nor does the fact that the claimants for redemption are under no personal liability to the mortgagee (e.g., if they are the executors of a deceased mortgagor) prevent time from running against them as owners of the equity of redemption.
- B**

Notes. The Real Property Limitation Act, 1874, was repealed by the Limitation Act, 1939, s. 12 of which prescribes twelve years as the limitation of actions for the redemption of land.

- C** Referred to: *Agbeyegbe v. Ikomi*, [1953] 1 W.L.R. 263.

As to the loss by mortgagors of the right to redeem, see 23 HALSBURY'S LAWS (2nd Edn.) 322; and for Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

- D** (1) *Jay v. Johnstone*, [1893] 1 Q.B. 189; 62 L.J.Q.B. 128; 68 L.T. 129; 57 J.P. 309; 41 W.R. 161; 9 T.L.R. 125; 37 Sol. Jo. 114; 4 R. 196, C.A.; 32 Digest 403, 819.
- (2) *Mellersh v. Brown* (1890), 45 Ch.D. 225; 60 L.J.Ch. 43; 63 L.T. 189; 38 W.R. 732; 32 Digest 317, 31.
- (3) *Re Powers, Lindsell v. Phillips* (1885), 30 Ch.D. 291; 53 L.T. 647, C.A.; 32 Digest 414, 915.
- E** (4) *London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161; 68 L.J.Ch. 568; 81 L.T. 263; 47 W.R. 602; 15 T.L.R. 420; 43 Sol. Jo. 586; 32 Digest 326, 128.
- (5) *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67; 75 L.J.Ch. 58; 93 L.T. 718; 54 W.R. 256; 22 T.L.R. 33; 50 Sol. Jo. 58, C.A.; 32 Digest 317, 28.
- F** (6) *Hovenden v. Lord Annesley* (1806), 2 Sch. & Lef. 607; 32 Digest 509, 1687.
- (7) *Archbold v. Scully* (1861), 9 H.L.Cas. 360; 5 L.T. 160; 7 Jur.N.S. 1169; 11 E.R. 769, H.L.; 32 Digest 464, 1298.
- (8) *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 C.P. 221; 22 W.R. 492, P.C.; 20 Digest 529, 2513.
- (9) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; 39 L.T. 269; 27 W.R. 65; sub nom. *New Sombrero Phosphate Co. v. Erlanger*, 48 L.J.Ch. 73, H.L.; 20 Digest 528, 2512.
- G** (10) *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154; 61 L.J.Ch. 193; 65 L.T. 806; 40 W.R. 241; 8 T.L.R. 194; 38 Sol. Jo. 151, C.A.; 32 Digest 505, 1653.
- (11) *Smith v. Clay* (1767), Amb. 645; 3 Bro.C.C. 646; 27 E.R. 419, L.C.; 20 Digest 524, 2490.
- H** (12) *Floyer v. Lavington* (1714), 1 P.Wms. 268; 24 E.R. 384, L.C.; 35 Digest 355, 984.
- (13) *Lockwood v. Ewer, Lady Child v. Chanstilet* (1742), 9 Mod. Rep. 275; 2 Atk. 303; 88 E.R. 448, L.C.; 35 Digest 496, 2258.
- (14) *Brooks v. Muckleston*, [1909] 2 Ch. 519; 79 L.J.Ch. 12; 101 L.T. 343; 20 Digest 525, 2497.
- I** (15) *Jenner v. Tracy* (1731), 3 P.Wms. 287, note (B).
- (16) *Agas v. Pickerell* (1745), 3 Atk. 225.
- (17) *Case 114 Anon.* (1746), 3 Atk. 313.
- (18) *Sutton v. Sutton* (1882), 22 Ch.D. 511; 52 L.J.Ch. 333; 48 L.T. 95; 31 W.R. 369, C.A.; 32 Digest 395, 757.

Appeal by the defendants, the legal personal representatives of the original mortgagee, J. F. Lescher, from an order of RUSSELL, J., that the plaintiffs, the

assignees of the executors of Weld-Blundell, the original mortgagor, were entitled A
to redeem the mortgage of the shares.

The plaintiffs claimed to be entitled to the equity of redemption in certain shares B
in a limited company for redemption, the defendants being the executors of the mortgagee. Redemption was resisted on the ground that, owing to the delay and laches of the plaintiffs, either their right to redemption had been lost or the court should withhold its assistance by refusing to order redemption. The shares in question were originally 300 ordinary shares of £5 each fully paid in the Cornbrook Brewery Co., Ltd. These were the property of Henry Weld-Blundell, who in February, 1900, mortgaged them to Joseph Francis Lescher, to secure a loan of £1,000 for three months with interest at 6 per cent. The shares were registered in the mortgagee's name on Dec. 10, 1900. Henry Weld-Blundell died on Sept. 5, 1901. His legal personal representatives were his widow, the plaintiff Herbert C
Joseph Weld, and William Dalglish Bellasis. The executors were unable or unwilling to pay off Mr. Lescher's £1,000 and in July, 1902, they offered him 200 further shares as additional security. He accepted this offer, and 200 further shares were registered in his name on Aug. 14, 1902. The estate of the mortgagor proved insolvent, but his brother Charles Weld-Blundell, who was a large creditor, took over some of the assets at the value of £8,534. He then proceeded to settle those assets for the benefit of his brother's widow and daughter. The settlement is dated Sept. 1, 1902. Among the assets so acquired and settled were the 500 shares subject to the £1,000 mortgage. The trustees of the settlement were the present plaintiffs. The interest which fell due to Mr. Lescher on Aug. 5, 1903, was not punctually paid, and as a result Mr. Lescher obtained further security from the trustees, in pursuance of a power contained in the settlement, to the extent of another 100 shares, which were registered in his name on Oct. 16, 1903. He was now mortgagee of 600 shares of £5 each. A dividend at the rate of 2 per cent. per annum less tax received by Mr. Lescher cleared the interest on the loan up to Feb. 5, 1904. It would appear that, by means of similar dividends received by Mr. Lescher, interest was cleared up to Feb. 5, 1908. In 1908 Mr. Lescher became desirous of having his loan repaid, and he so stated in a letter of June 18, 1908, but he did nothing. During the 1914-18 war prosperity came to the brewery, and in respect of the year 1916 and succeeding years substantial dividends free of tax were paid on the ordinary shares. Those dividends were received and retained by Mr. Lescher. In 1920 the 600 shares of £5 each were sub-divided into 3,000 shares of £1, and 1,500 bonus shares were allotted to Mr. Lescher, with the result that he then held 4,500 fully paid shares of £1 each. Mr. Lescher died in 1923. On Oct. 4, 1926, the solicitors to Mr. Weld-Blundell's executors wrote to the solicitors for Mr. Lescher's executors claiming to redeem the security. Correspondence ensued, the right to redeem was disputed, and the present originating summons was issued on July 30, 1927. RUSSELL, J., found that the following facts were clear upon the evidence: (i) the plaintiffs were assignees of the equity of redemption in the shares; (ii) the mortgagee received in his lifetime by means of dividends moneys far more than sufficient to repay him the £1,000 principal with interest at the agreed rate from the date of the loan; (iii) the mortgaged shares with the bonus additions were available for return to the assignees of the equity of redemption if the debt for which they stood in Mr. Lescher's name as security was repaid; and (iv) no rights of any third person affecting the shares had intervened, for those claiming under Mr. Lescher's will were mere volunteers. His Lordship held that I
the plaintiffs were entitled to redeem, and the defendants appealed.

Spens, K.C., and *F. R. Evershed* for the defendants.

C. E. E. Jenkins, K.C., and *B. A. Hall* for the plaintiffs.

Cur. adv. vult.

July 16. The following judgments were read.

LORD HANWORTH, M.R.—I agree that upon the evidence the plaintiffs are *prima facie* entitled to the order for redemption that they seek. I agree also that

A there was no bargain by which Mr. Lescher could be supposed to have acquired or held the shares freed from any right to redeem them. Nor was any foreclosure carried out by Mr. Lescher. It appears to me that his attitude as expressed in his letter of June 18, 1908, shows that he recognised that he was a mortgagee, and that he refrained from taking the course which he appreciated was an unpleasant one, and left the matter to drift as it was—a loan the repayment of which was

B remote, secured by a mortgage of shares which were of small—if any—value. So the matter rested at any rate up to 1916, for there was no change in the relevant facts. It was not until dividends were declared and received by Mr. Lescher that this dormant transaction was quickened into life by a part payment of the arrears of interest which had continued to accrue. The country was then in the throes of the 1914-18 war and I see no reason to suppose that immediate activity or assertion

C of their rights by the parties on either side was to be expected or called for. There is no statute of limitation which applies to bar the right of redemption, and the defendants rely upon delay and laches for such a time as ought to lead the court to refuse the relief asked for, on the ground that the court will take the standard of the statutes of limitation as the measure to be approximately applied, and that, as there was no recognition by Mr. Lescher of his position as a mortgagee

D later, at any rate, than June, 1908, a twelve years' period and more had elapsed before this summons was issued on July 30, 1927. It is said that the Real Property Limitation Act, 1874, provides a limit or standard of twelve years. LINDLEY, L.J., in *Jay v. Johnstone* (1) ([1893] 1 Q.B. at p. 191), says that the key to that Act is to be found in the preamble and in s. 9. The preamble says:

E "Whereas it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent and of charges thereon."

Section 7 applies the twelve years' limit to actions and suits by a mortgagor in cases where the mortgagee has obtained possession, or receipt of the profits, of any land or receipt of any rent comprised in his mortgage, and s. 8 applies the same

F limit to actions to recover any sum secured by any mortgage—or otherwise charged upon or payable out of any land or rent. Neither of these sections refer to mortgages of personalty. By s. 9 the sections of the Real Property Limitation Act, 1833, except those specifically mentioned, are retained "in full force and shall be construed together with this Act." The excepted sections are s. 2, which refers to making an entry upon or to recover land; s. 5, which refers to a reversioner's right to recover land; s. 16, which provides, in respect of actions to recover land,

G an allowance of time to persons under a disability with a total limit of the allowance, under s. 17, of forty years; s. 23, which imposes a limit of twenty years where there is possession of land under an assurance of a tenant in tail which does not bar the remainders; ss. 28 and 40, which are the sections replaced by ss. 7 and 8 of the Act of 1874. It appears that, except in the case of land and charges upon it, no alteration is made, bringing the limits down from twenty to twelve years, and

H that the other limits remain in full force.

In my judgment, there is no ground whatever for the application of the twelve years' rule to proceedings for the redemption of a mortgage of personalty. Such an attempt at a so-called analogy was rejected by KAY, J., in *Mellersh v. Brown* (2), and in *Re Powers* (3) the Court of Appeal decided that a bond for a sum of money which, if paid by the surety, would have entitled him to the benefit of the mortgage

I of land on which the sum was lent to the mortgagor at the request of the surety, was not secured upon land and was not affected by the twelve years' limit. The distinction between claims relating to land and to personalty are, in my judgment, clearly and explicitly retained and there is no basis for applying a twelve years' limit in the present case. I have had the advantage of reading the judgments which will be delivered by LAWRENCE and SANKEY, L.JJ., and in view of the exhaustive examination of the cases cited to us, and others, it appears to me to be quite unnecessary to go over the same ground. I agree with them in relation to the appeal.

LAWRENCE, L.J.—The main question on this appeal is whether the plaintiffs have lost their right to redeem the share in question. It is admitted that there is no statute of limitation which applies to the case, and, consequently, that there is no statutory bar to the plaintiff's claim for redemption. The defendants, however, contended that the court ought to act upon the analogy of the statute of limitation relating to land, and, consequently, ought to hold that the plaintiffs' claim for redemption was barred after a lapse of twelve years from the date of the last acknowledgment by the mortgagee in the month of June, 1908. A
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The proposition that the court in the case of a mortgage of property other than land ought to act upon the analogy of the statutes of limitation relating to land was emphatically negatived by KAY, J., upwards of thirty-seven years ago in *Mellersh v. Brown* (2), which, so far as I know, has never been questioned. The learned judge, in the course of his judgment, states as follows (45 Ch.D. at p. 229): C

"If the legislature has enacted that there shall be that limit with regard to real estate and has not so enacted with regard to personal estate, on what ground am I to follow that analogy? It is not an analogy between arrears of interest recoverable on a legal debt and those recoverable on an equitable debt. No doubt equity in the case of an equitable debt follows the simple analogy afforded to it by the law applicable to a legal debt; but I never heard that a court of equity is under any obligation to follow, as regards personal estate, the analogy of a statute which applies to real estate. That is not an analogy within the application of the rule that equity follows the law: but the reasoning is that whereas the legislature has enacted that in the case of a charge on real estate only six years' arrears of interest shall be recoverable against the estate and whereas it has not enacted anything of the kind with regard to personal estate, therefore—what? I should have thought the result inevitable that as to personal estate the rule is not to be observed and the idea of there being any analogy is one which I do not understand."

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London and Midland Bank v. Mitchell (4) and *Re Stucley, Stucley v. Kekewich* (5) furnish further examples of the court's refusal to apply the analogy of limitations relating to land to mortgages of property other than land. Although the cases to which I have referred were cases in which a mortgagee was claiming foreclosure yet the principle on which they were decided, in my opinion, applies equally to a case such as the present where a mortgagor or his assignee is claiming redemption, with the result that the old decisions in which the courts of equity before the Real Property Limitation Act, 1833, have, either by analogy or in obedience to a statute barring the remedy at law, adopted the same period as a bar to equitable relief (the reasons for which adoption was clearly stated by LORD REDESDALE in *Hovenden v. Lord Annesley* (6) (2 Sch. & Lef. at pp. 630–632)), have no application to the present case. On these grounds I am of opinion that the contention of the defendants that the court ought in this case to act on the analogy of the Real Property Limitations Act, 1874, is not well founded. Further, it is clear that, as the mortgagee has acknowledged the plaintiffs' right of redemption at a date less than twenty years before the commencement of this action, the defendants cannot successfully maintain that the court ought to presume a release by the plaintiffs of their equity of redemption. F
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In the absence of any statutory bar on any presumption of a release the question in the present case resolves itself into whether the court ought to refuse relief on the ground of acquiescence or laches. The difference between acquiescence and laches was clearly pointed out by the House of Lords in *Archbold v. Scully* (7). I need only quote the following passage from the speech of LORD WENSLEYDALE (9 H.L.Cas. at p. 383): I

"So far as laches is a defence I take it that where there is a statute of limitation the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than laches. If a party, who could object, lies by and knowingly permits

- A another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce: but the fact, of simply neglecting to enforce a claim for the period during which the law permits him delay, without losing his right, I conceive cannot be any equitable bar."
- B In the present case the defendants have adduced no evidence whatever tending to show that either the mortgagee during his lifetime or they (the defendants) since his death has or have altered his or their condition on the faith of the plaintiff's inaction. Had it been proved that any such alteration had taken place I am of opinion that a much shorter period of delay than the one in question here would have constituted a sufficient ground for refusing relief. In the absence of any
- C such proof, however, it is plain that the appellants cannot rely upon acquiescence as a defence to the plaintiffs' claim, and I did not understand counsel seriously to contend that they could. In the result the only ground upon which defendants can found their argument against relief is delay or laches, which for present purposes I treat as synonymous terms.
- D The principle applicable to a case where long delay is set up as a defence to equitable relief is stated in the following well-known passage in the judgment of the Privy Council in *Lindsay Petroleum Co. v. Hurd* (8) (L.R. 5 P.C. at p. 239):
- E "The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of those cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitations, the validity of that defence must be
- F tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."
- G In *Erlanger v. New Sombrero Phosphate Co.* (9), LORD BLACKBURN, after quoting the above passage, says (3 App. Cas. at p. 1279):
- H "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."
- I In *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe* (10) ([1892] 1 Ch. at p. 168), LINDLEY, L.J., stated that staleness of demand as distinguished from the statute of limitation and analogy to it as furnishing a defence in equity to an equitable claim was settled at least as early as *Smith v. Clay* (11), and after referring to *Lindsay Petroleum Co. v. Hurd* (8) and *Erlanger v. New Sombrero Phosphate Co.* (9), said

"a defence based on staleness of demand renders it necessary to consider the time which has elapsed and the balance of justice or injustice in affording or refusing relief."

The learned lord justice, in holding that the delay in that case was no bar, laid stress on the fact that the appellants there had lost no evidence nor any remedy, and on the fact that they had adduced no evidence to prove that their testator had been induced by the plaintiff's delay to alter his position for the worse. A

The real difficulty lies in applying the principle enunciated in these cases to the facts of the present case. In the first place, I think that counsel for the defendants were right in their contention that the delay ought in the circumstances to be considered as having commenced in June, 1908, and as having continued until the month of October, 1926, when the plaintiffs definitely asserted their present claim, that is to say, for a period of eighteen years and four months. During this period the plaintiffs made no payments of principal or interest in respect of the mortgage debt, nor did they in any way assert their right to redeem; after June, 1908, neither the mortgagee nor the defendants did anything which amounted to a recognition of the plaintiffs' right to redeem. In these circumstances the fact that the dividends which were received by the mortgagee did not amount to a sufficient sum to pay off the mortgage until the year 1921 does not, in my opinion, operate to cut out from the period of delay of years which elapsed prior to that date. The fact that a mortgagee is in receipt of the income of the mortgaged property (be such income large or small), and that in case of redemption he is bound to give credit for such income against the amount owing on his security does not, in my opinion, prevent time running against an owner of the equity of redemption who neither pays any principal or interest in respect of the mortgage debt nor asserts his right to redeem. Nor do I think that the fact that the plaintiffs were under no personal liability to the mortgagee prevents time from running against them as owners of the equity of redemption. If the mortgage in the present case had been a mortgage of land I am clearly of opinion that the plaintiffs' claim to redeem would, under the Real Property Limitation Act, 1874, have been barred in June, 1920. It cannot be denied that a mortgagor who sleeps on his rights for such a long interval of time as has occurred here runs a very serious risk of finding, when he at last awakes and bestirs himself, that the mortgagee has in the meantime altered his position on the faith of the delay and that his right to relief has been lost. But I know of no case where mere delay of less than twenty years has of itself been held a sufficient ground for refusing relief to a mortgagor of personal estate claiming to redeem the mortgage. B C D E F

Counsel for the defendants, in support of their argument on this point, relied upon *Floyer v. Lavington* (12) and *Lockwood v. Ewer* (13). These cases, however, do not, in my opinion, assist their contention. In both the period of delay was more than twenty years; moreover, in both there were special circumstances which pointed to there having been acquiescence and not merely delay. In the former (where the delay was apparently sixty years) the mortgage debt was to be repaid by half-yearly instalments and the mortgagee had sold the rentcharge, the subject-matter of his security, to a purchaser who had settled it. In the latter (where the delay was more than twenty years) the mortgagee had been compelled to pay calls on the stock, the subject-matter of his security, and further had sold out the stock and "united it to his own gross stock" whatever this may mean. In *Brooks v. Muckleston* (14), another case cited to us, the delay was forty-eight years. Counsel for the defendants also relied upon the following observations of LORD REDESDALE in *Hovenden v. Lord Annesley* (6) (2 Sch. & Lef. at p. 636): G H

"On the contrary, I think the rule has been so laid down that every new right of action in equity that accrues to the party, whatever it may be, must be acted upon at the utmost within twenty years. Thus, in the case of redemption of a mortgage; if the mortgagee has been in possession for a great length of time, but has acknowledged that his possession was as mortgagee, and therefore liable to redemption, a right of action accrues upon that acknowledgment. But if not pursued within twenty years, it is like the case at law of a promise of payment beyond the six years, and non assumpsit infra sex annos pleaded, and so in every case of equitable title (not being the case of a trustee, whose I

A possession is consistent with the title of the claimant) it must be pursued within twenty years after the title accrues. This was so considered by LORD CAMDEN, in *Smith v. Clay* (11) referring to *Jenner v. Tracy* (15), that the same length of time should bar a redemption that would bar any other equity."

B This passage does not help the plaintiffs as the period there referred to is twenty years. Further, I am clearly of opinion that there is no rigid rule that every equity must be acted upon at the utmost within twenty years, and if not so acted upon will be barred. Every case must obviously depend upon its own circumstances and counsel for the defendants freely admitted that he could not support any such hard-and-fast rule. Moreover, both LORD REDESDALE in *Hovenden v. Lord Annesley* (6) and LORD CAMDEN in *Smith v. Clay* (11), when referring to the right of redemption being barred after twenty years, evidently had in mind a mortgage of land. In my opinion, therefore, the delay which has taken place in the present case is not of itself sufficient to disentitle the plaintiffs to relief.

C The next matter to be considered is whether anything has taken place during the interval which would render it "practically unjust to give the plaintiffs their remedy." The only facts relied upon by the defendants in support of their contention on this point are, first, that the shares became valuable and that by the month of July, 1921, the mortgagee had received dividends sufficient to pay off the total amount due to him under his mortgage, and, secondly, that the mortgagee died in the month of January, 1923, and, it is alleged (although there is no evidence on this point), that estate duty has been paid on the shares on the faith that they formed part of the mortgagee's estate. The facts so relied upon do not, in my opinion, render it inequitable to grant the relief claimed by the plaintiffs, nor, so far as I can see, is there any obstacle in the way of granting such relief. Nobody has been prejudiced by the delay. The mortgagee retained the shares up to the time of his death and they are now in the hands of his executors who have refrained from distributing them as part of the mortgagee's estate pending the decision of the court in the present case. There is no difficulty in accounting for the dividends received by the mortgagee and by the defendants. There has been no expenditure in connection with the shares and the defendants have not lost any evidence or remedy. Moreover, the mortgagee had notice that the plaintiffs were trustees of the equity of redemption, and, therefore, must be taken to have known that they could not properly abandon their equity of redemption, while the plaintiffs may have placed some reliance upon the fact that the mortgagee could not properly sell the shares without first giving them a reasonable notice and could not foreclose without making them parties to the proceedings and giving them an opportunity to redeem. The fact that the plaintiffs were acquainted with the affairs of the company and ought to have known that the mortgage debt had been paid off in 1921 does not, in my opinion, in the circumstances, afford any ground for refusing relief, though it would, in my opinion, have been conclusive against the plaintiffs if the defendants could have proved that the mortgagee had altered his position for the worse on the footing of such payment off and in the belief that the plaintiffs had abandoned their right to redeem. If it be the fact that the defendants have included the shares in their residuary account and have paid estate duty on them, such fact does not, in my opinion, in the circumstances, constitute a sufficient ground for refusing relief. The defendants have placed so little reliance upon this fact that they have not even mentioned it in their evidence. They no doubt relied on being able to obtain a return of the duty if the court were to hold that the plaintiffs were entitled to redeem. On the whole I have arrived at the conclusion that nothing has happened during the interval between June, 1908, and October, 1926, long though it was, to render it inequitable now to make a decree for redemption, and accordingly that RUSSELL, J., was right in holding that the plaintiffs were entitled to such a decree.

I **SANKEY, L.J.**—It is not necessary to recapitulate all the facts of this case. It will be sufficient to draw attention to a few of the salient ones. The loan of

£1,000, the deposit of the shares, and their transfer into Mr. Lescher's name were made in 1900. Mr. Lescher then became a mortgagee of personal property. Mr. Weld-Blundell died in 1901, and the last acknowledgment made by Mr. Lescher was in the letter of June 18, 1908. For some years he retained such dividends as were paid on the shares, but received no interest on the loan. During the war the shares appreciated in value, large dividends were paid and bonus shares were allotted from time to time, so that everything due to Mr. Lescher in respect of the loan and interest was paid off by June 13, 1921. Mr. Weld-Blundell's executors on Jan. 5, 1923, wrote saying, "Would you be prepared to transfer the shares on payment of principal and interest." Mr. Lescher died on Jan. 7, 1923, and on July 30, 1927, Mr. Blundell's executors issued the originating summons claiming redemption and an account.

Admittedly no statute of limitation applies, but the defendants contend that equity should follow the law. They say that, at the beginning of the last century, equity in dealing with mortgagees of land followed or acted in the analogy of the statute and held that where a mortgagee of land had been in possession for twenty years equity would not readily assist the mortgagor to recover the property and that the doctrine of stale demand would bar his claim. Then, still by analogy, the rule was applied in cases of mortgagees of personalty. So far the argument proceeds on the lines referred to in COOTE ON MORTGAGES (9th Edn. 1927), p. 1093:

"Formerly before the passing of the statute for the limitation of actions relating to real property there was no statutory limitation of time within which a suit in equity might have been brought for the foreclosure of the equity of redemption in mortgaged land. But the [Limitation Act, 1603] s. 1 (b), enacted that no entry into lands, tenements, or hereditaments should be made but within twenty years after the right or title to the same should have accrued or descended. The courts of equity, following the maxim, 'expedit reipublicæ ut sit finis litium,' adopted the statutory rule by way of analogy, and applied it to similar cases in equity; and accordingly precluded a mortgagee of land from bringing a suit in equity for foreclosure more than twenty years after his cause of action at law for ejectment had arisen."

By the Real Property Limitation Act, 1833, the period within which actions for the recovery of land must be brought was fixed twenty years next after the time at which the right to bring such action should have first accrued, and by the Real Property Limitation Act, 1874, the period was fixed at twelve years. The defendants' argument then proceeded that equity should follow or act upon the analogy of this later statute and should apply the period of twelve years to mortgages of personalty, and that, therefore, in this case the court should not assist the plaintiff to redeem the shares having regard to the fact that the last acknowledgment made by the defendant that he was holding as mortgagee was as far back as 1908. It may be remarked that there is no case in the reports which supports any such construction, and no recognised text-book which gives any countenance to it.

The rule begins to emerge in *Floyer v. Lavington* (12), decided in 1714, and apparently disclosing a very great lapse of time, viz., sixty years. COWPER, L.C., conceived:

"The rentcharge to be not redeemable at so great a distance of time, and that the court had hitherto gone too far in permitting redemptions."

In *Lockwood v. Ewer* (13), decided in 1742, LORD HARDWICKE refused to decree a redemption. He said:

"It would be of mischievous consequence if I should decree a redemption in this case for the bill would never have been brought if the East India stock had not increased in value, which is merely an accident, and could not have been foreseen at the time the mortgage was made."

A The time there was over twenty years. In *Aggas v. Pickerell* (16), in 1745, a plea of limitations was allowed to a bill for redemption after a mortgagee of land had been in possession of the mortgaged premises at least thirty years, LORD HARDWICKE, L.C., saying: "How is it possible to give a greater allowance to length of time than the statute of limitations does."

B In *Case 114 Anon.* (17) LORD HARDWICKE, L.C., apparently was not prepossessed in favour of the plaintiff, whom he described as a prowling assignee of the equity of redemption of land, but he said

C "the rule in relation to redemptions which is analogous to the statute of limitations is a very right and proper one. [He added:] I am of opinion that though no single circumstance, abstracted from the rest, will be sufficient to entitle the plaintiff to a decree, yet, taking them altogether, they are of weight enough to entitle the plaintiff to a decree."

D That I conceive to be the true rule. Taking the circumstances altogether are they of weight enough to entitle the plaintiff to a decree?

In *Smith v. Clay* (11) (3 Bro.C.C. at 646), it is said

D "the reporter having been favoured with a more accurate note of LORD CAMDEN's judgment in this case than has hitherto appeared in print, he flatters himself the publication of it will be acceptable to the Profession, and has therefore inserted it here."

The note itself is in fact from LORD CAMDEN's own handwriting in his notebook, and states:

E "A court of equity which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands where the party has slept upon his right and acquiesced for a great length of time. Nothing can call this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

F In that case it was held that a bill of review may be barred by delay of twenty years, but the Lord Chancellor goes on:

G "But, as the court has no legislative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year; it was governed by circumstances. But as often as Parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the court of chancery adopted that rule and applied to similar cases in equity. For when the legislature had fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation), to countenance laches beyond the period that law had been confined to by Parliament, and, therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

H I do not think that this means that a court of equity is always to adopt the period fixed by Parliament for, by the hypothesis in this particular case no period has been fixed by Parliament. The court is governed by the circumstances of each case: see, too, per LORD REDESDALE in *Hovenden v. Lord Annesley* (6) (2 Sch. & Lef. at p. 636) where he reviews the previous cases, and per JESSEL, M.R., in *Sutton v. Sutton* (18) (22 Ch.D. at p. 515). In *Archbold v. Scully* (7), in 1861, LORD CAMPBELL, L.C., said (9 H.L.Cas. at p. 371):

"The real question in the case seems to me to be, whether the appellant is barred by the lapse of time between 1835 and 1857 when his bill or cause petition was filed. If any new rights had been created in this interval, or if anyone would be prejudiced by the delay, that is, by the appellant being now enabled to make good his claim, I should be clearly of opinion that he is barred by laches or acquiescence or whatever name may be given to his long

sleep over his rights. But I do not discover any obstacle of this sort to the relief which he prays." A

LORD WENSLEYDALE made the same remarks (*ibid.* at p. 383).

In *Erlanger v. New Sombrero Phosphate Co.* (9) a great common lawyer, LORD BLACKBURN, uttered a note of warning on the principles of delay, although the matter under discussion had nothing to do with that now under consideration. Quoting from *Lindsay Petroleum Co. v. Hurd* (8), he says (L.R. 5 P.C. at p. 279): B

"But in every case if an argument against relief, which otherwise would be just, is founded on mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. . . . I think from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend upon the turn of mind of those who have to decide, and must, therefore, be a subject of uncertainty." C

It is not necessary to go through all the cases because they are only illustrations of the application of the rule to the particular facts of the case and those cited from what facts have from time to time been taken into consideration. Two examples are *London and Midland Bank v. Mitchell* (4) and *Brooks v. Muckleston* (14), decisions of STIRLING, J., and JOYCE, J., respectively. STOREY'S EQUITY JURISPRUDENCE (12th Edn.), 1877 at p. 1030, states, in my view, the true rule. The learned author begins by saying "Let us now pass to a brief consideration of the doctrine of equity applicable to mortgages and pledges of personal property," and contends in mortgages of personal property, although the prescribed condition has not been fulfilled, there exists as in mortgages of land an equity of redemption which may be asserted by the mortgagor if he brings his bill to redeem within a reasonable time. That, in my view, is the difference in principle between mortgages of land as governed by statute and mortgages of personalty, the redemption of which depends upon equitable doctrines founded upon what is just and reasonable having regard to all the circumstances of the case. Nowhere is it suggested in the text-books that the period of twenty years should now be reduced to twelve. In ROBINS' LAW OF MORTGAGES (1897), p. 742, the law as to redemption of mortgaged personalty is stated as in COOTE and no suggestion is made of a twelve years' rule. In FISHER'S LAW OF MORTGAGE (6th Edn. 1910), p. 717, the question of the remedy in equity for redemption of pledges of goods and stock is discussed again with no mention of a period of twelve years. The author says, D

"The privilege of redemption will be sparingly allowed if the action appear to have been brought on account of an accidental increase in the value of the pledge." E

With regard to a pledge it is suggested it may be redeemed at any time during the lifetime of the pledgor, except during outlawry. F

It will, therefore, be seen that there are no decided cases and no text-books of authority which supports the construction that the court should now adopt the twelve years' rule. I doubt the wisdom of laying down a hard-and-fast rule in equity that any particular number of years should bar a mortgagor's right to redeem personal property; that would be to make equity governed by an Act of Parliament, and, in the words of HOBART, C.J., "to bring the statute in like a tyrant," whereas Parliament has not thought fit to legislate for this particular case. In my opinion, the court in deciding the problem must have regard to all the circumstances of the case. Unreasonable delay may bar the mortgagor's right to redeem. What is reasonable is a question of fact. No doubt, length of time is a material consideration and an important fact. On the other hand, an equally important fact is the consideration whether there has been any change in the position G

A of the mortgagee or anyone claiming under him, so as to make it neither just, nor convenient, nor, indeed, possible to restore the parties to their original condition. Again the recognised legal exceptions contained in the statute which prevent time running must be taken into consideration. Beyond that there is the fact that for some years during the period in question a war was going on during which some people did not insist upon or put forward their rights. In the present case the

B sole question, in my view, is whether the delay of the mortgagors in applying to redeem is such that it ought to bar their right. Here there has been no such change in the position of the parties as to make it impossible to restore them to their original position. To that position they can be remitted without difficulty, without inconvenience, and without injustice to themselves or prejudice to third parties. That there has been delay must be conceded. If the period is taken, as

C the learned judge in the court below took it, from the date when the debt was satisfied in 1921, it is clear that the subsequent delay is not sufficient to bar, but I do not think that the court ought to adopt the period of twelve years contended for, and, even if the delay has to be reckoned from June, 1908, I see nothing to compel us, having regard to all the circumstances, to say that it is so long that it ought to bar the plaintiff's claim. In my opinion, the appeal should be dismissed.

D *Appeal dismissed; cross-appeal allowed.*

Solicitors: *W. A. Crump & Son; Gregory, Rowcliffe & Co., for Weld & Weld, Liverpool.*

[Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.]

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INLAND REVENUE COMMISSIONERS v. LYSAGHT

[HOUSE OF LORDS (Viscount Cave, L.C., Viscount Sumner, Lord Atkinson, Lord Buckmaster and Lord Warrington), January 27, 30 and March 9, 1928]

[Reported [1928] A.C. 234; 97 L.J.K.B. 385; 139 L.T. 6;
44 T.L.R. 374; 72 Sol. Jo. 270; 13 Tax Cas. 511]

G *Income Tax—Residence in United Kingdom—Visits for business purposes only—Nature of question as to residence—How far decision of Special Commissioners is open to review—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 46 (1), Sched. C, General Rules, r. 2 (d).*

The taxpayer, who was a director of an English company, lived in England until 1919, when he retired from active management of the company, but continued as advisory director. He then went to live in the Irish Free State, where he owned a large estate, but in the years 1920 to 1925 came regularly to England to attend the directors' meetings, which were held monthly at an hotel where he used to stay for a few days at a time. He occasionally visited branch works of the company, but rarely came to London, and his visits were made for purely business reasons, his wife and family always remaining in Ireland. The total number of days which he spent in England in any one year varied from forty-eight to 101. The taxpayer was assessed to income tax in respect of dividends from foreign and colonial government securities and war loan, but claimed exemption under the Income Tax Act, 1918, s. 46 (1), and Sched. C, General Rules, r. 2 (d), on the ground that at the relevant times he was not "ordinarily resident" or "resident" in the United Kingdom within the meaning of those provisions. The special commissioners confirmed the assessments, finding that the taxpayer was both

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I ordinarily resident and resident in the United Kingdom.

Held (VISCOUNT CAVE, L.C., dissenting): the question of residence or ordinary residence was one of fact and there was no technical or special meaning attached to either expression for the purposes of the Income Tax Act, 1918; and, therefore, as there was evidence on which the commissioners could reasonably reach the conclusion at which they arrived, their decision was not open to review. A

Decision of the Court of Appeal, [1927] 2 K.B. 55, reversed. B

Notes. The Income Tax Act, 1918, s. 46 (1), and Sched. C, General Rules, r. 2 (d), were replaced respectively by the Income Tax Act, 1952, s. 195 (1), and s. 120 (1).

Considered: *Morley v. Lawford & Co.* (1928), 140 L.T. 125; *Egyptian Delta Land and Investment Co. v. Todd*, [1929] A.C. 1. Applied: *R. v. St. Marylebone Income Tax Comrs., Ex parte Schlesinger* (1928), 13 Tax Cas. 746. Considered: *I.R. Comrs. v. Combe* (1932), 17 Tax Cas. 405; *Ryall v. Du Bois Co., Ltd.* (1933), 150 L.T. 386; *Re Mackenzie*, [1940] 4 All E.R. 310; *Lord Inchiquin v. I.R.Comrs.* (1948), 31 Tax Cas. 125; *Edwards v. Birstow*, [1955] 3 All E.R. 48. Referred to: *Duckworth v. Lowe*, [1937] 2 All E.R. 418; *Re Adoption Application No. 52/1951*, [1951] 2 All E.R. 931; *Union Corpn., Ltd. v. I.R.Comrs., Johannesburg Consolidated Investment Co. v. I.R.Comrs., Trinidad Leaseholds, Ltd. v. I.R.Comrs.*, [1952] 1 All E.R. 646; *Stansky v. Stansky*, [1954] 2 All E.R. 536. C

As to residence and ordinary residence, see 20 HALSBURY'S LAWS (3rd Edn.) 392 et seq. For the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.); and for cases see 28 DIGEST 24 et seq. D

Cases referred to: E

- (1) *Levene v. I.R.Comrs.*, post, p. 746, [1928] A.C. 217; 97 L.J.K.B. 377; 139 L.T. 1; 44 T.L.R. 374; 72 Sol. Jo. 270; 13 Tax Cas. 486; Digest Supp.
- (2) *Pickles v. Foulsham*, [1923] 2 K.B. 413; 92 L.J.K.B. 701; 129 L.T. 636; 39 T.L.R. 478; 67 Sol. Jo. 810; affirmed, [1924] 1 K.B. 323; 93 L.J.K.B. 197; 130 L.T. 492; 40 T.L.R. 107; 68 Sol. Jo. 185, C.A.; affirmed, [1925] A.C. 458; 94 L.J.K.B. 418; 133 L.T. 5; 41 T.L.R. 323; 69 Sol. Jo. 411; 9 Tax Cas. 261, H.L.; 28 Digest 25, 131. F
- (3) *Farmer v. William Cotton's Trustees*, [1915] A.C. 922; 113 L.T. 657; sub. nom. *Cotton's Trustees v. Inland Revenue*, 1915 S.C. (H.L.) 109; 52 S.L.R. 713; 1915 2 S.L.T. 2, H.L.
- (4) *Great Western Rail Co. v. Bater*, [1922] 2 A.C. 1; 91 L.J.K.B. 472; 127 L.T. 170; 38 T.L.R. 448; 66 Sol. Jo. 365; 8 Tax Cas. 231, H.L.; 28 Digest 85, 486. G
- (5) *Inland Revenue v. Cadwalader* (1904), 7 F. (Ct. of Sess.) 146; 42 Sc.L.R. 117; 12 S.L.T. 449; sub nom. *Cooper v. Cadwalader*, 5 Tax Cas. 101; 28 Digest 24, g.
- (6) *Brown v. Burt* (1911), 81 L.J.K.B. 17; 105 L.T. 420; 27 T.L.R. 572; 5 Tax Cas. 667, C.A.; 28 Digest 24, 130. H
- (7) *Reid v. Inland Revenue* (1926), 10 Tax Cas. 673; 1926 S.C. 589; Digest Supp.
- (8) *Smith v. Lion Brewery Co., Ltd.*, [1911] A.C. 150; 80 L.J.K.B. 566; 104 L.T. 321; 27 T.L.R. 261; 55 Sol. Jo. 269; 5 Tax Cas. 568; 75 J.P.Jo. 87, H.L.; 28 Digest 57, 291.
- (9) *Malcolm v. Lockhart*, [1919] A.C. 463; 88 L.J.P.C. 46; 120 L.T. 449; 35 T.L.R. 231; 63 Sol. Jo. 264; 7 Tax Cas. 99, H.L.; 28 Digest 22, 118. I
- (10) *Cooper v. Stubbs*, [1925] 2 K.B. 753; 94 L.J.K.B. 903; 133 L.T. 582; 41 T.L.R. 614; 69 Sol. Jo. 743, C.A.; 28 Digest 22, 113.

Appeal by the Crown from the decision of the Court of Appeal (LORD HANWORTH, M.R., and SARGANT, L.J.; LAWRENCE, L.J., dissenting), reported, [1927] 2 K.B. 55, upon a Case stated under s. 149 of the Income Tax Act, 1918, and s. 27 of the Finance Act, 1924, by Special Commissioners of Income Tax for the opinion of the King's Bench Division of the High Court of Justice. The facts appear from the opinion of VISCOUNT CAVE, L.C. ROWLATT, J., affirmed the decision of the

A commissioners, but the Court of Appeal held (LAWRENCE, L.J., dissenting) that the taxpayer was neither "resident" nor "ordinarily resident" in England. The appellant's only residence was in Ireland and periodical short visits for business purposes paid to England did not make him resident there. The meaning of "residence" in Income Tax Acts was a question of law.

B *The Attorney-General (Sir Douglas Hogg, K.C.), The Solicitor-General (Sir Thomas Inskip, K.C.) and Reginald Hills for the Crown. Latter, K.C., and S. R. Benson for the taxpayer.*

The House took time for consideration.

Mar. 9. The following opinions were read.

C **VISCOUNT CAVE, L.C.**—The facts in this case as found by the Special Commissioners may be very shortly stated. The respondent, Mr. S. R. Lysaght, who was born in England of Irish parents, was formerly the managing director of a company called John Lysaght, Ltd., which has works at Bristol and Newport, and while he was so engaged owned a property near Bristol and resided there with his family. In 1919 he partially retired from the business, but was appointed an advisory director. Thereupon he sold his property near Bristol and went to live on a family property at Mallow in Ireland which he had purchased in 1916, and from that time he has had no definite place of abode in this country, but he comes to England from time to time in circumstances detailed in the following paragraph from the Case stated by the commissioners:

E "(4) The [respondent] comes to England for a meeting of the directors of John Lysaght, Ltd., every month and remains for consultations with the other directors and for committee meetings. The company have a branch business at Scunthorpe, Lines., and the [respondent] has visited this business on several occasions during his visits to England. On the occasion of these visits he spends about a week in England. On two occasions his return to Ireland was delayed by illness. The total number of days spent in England in the respective years has been as follows:

	Days
In the year ending April 5, 1923	101
In the year ending April 5, 1924	94
In the year ending April 5, 1925	84
In the period from April 6 till Sept. 25, 1925	48

G When in England the [respondent] generally stays at the Spa Hotel, Bath, at which the meetings of the directors of the company are held. Occasionally he has stayed at his brother's house at Chepstow. These visits to England are solely for business purposes, and the [respondent's] wife never accompanies him on these visits. He owns a field of about three acres near Burnham, purchased many years ago, which he is anxious to sell. He has a few relatives and many friends in England. He has also relatives and friends abroad. (5) He has no business activities in Ireland except the management of his estate at Mallow, of which eight hundred acres are in hand. (6) His banking account is at the Mallow branch of the Bank of Ireland, but he has also a small account at a branch in Bristol of the Westminster Bank. The registered address of his various securities is Hazelwood, Mallow. He is a member of the Savile Club, London, but hardly ever goes there. During the past five years he has made three lengthy trips to Australia and South America on behalf of the company."

I The respondent, having been assessed by the general commissioners to income tax in respect of the tax-years 1922-23 and 1923-24 in respect of income from foreign and colonial government securities and war loan, claimed exemption from tax under r. 2 (d) of the General Rules applicable to Sched. C of the Income Tax Act, 1918, and s. 46 (1) of the same Act on the ground that during the years in

question he was neither resident nor ordinarily resident in the United Kingdom; but the claim was disallowed, and on appeal to the special commissioners they confirmed the decision of the general commissioners subject to a Case Stated for the opinion of the High Court. After stating the facts and the contentions of the parties, the Case proceeds as follows:

"We held that the appellant was both ordinarily resident and resident in the United Kingdom for each of the two years ended April 5, 1923, and April 5, 1924, respectively."

On the case being argued, ROWLATT, J., refused to disturb the commissioners' decision, but the Court of Appeal (by a majority) took a different view. The Crown now appeals to this House.

This case differs in an essential respect from the case of *Levene v. I.R.Comrs.* (1). In that case the appellant, Mr. Levene, was during the period in question a homeless man living at different hotels in the United Kingdom and abroad. In the present case the respondent, Mr. Lysaght, has a permanent home in Southern Ireland, where he lives with his family; but he comes to England once a month for business purposes, stays at an hotel and, when his business (which usually occupies about a week) is concluded, he returns home. It is unnecessary for me to repeat the observations which I have made in the previous case as to the meaning of the expressions "reside" and "ordinarily reside"; and it is enough to say that, on the view which in that case I have taken as the meaning of those expressions, there appears to me to be no reason whatever for holding that the respondent is resident or ordinarily resident in this country. It is true that he comes here at regular intervals and for recurrent business purposes; but these facts, while they explain the frequency of his visits, do not make them more than temporary visits or give them the character of residence in this country. That he has a small account at a bank in Bristol—doubtless for use during his visits to this country—and a club in London to which he hardly ever goes, appear to me to be trivial circumstances which cannot affect the decision. If the respondent is held to reside here and to be taxable accordingly, there would appear to be no reason why those many foreigners who periodically visit this country for business purposes, and having concluded their business go away, should not be made subject to a like burden.

But it was argued—and this was the point mainly insisted on on behalf of the Crown—that the conclusion of the special commissioners that the respondent was both resident and ordinarily resident in the United Kingdom was a finding of pure fact, and accordingly could not be disturbed by the Court of Appeal. No doubt the rule is well established that a finding of the commissioners on a question of pure fact cannot be reviewed by the courts except on the ground that there was no evidence on which the commissioners could as reasonable men have come to their conclusion, and this although the court of review would, on the evidence, have come to a different conclusion. But it does not appear to me that the conclusion of the commissioners in the present case was a finding of pure fact. It is true, as ROWLATT, J., said in *Pickles v. Foulsham* (2), that where a man resides is a question of fact to be determined on proper legal principles; and it is true also, as he said in the same case, that when you get a case on the border line, i.e., where there is evidence both ways which is nearly balanced—it becomes very essentially a question of fact. A good instance of this is *Levene v. I.R.Comrs.* (1) to which I have referred. But, as LORD PARKER said in *Farmer v. William Cotton's Trustees* (3) ([1915] A.C. at p. 932), it is not always easy to distinguish between questions of fact and questions of law for the purposes of the taxing Acts; and I venture to express my concurrence with the protest made by LORD ATKINSON in *Great Western Rail. Co. v. Bater* (4) ([1922] A.C. at p. 12) against the attempt which is often made to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on a question of pure fact. In the present case the commissioners appear to me to have so framed their Case

A as to prevent (if possible) any confusion of that kind. They have carefully and fully stated all the material facts found by them to exist and then, after setting out the rival contentions of the parties (some of them being contentions of law), they have "held" that the respondent was both ordinarily resident and resident in the United Kingdom in the years in question. This seems to me to mean that on the facts already found by them and on their view of the law they were prepared to draw the inference of residence. In short, it is a mixed finding of fact and law, and unless such a finding is open to review by the courts little benefit will accrue to the subject from the right which is given to him to have a case stated for the opinion of the King's Bench Division. In my opinion this argument fails. I feel compelled to add that, if the commissioners' decision is to be taken as a finding on the facts only, then it appears to me that there was on **C** their own showing no evidence on which that finding could properly be based. For these reasons I would dismiss this appeal.

VISCOUNT SUMNER.—What has to be decided in this case is really the meaning of the word "resident" in the Income Tax Act, 1918, and the mode in which that meaning is to be settled in particular cases. The respondent, who **D** lives in the Irish Free State, claimed exemption from tax, as to some of his securities because he was "not ordinarily resident in the United Kingdom" within s. 46 (1) and as to others because he was not "resident in the United Kingdom" within the General Rules applicable to Sched. C, r. 2 (d). The Commissioners for Special Purposes decided against him in both cases. Section 46 (1) provides that the non-residence there mentioned is to be shown "in manner directed by **E** the Treasury," while r. 2 (d) of the General Rules exempts a taxpayer for non-residence "where it is proved to the satisfaction of the Commissioners of Inland Revenue" but no distinction has been drawn nor has any point been taken on this ground. There is, however, a preliminary question on the form of the commissioners' decision. Their Case Stated is framed thus:

F "2. The following facts were admitted or proved in evidence. . . . 3. It was contended by the [respondent]. . . . 4. It was contended on behalf of the Crown. . . . 5. We held that the [respondent] was both ordinarily resident and resident in the United Kingdom."

G Paragraph 2 sets out under six heads the circumstances of various kinds relevant to the issue of Mr. Lysaght's way of life and particularly of his visits to England. It was contended that this paragraph and this alone stated the facts found by the commissioners and that para. 5 found no fact but only stated their opinion of the consequences in law, which followed from their previous finding. In that case, if residence, ordinary or otherwise, is a question of fact the Case must have gone back to be completely stated; if it is purely a question of law, the whole case would be open for your Lordships' decision as to the consequences legally arising from the facts found.

H It is certainly much to be wished that the commissioners should be scrupulously careful to say that they "find" a conclusion of fact, arrived at from other facts found, or, if they only mean to apply the law as they understand it to be and not to draw any conclusion of fact, should say, that they hold so and so in accordance with what they conceive to be the law, for a debate on the meaning of a Case Stated is an unsatisfactory prelude to a debate on the general law applicable. **I** I have, however, no doubt as to the commissioners' meaning here. Their experience makes them fully conversant with the wide scope of their functions and with its limits and it is most unlikely that they intended to leave unfound the ultimate fact of residence, which was the substance of the whole case before them. It is as though a jury, fully directed by the trial judge, had found a special verdict stating the points, which the evidence had proved to their satisfaction, and had concluded "we hold this to have been careless and unreasonable conduct on the defendant's part and we find for the plaintiff." It is well settled that, when the commissioners have thus ascertained the facts of the case and

then have found the conclusion of fact which the facts prove, their decision is not open to review, provided (a) that they had before them evidence from which such a conclusion could properly be drawn, and (b) that they did not mis-direct themselves in law in any of the forms of legal error, which amount to misdirection. A

The word "ordinarily" may be taken first. The Act on the one hand does not say "usually" or "most of the time," or "exclusively," or "principally," nor does it say, on the other, "occasionally" or "exceptionally," or "now and then," B though in various sections it applies to the word resident, with a full sense of choice, adverbs like "temporarily" and "actually." I think the converse to "ordinarily" is "extraordinarily" and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not "extraordinary." C Having regard to the times and duration, the objects and the obligations of Mr. Lysaght's visits to England, there was in my opinion evidence to support, and no rule of law to prevent, a finding that he was ordinarily resident, if he was resident in the United Kingdom at all. No authority was cited, which requires special consideration on this head.

Grammatically the word "resident" indicates a quality of the person charged and is not descriptive of his property, real or personal. To ask where he has his residence is often a convenient form of inquiry, but only as leading to the question "then where is he resident himself?" D I think this distinction, though often pointed out, has too often been overlooked in the arguments in the reported cases. No doubt, on the authority of the merchant seamen's cases, Mallow was Mr. Lysaght's home and he resided there. There were his family seat and his demesne lands, his wife and family, his farming and his sport, and though some people may be able to make themselves at home from home anywhere, I do not suppose that the Spa Hotel, Bath, however excellent, was much of a home to E Mr. Lysaght. This, however, is not conclusive. Who in New York would have said of Mr. Cadwalader "his home's in the Highlands; his home is not here?" After all, many nomads are homeless folk, though they may reside continually here and there within the limits of the United Kingdom. Property, obviously, is F no conclusive test. Whether Mr. Lysaght resides in his own or in a hired house in Ireland cannot have much to do with it, nor is a person precluded from being resident because he puts up at hotels, and not always the same hotel, and never for long together. It was said in *Cadwalader's Case* (5) that an establishment was set up in the United Kingdom. None was set up here, and in fact Mr. Lysaght had closed his English establishment some years before, but although G setting up an establishment in this country, available for residence at any time throughout the year of charge, even though used but little, may be good ground for finding its master to be "resident" here, it does not follow that keeping up an establishment abroad and none here is incompatible with being "resident here," H if there is other sufficient evidence of it. One thinks of a man's settled and usual place of abode as his residence, but the truth is that in many cases in ordinary speech one residence at a time is the underlying assumption and, though a man may be the occupier of two houses, he is thought of as only resident in the one he lives in at the time in question. For income tax purposes such meanings are I misleading. Residence here may be multiple and manifold. A man is taxed where he resides. I might almost say he resides wherever he can be taxed.

There is, again, the circumstance that Mr. Lysaght only comes over for short visits. Does this make any conclusive difference? If he came for the first three months in the year for the purpose of his duties and then returned home till the next year, would there not be evidence that he was resident here, and, if so, how does the discontinuity of the days prevent him from being resident in England, when he is here in fact, though the obligation to come, as required, is continuous and the sequence of the visits excludes the elements of chance and of occasion. If the question had been one of "occasional residence" abroad in the language of r. 3 these facts would have satisfied the expression, for residence is still residence, though it is only occasional, and I see no such fundamental antithesis between

A "residence" and "temporary visits" as would prevent Mr. Lysaght's visits, periodic and short as they are, from constituting a residence in the United Kingdom, which is "ordinary" under the circumstances. I think that it is the shortness of the aggregate time during which Mr. Lysaght is here, that constitutes the principal, though by no means the only point in his favour, but the question of a longer or a shorter time, like other questions of degree, is one peculiarly for the commissioners. I do not say that time might not be so short, or again so long, as to make it right to hold, no matter what other evidence there was, that as the case might be, there was either no evidence of residence or that the evidence was all one way in favour of it, but these questions are not before us. It is attractive to say, as in substance was the opinion of the Court of Appeal, that "resident" in this case is a matter of law, as being a matter of interpretation, but that does not cover the ground. Interpretation only says what the Act itself refrains from telling us, namely, the meaning of the word "resident," but, as that meaning is its meaning in the speech of plain men, the question still remains, whether plain men would find that the result of the facts found was "residence" in its plain sense, and I do not doubt that the commissioners understood the word not otherwise than in its correct legal signification and so applied it. Accordingly I do not think that their decision can be interfered with.

B It remains to notice an argument founded on the Finance Act, 1924, s. 27. This section provides that, in the case of questions as to "ordinary residence" under s. 46 (1) of the Income Tax Act, 1918, or as to "residence" in r. 2 (d) of the General Rules applicable to Sched. C, a person aggrieved by the decision of the Inland Revenue Commissioners can apply to have his claim for relief determined by the special commissioners, who are to proceed as on an appeal against an assessment under Sched. D, subject to all the provisions of the Income Tax Acts relating to such an appeal. This was what Mr. Lysaght did, and the section is supposed to show that "residence" and "ordinary" residence are questions of law. I do not think that it does. It only shows that they are questions which the special commissioners are competent to review, leaving the distinction between questions of law and questions of fact untouched. True, the special commissioners can state a Special Case for the opinion of the High Court on a question of law, but the section does not say that "residence" and "ordinary" residence in themselves are such questions of law and it is only on such questions as may arise, if any, that the case can be stated. The commissioners are not required to find out or to formulate such questions. If, as here, they say "The appellant immediately upon the determination of the appeal declared to us his dissatisfaction therewith, as being erroneous in point of law, and in due course required us to state a Case . . . which Case is here stated," they have done their duty, and it is open to your Lordships to say that, not having misdirected themselves in point of law and not having proceeded without evidence on which they could properly find as they have found, their determination is not erroneous in point of law. This satisfies the section. It does not say, expressly or by implication, that "resident," whether "ordinarily" or otherwise, raises a question of law in itself.

LORD ATKINSON concurred with **VISCOUNT SUMNER**.

I **LORD BUCKMASTER**.—The real question that arises in this case is whether the finding of the commissioners that the respondent was resident and ordinarily resident in England is a finding of fact which cannot be disturbed, or whether it is open to examine the circumstances set out by the commissioners for the purpose of seeing whether the conclusion they drew is one that this House will accept. The distinction between questions of fact and questions of law is difficult to define, but according to the respondent whether a man is resident or ordinarily resident here must always be a question of law dependent on the legal construction to be placed on the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the word "reside" or "residence" in other

Acts may have special meanings but in the Income Tax Acts it is, I think, used in its common sense, and it is essentially a question of fact whether a man does or does not comply with its meaning.

It is, of course, true that if the circumstances found by the commissioners in the Special Case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials on which that conclusion could depend. But if the incidents relating to visits in this country are of such a nature that they might constitute residence and their prolonged or repeated repetition would certainly produce that result then the matter must be a matter of degree, and the determination of whether or not the degree extends so far as to make a man resident or ordinarily resident here is for the commissioners, and it is not for the courts to say whether they would have reached the same conclusion. This Case is an excellent illustration of this particular point. The respondent's home is in Ireland, and he has no definite place of abode in England, as found by the commissioners:

"(4) The [respondent] comes to England for a meeting of the directors of John Lysaght, Ltd., every month and remains for consultations with the other directors and for committee meetings. The company have a branch business at Scunthorpe, Lines., and the [respondent] has visited this business on several occasions during his visits to England. On the occasion of these visits he spends about a week in England. On two occasions his return to Ireland was delayed by illness. The total number of days spent in England in the respective years has been as follows:

	Days
In the year ending April 5, 1923	101
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When in England the [respondent] generally stays at the Spa Hotel, Bath, at which the meetings of the company are held. Occasionally he has stayed at his brother's house at Chepstow. These visits to England are solely for business purposes, and the [respondent's] wife never accompanies him. He owns a field of about three acres near Burnham, purchased many years ago, which he is anxious to sell. He has a few relatives and many friends in England. He has also relatives and friends abroad."

It could not, I think, be denied that, even although the respondent had his home in Ireland, his sojourn in this country might be so prolonged as to place his residence here beyond dispute, but none the less I understand the judgment of the Court of Appeal to mean this, that they regard the purpose of his visits sufficient to show that he could not be regarded as resident. They state that it was not of his own free choice, but in obedience to the necessities of his position in relation to the company of John Lysaght, Ltd., that he was over here, from which it would appear that the element of choice is regarded by the Court of Appeal as a factor of great, if not of final, consequence in determining residence. In my opinion this reasoning is not sound. A man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet, none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, it is open to the commissioners to find that in fact he does so reside, and if residence be once established "ordinarily resident" means, in my opinion, no more than that the residence is not casual and uncertain, but that the person held to reside does so in the ordinary course of his life.

LORD WARRINGTON.—This case raises under different circumstances the same questions as those raised in *Levene's Case* (1) just decided by your Lordships' House, viz., whether the respondent (as he is in this case) was in either of the

A years of assessment, viz., 1922-23 and 1923-24 resident and ordinarily resident in the United Kingdom.

The respondent was entitled to certain securities of British possessions the interest on which was payable in the United Kingdom and to British war loan stock issued with the condition mentioned in s. 46 of the Income Tax Act, 1918. Having been assessed to income tax on both classes of security he appealed to the special commissioners, who decided that he was resident in the case of one class, and was ordinarily resident in the case of the other. A Case was thereupon stated by the commissioners for the opinion of the High Court. The case was heard before ROWLATT, J., who affirmed the decision of the commissioners. The respondent appealed to the Court of Appeal who by a majority (LORD HANWORTH, M.R., and SARGANT, L.J.; LAWRENCE, L.J., dissenting) allowed the appeal and set aside the judgment of ROWLATT, J., and the decision of the commissioners, being of opinion that the respondent was not at the material times either resident or ordinarily resident in the United Kingdom.

The argument of the Attorney-General in this House was rested exclusively on the contention that the questions to be determined are both questions of degree and therefore of fact and that there was on each question evidence on which the commissioners might reasonably come to the conclusion at which they arrived, and consequently their decision was not subject to review. I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act, 1918, and accordingly a decision of the commissioners on the question of a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded.

In *Brown v. Burt* (6) (5 Tax Cas. at p. 670), HAMILTON, J., after mentioning the finding of the commissioners that the appellant was resident in the United Kingdom, said:

F "That only raises a question of law, if it can be contended that it is impossible to draw that conclusion of fact as to his residence in the United Kingdom from the facts set out in the case."

This view was affirmed in the Court of Appeal. The same view was expressed by ROWLATT, J., in *Pickles v. Foulsham* (2). The point was not raised in the Court of Appeal.

G In *Reid v. Inland Revenue* (7) (1926 S.C. at p. 594) (a Scottish case), the Lord President (LORD CLYDE) said:

H "It is obvious that the more general and wide the scope of expressions used in a statute, the more difficult it may become to convict those whose duty it is to interpret it, of an error or misdescription in applying it to a given state of facts. It may be possible in such cases to predicate of a particular state of facts that they lie outside the scope of the expressions used, although it may be really an impossible task to define that scope positively and with exact accuracy. The expressions 'resident in the United Kingdom' and the qualification of that expression implied in the word 'ordinarily' so resident, are just about as wide and general and difficult to define with positive precision as any that could have been used. The result is to make the question of law become (as it were) so attenuated, and the field occupied by the questions of fact become so enlarged, as to make it difficult to say that a decision arrived at by the commissioners, with respect to a particular state of facts held proved by them, is wrong."

I In the same case LORD SANDS said:

"When a statute uses ordinary non-technical language in describing a certain person or thing in general or ambulatory terms, and it becomes merely a

matter of impression or opinion whether, in relation to the special circumstances, a person or a thing falls within the expression, the tendency of the law is to treat a finding upon the matter as a finding in fact."

He concurred in refusing to disturb the determination of the commissioners though he was not sure that he would have been prepared to differ had they decided the other way. See also the opinion of LORD HALSBURY in *Smith v. Lion Brewery Co., Ltd.* (8) ([1911] A.C. at p. 155), and that of LORD BUCKMASTER in *Malcolm v. Lockhart* (9) ([1919] A.C. at p. 466), and my own remarks in the Court of Appeal in *Cooper v. Stubbs* (10) ([1925] 2 K.B. at p. 768).

In the present case, after stating that certain facts set forth in detail were either admitted or proved, the commissioners "held" that the present respondent was both ordinarily resident and resident in the United Kingdom for each of the two years in question. The most material fact in the present case in favour of a finding contrary to that of the commissioners was that the respondent had a permanent family home in Southern Ireland. His visits to this country were for business purposes as advisory director of John Lysaght, Ltd., of which he had previously been director and managing director; they were frequent and regular and the number of days spent in this country in the two years in question was 101 and ninety-four respectively. I cannot say that there was no evidence on which the commissioners could properly arrive at their conclusion though I am not sure I should have taken the same view. I think the appeal ought to be allowed with costs here and below and the judgment of ROWLATT, J., restored.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Whites & Co., for Clarke, Sons & Press,* Bristol.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HAYES v. CURTIS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Shearman, JJ.), May 9, 1928]

[Reported 139 L.T. 312; 92 J.P. 119; 44 T.L.R. 619;
26 L.G.R. 389; 28 Cox, C.C. 518]

Agriculture—Wages—Benefits or advantages reckoned as wages—Milk provided by employer—Price of milk deducted from wages—Agricultural Wages (Regulation) Act, 1924 (14 & 15 Geo. 5, c. 37), s. 8.

A farmer employed a cowman at a weekly wage and supplied him with a pint of milk daily, the milk being purchased by the cowman from the farmer and the price being deducted from the cowman's wages. On informations against the farmer for paying less than the minimum wages fixed in pursuance of the Agricultural Wages (Regulation) Act, 1924, the justices, while finding on other grounds that the wages were less than the minimum, excluded the question of the supply of milk on the ground that the supply was in the nature of a sale. Accordingly, they did not order the farmer to pay the cowman anything in respect of the price of the milk as an amount by which the farmer had underpaid him. In the area which included the farm in question there was in force an order of the Agricultural Wages Committee prescribing that no benefit was to be reckoned as payment of wages in lieu of cash except a cottage or board and lodging.

A **Held:** by deducting the price of the milk from the cowman's wages the farmer had treated the price as part of the wages, and had thereby contravened the Act, and so must be ordered to pay the cowman the price of the milk supplied during the six months preceding the complaint.

Notes. The Agricultural Wages (Regulation) Act, 1924, ss. 1 (1), (3), 8 (1) (a), have been replaced by the Agricultural Wages Act, 1948, s. 4 (1), (2), s. 7 (i) (c).

B Considered: *Hughes v. Davies* (1929), 94 J.P. 48.

As to benefits and advantages in lieu of wages and agreements in contravention of the Agricultural Wages Act, see 1 HALSBURY'S LAWS (3rd Edn.) 477-478; and for cases see 44 DIGEST 1302. For Agricultural Wages Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 2.

C Cases referred to:

(1) *Williams v. North's Navigation Collieries* (1889), *Ltd.*, [1906] A.C. 136; 75 L.J.K.B. 334; 94 L.T. 447; 70 J.P. 217; 54 W.R. 485; 22 T.L.R. 372; 50 Sol. Jo. 343, H.L.; 24 Digest (Repl.) 1101, 477.

(2) *Jones v. Harris*, [1927] 1 K.B. 425; 96 L.J.K.B. 70; 136 L.T. 248; 91 J.P. 1; 43 T.L.R. 1; 25 L.G.R. 27; 28 Cox, C.C. 272, D.C.; 2 Digest (Repl.) 162, 1179.

D **Case Stated** by justices for Dorset.

Two informations were preferred by Courtenay Hayes (hereinafter called the appellant) against Bertram Curtis (hereinafter called the respondent) for that he on Mar. 11 and 18, 1927, at Coombe Farm, Sherborne, in the said county, being a person who employed James Ellis Hunt, a worker in agriculture, did not pay wages

E to the said James Ellis Hunt at a rate not less than the minimum rate as fixed under the provisions of the Agricultural Wages (Regulation) Act, 1924, and the Order of the Agricultural Wages Board made thereunder, No. 216, dated Feb. 21, 1927, and the Orders of the Agricultural Wages Committee for the said county of Dorset, dated April 30, 1926, and Feb. 11, 1927, respectively, contrary to s. 7 (1) of the Act. Section 7 (3) of the Act provided that the justices must order the

F employer to pay the worker the difference between the amount which ought to have been paid him during the six months immediately preceding the complaint and the amount actually paid. The justices convicted the respondent and fined him in the sum of 10s. in respect of each offence and also ordered him to pay the said James Ellis Hunt the sum of 5s. 4d. a week for a period of six months in accordance with the provisions of s. 7 (3) of the Agricultural Wages (Regulation) Act, 1924, and the Orders of the Agricultural Wages Board and the Agricultural Wages Committee for the county of Dorset aforesaid.

On the hearing of the informations the following facts were proved or admitted:

(a) That the appellant was a person authorised by law to institute proceedings under the Agricultural Wages (Regulation) Act, 1924, and that he accordingly laid the informations against the respondent.

H (b) That the Orders of the Agricultural Wages Board and the Agricultural Wages Committee for the administrative county of Dorset material to this case were as follows:

(i) An Order of the Agricultural Wages Board, No. 216, dated Feb. 21, 1927, prescribing minimum rates of wages.

I (ii) An Order of the Dorset Agricultural Wages Committee (Dorset 6) dated April 30, 1926, defining overtime employment.

(iii) An Order of the Dorset Agricultural Wages Committee (Dorset 7) dated Feb. 11, 1927, defining the benefits or advantages which might be reckoned as payment of wages in lieu of payment in cash. These were, (a) a cottage, and (b) board and lodging. The Order further provided: "Except as in this Order provided, no benefit or advantage shall be reckoned as payment of wages in lieu of payment in cash."

(c) That the respondent in or about the month of March, 1922, entered into a contract with the said James Ellis Hunt, whereby the respondent was to employ

the said James Ellis Hunt as a worker in agriculture—namely, as a cowman—on the respondent's farm, called Coombe Farm, Sherborne, and that the said James Ellis Hunt continued in the service of the respondent until Mar. 25, 1927, under the said contract.

(d) That at all material times the respondent paid to the said James Ellis Hunt a weekly wage of £1 12s. 6½d. and supplied him with one pint of new milk daily.

(e) That the value of the said milk was 2½d. a pint or 1s. 5½d. per week.

(f) That, in accordance with the agreement made between the respondent and the said James Ellis Hunt the said milk was purchased from the respondent, the price thereof being deducted from the weekly cash wages paid to the said James Ellis Hunt.

It was contended on behalf of the appellant :

(a) That as and from the date of the Order of the Dorset Agricultural Wages Committee, dated Feb. 11, 1927, the respondent was prohibited from reckoning as payment of wages the value of the milk provided by the respondent and that the respondent was bound to pay the said James Ellis Hunt such wages in cash without any deduction or set-off for any amount which might be owed by the said James Ellis Hunt.

(b) That if there was an agreement made between the respondent and the said James Ellis Hunt to set off the value of the said milk against the weekly cash wages due to the said James Ellis Hunt such deduction would be contrary to the said orders and to the decisions in *Williams v. North's Navigation Collieries* (1889), *Ltd.* (1) and *Jones v. Harris* (2).

It was contended on behalf of the respondent that he was entitled to set off against the wages payable to the said James Ellis Hunt the value of the milk as a debt due to the respondent.

On the facts proved or admitted the justices held :

(a) That the supply of the milk to the said James Ellis Hunt was in the nature of a sale; that the said James Ellis Hunt in effect paid the money for the price of the milk to the respondent out of the moneys received by him as wages from the respondent.

(b) That excluding the sum of 1s. 5½d. referred to above, 5s. 4d. was in fact due from the respondent to the said James Ellis Hunt in respect of arrears of wages for the weeks ending Mar. 11 and 18, 1927, respectively.

The justices, therefore, in the circumstances, convicted the respondent and imposed upon him a fine of 10s. in each case and ordered him to pay to the said James Ellis Hunt the sum of £6 18s. 8d. in respect of arrears of wages at the rate of 5s. 4d. per week in accordance with s. 7 (3) of the Agricultural Wages (Regulation) Act, 1924.

The ground of the appeal was that the justices were wrong in allowing a set-off of 1s. 5½d. a week.

Hubert Hull for the appellant.

The respondent did not appear.

LORD HEWART, C.J.—This is a Case stated by justices and it raises a rather important point on the working of the Agricultural Wages (Regulation) Act, 1924. By s. 8 (1) of that Act the Minister of Agriculture has power to make regulations, and in particular

“(a) for requiring the wages committees by order to define the benefits and advantages (not being benefits or advantages prohibited by law) which may be reckoned as payment of wages in lieu of payment in cash . . . and for enabling the committees by order to limit or prohibit the reckoning of benefits or advantages as payment of wages in lieu of cash. . . .”

In pursuance of those powers and the orders made under them the Dorset Agricultural Wages Committee made a certain order, dated Feb. 11, 1927, whereby it was ordered that, except as therein provided, no benefit or advantage should be

A reckoned as payment of wages in lieu of payment in cash. The only benefits permitted to be so reckoned were a cottage and board and lodging. It was here found that the appellant paid Hunt, his cowman, £1 12s. 6½d. per week, and that that fell short of the minimum wage by 5s. 4d. even though credit were given for 1s. 5½d., which was paid, as it was said, for milk. The Case finds that the respondent in March, 1922, entered into a contract with this cowman, and that in pursuance of that contract the milk was purchased from the respondent, and the price was deducted from the wages paid by the respondent to Hunt. In other words, the price of the milk was treated as part of the wages. The justices found, with some hesitation, that this deduction was allowable, that it was "in the nature of a sale" and that the cowman "in effect" paid for the milk. It is clear that the respondent has done the very thing which the statute and orders provide that he is not to do. The appeal in my opinion succeeds.

AYORY, J.—I agree.

SHEARMAN, J.—I agree.

Appeal allowed and Case remitted.

D Solicitor: *The Official Solicitor to the Ministry of Agriculture and Fisheries.*

[Reported by J. F. WALTER, ESQ., Barrister-at-Law.]

E

TICKNER v. CLIFTON

[KING'S BENCH DIVISION (Swift and Acton, JJ.), October 31, 1928]

F [Reported [1929] 1 K.B. 207; 98 L.J.K.B. 69; 140 L.T. 136;
93 J.P. 57; 45 T.L.R. 35; 72 Sol. Jo. 762]

G *Rent Restriction—Statutory tenant—Member of tenant's family continuing to reside as statutory tenant after tenant's death—Liability for arrears of rent in respect of period before tenant's death—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (1) (g), s. 15 (1).*

H A person occupying premises as a statutory tenant under s. 12 (1) (g) of the Increase of Rent and Mortgage (Restrictions) Act, 1920, on the ground of being a member of the deceased tenant's family "residing with him at the time of his death," is not liable for arrears of rent owing by the original tenant at the time of his death, and, therefore, an order for possession cannot be made against such a statutory tenant on the ground of non-payment of those arrears.

Notes. Referred to: *Sherrin v. Brand (otherwise Phelps)*, [1956] 1 All E.R. 194.

I As to orders for possession of rent-restricted premises on the ground of non-payment of rent, see 23 HALSBURY'S LAWS (3rd Edn.) 818; and as to the position as statutory tenants of persons residing with the tenant at his death, see *ibid.* 809–812; and for cases see 31 DIGEST (Repl.) 662–666, 699. For Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, see 13 HALSBURY'S STATUTES (2nd Edn.) 981.

Appeal from West London County Court.

The plaintiff, Mrs. Tickner, claimed from the defendant, Miss Clifton, possession of a dwelling-house at Shepherd's Bush, W., which was within the limits of the Rent Restriction Acts, on the ground of non-payment of rent. She also claimed £25 10s. arrears of rent and mesne profits.

The following statement of facts was agreed upon between the parties: In 1926 one Edward William Clifton was tenant of the premises, 158, Conningham Road, from the plaintiff as a tenant from year to year on the terms and conditions contained in an agreement dated May 17, 1917, and made between Alfred Chilton Pearson of the one part and Edward William Clifton of the other part. Edward William Clifton died intestate on Sept. 27, 1926. He left no widow. On Sept. 27, 1926, Edward William Clifton was in arrears with his rent to the extent of £25 10s. in respect of one half-year's rent. On that date part of the premises were sublet by Edward William Clifton. The premises came within the provisions of the Rent and Mortgage Interest (Restrictions) Act, 1920, the rent having been increased in 1923 from £40 a year to £51 a year exclusive of rates. The defendant, who was a daughter of Edward William Clifton, was "residing with him at the time of his death" within the meaning of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. She continued to reside at the premises after her father's death and she tendered the rent to the plaintiff, who accepted it without prejudice to a claim which she made against the defendant for the payment of the £25 10s. arrears of rent. No letters of administration were taken out of the estate of Edward William Clifton, who left no estate other than his interest under the tenancy. Since Sept. 27, 1926, the sub-letting of the premises was continued by the defendant, but the rooms sublet were sublet to different sub-tenants. The whole of the rent in respect of those sub-lettings since Sept. 27, 1926, was received by the defendant, who paid the rates due in respect of the premises.

The plaintiff demanded from the defendant the arrears of rent owing by her father at the time of his death, and, upon her continued refusal to pay, brought an action in the county court, in which she claimed possession, arrears of rent, and mesne profits. The county court judge held that the plaintiff was entitled to succeed, but stayed the order for possession, so long as the defendant paid the rent and £2 5s. per quarter off the £25 10s. arrears. The defendant appealed.

By Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:

"Section 12 (1) (g). . . . The expression tenant includes . . . where a tenant . . . leaves no widow or is a woman, such member of the tenant's family [who was residing with him at the time of his death] as may be decided in default of agreement by the county court.

Section 15 (1). A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act. . . ."

A. A. Avetoom for the defendant.

H. Lloyd-Williams for the plaintiff.

SWIFT, J.—The defendant occupies the premises, possession of which is claimed in the present proceedings, as a statutory tenant. She is possessed of all the rights of a person who occupies premises not by agreement nor by the will of the landlord, but merely by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In the capacity of a statutory tenant she has sublet part of the premises and has paid the rent to the plaintiff quarter by quarter as it has become due. The plaintiff has accepted the rent without prejudice to her contention that the defendant is liable to pay to her the £25 10s. which her father owed to the plaintiff when he died.

It was contended both before the county court judge and in this court that the defendant is liable to pay the arrears of rent owed to the plaintiff by her father because she is either executrix de son tort of his estate or an equitable assignee of the term which her father held. I am not sure whether or not she is an executrix de son tort. I think it quite possible that she has so dealt with her father's estate as to render herself liable to account for such of the proceeds of it as have come into her hands, but there is no evidence of that before the county court judge or

A before us. Nor is there any evidence that the defendant is an assignee of the term. The truth is that she is in occupation of the premises not as executrix de son tort, and not as an assignee, but as a statutory tenant. Her statutory tenancy began with her. She has to observe the terms of the original agreement of tenancy. If those terms require that the tenant shall put the house into repair she must put it into repair. If they require that the tenant must keep it in repair she must do so, and that may imply that she must first of all put it in repair. If the agreement requires that the tenant shall not carry on a particular business or commit certain nuisances at the premises she must observe it, and if her father carried on a prohibited trade or committed any prohibited nuisance she must cease doing so, but she is not responsible for what went on before she became the statutory tenant of the premises. I can find nothing in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that a statutory tenant who has become entitled to the benefits of a statutory tenancy because he was a member of the family of the preceding tenant and was residing with him at the time of his death is liable to discharge liabilities incurred by that preceding tenant during his life. The £25 10s. which the defendant's father owed to the plaintiff is not a debt owing by the defendant herself quâ statutory tenant, whatever may be her liability with regard to it in some other capacity.

The county court judge took a different view and made an order for the possession of the premises and for the payment by the defendant to the plaintiff of the arrears of rent and mesne profits. In my view, that was wrong. The defendant had paid money into court to satisfy that part of the sum claimed as rent and mesne profits which constituted her own liability. Judgment should have been entered in her favour with costs from the time of the payment into court. This appeal must, therefore, be allowed, the judgment of the county court judge must be set aside, and judgment must be entered for the defendant in the form which I have indicated.

ACTON, J.—I agree.

Solicitors: *H. B. I. Schultess-Young; Whittington, Son & Barham.*

F [*Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.*]

G

M. v. M.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), January 30, February 6, 1928]

H

[Reported [1928] P. 123; 97 L.J.P. 101; 138 L.T. 648;
44 T.L.R. 299; 72 Sol. Jo. 155]

Divorce—Judicial separation—Alimony pendente lite—Application before decree—Hearing after decree—Jurisdiction to make order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190 (3).

I

A suit for judicial separation is no longer pending once a decree has been made thereon, and, therefore, on a petition for judicial separation the court has no jurisdiction to allot alimony pendente lite for a period after the decree has been made. Nor will the court make an order after decree for alimony pendente lite in respect of the period before decree, even though the petitioner has proceeded with due diligence and her failure to obtain an order before decree is due to no fault of her solicitor.

Ver Mehr v. Ver Mehr (1), [1921] P. 404, explained and distinguished.

Notes. The provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (3), (4), as to alimony in suits for judicial separation have been

replaced by those of s. 20 of the Matrimonial Causes Act, 1950. See note "Alimony" to Matrimonial Causes Act, 1950, s. 20: 29 HALSBURY'S STATUTES (2nd Edn.). The Matrimonial Causes Rules, 1924, have been repealed: see now Matrimonial Causes Rules, 1957, r. 3 (3) (as amended by r. 4 (1) of the Matrimonial Causes (Amendment) Rules, 1958), r. 8 (2), r. 42, r. 45, r. 48, r. 51, r. 52.

As to allotment of alimony after decree, see 12 HALSBURY'S LAWS (3rd Edn.) 349; for cases see 27 DIGEST (Repl.) 497; for the Supreme Court of Judicature (Consolidation) Act, 1925, and the Matrimonial Causes Act, 1950, see 5 and 29 HALSBURY'S STATUTES (2nd Edn.) 337 and 388 respectively; and for the Matrimonial Causes Rules, 1957, No. 619, see 10 HALSBURY'S STATUTORY INSTRUMENTS.

Cases referred to:

- (1) *Ver Mehr v. Ver Mehr*, [1921] P. 404; 90 L.J.P. 349; 126 L.T. 108; 66 Sol. Jo. (W.R.) 4; 27 Digest (Repl.) 494, 4350.
- (2) *Westmeath v. Westmeath* (1827), 2 Hag. Ecc. Supp. 61; 162 E.R. 1012; on appeal (1829), 2 Hag. Ecc. Supp. 134; 27 Digest (Repl.) 400, 3300.

Application for alimony pendente lite.

A wife instituted a suit for judicial separation in March, 1927. After the petition was filed she applied for an order for alimony pendente lite with due diligence. In November, 1927, the suit for judicial separation came on for hearing and a decree was pronounced. In January, 1928, the application for alimony pendente lite came on for hearing, the delay not being due to the fault of the wife's solicitor. On this application the registrar made no order except that the husband should pay the wife's costs of the application up to the date of the decree. From this decision the wife appealed to the judge in chambers, who adjourned the application into court for argument. The wife asked that direction might be given for an inquiry into the facts as to her maintenance from March to November, 1927, whilst the litigation was proceeding.

T. Bucknill for the wife.

H. B. D. Grazebrook for the husband.

The Supreme Court of Judicature (Consolidation) Act, 1925, provides:

"Section 21. The High Court shall have such jurisdiction (a) in relation to matrimonial causes and matters as was immediately before the commencement of the Matrimonial Causes Act, 1857, vested in or exercisable by any ecclesiastical court or person in England in respect of divorce *a mensâ et thoro*, . . ."

The Matrimonial Causes Rules, 1924, provided:

"Rule 57. A wife who is petitioner in a cause after filing her petition may file and after serving the same, may serve a petition for alimony pending suit, and a wife after entering appearance to a petition may file and serve a petition for alimony pending suit.

Rule 58. The husband shall within fourteen days after service of a petition for alimony file his answer thereto upon oath setting out his property and income, and if respondent shall before so doing enter an appearance in the cause. Such appearance may be limited to the alimony proceedings.

Rule 59. The wife, if the husband's answer is insufficient, may apply on summons for a further and better answer or for discovery of documents or for an order for the husband's attendance for cross-examination and such order shall thereupon be made as in the circumstances of the case may appear to the registrar to be required.

Rule 61. A registrar shall investigate the averments in the petition for alimony, answer and reply, in the presence of the parties or their solicitors, and shall be at liberty to require the attendance of either party for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any document, and to call for affidavits, and shall direct such order to issue as he shall think fit or refer the application or any question arising therefrom to the judge for his decision."

Feb. 6. **LORD MERRIVALE, P.**, read a judgment, in which he stated the facts, and continued: In support of the appeal reliance is placed on the general terms in which the Matrimonial Causes Rules, 1924, rr. 57, 58, 59, and 61, direct proceedings in respect of alimony pending suit. It is contended that the suit was not at an end on Jan. 11 when the application was made inasmuch as the marriage was subsisting and the decree is subject by statute to be reviewed or rescinded in certain events. It is argued that this case is governed by *Ver Mehr v. Ver Mehr* (1). Further, there was a suggestion that the right of a wife to maintenance, which is in question, is a substantive right, asserted by this petition for alimony and proper to be enforced irrespective of the position of this suit. For the husband it was submitted that after the pronouncing of this decree, which is the final judgment of the court in the suit, there is no longer any *lis pendens*, and therefore no such order as is sought can be made.

Ver Mehr v. Ver Mehr (1) does not govern this dispute. That case was a wife's suit for restitution of conjugal rights. The order for restitution had not been obeyed, and although no steps had been taken under the Matrimonial Causes Act, 1884, the husband was guilty of desertion and of disobedience to a subsisting order. This decree had the effect of a like decree in the ecclesiastical courts, save in so far as the statute of 1884 otherwise provided. What was said was that inasmuch as in the ecclesiastical courts the husband cited in such a suit remains subject to the jurisdiction of the court until there had been obedience to the decree, or the decree is discharged, the husband was liable. The existing practice of long standing was thus confirmed.

The rules of practice which are in question must be construed with due regard to the subject-matter and the case law relating thereto. By s. 22 of the Matrimonial Causes Act, 1857, repealed by the Supreme Court of Judicature (Consolidation) Act, 1925 (see ss. 32 and 103 of the last-mentioned Act):

"In all suits and proceedings other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

Under the practice of the ecclesiastical courts two distinct powers existed, as they do now, in respect of enforcement of the husband's duty to maintain his wife. Pending a suit for judicial separation the coercive authority of that tribunal was available, as now, to secure to the wife means of subsistence and necessary money for costs while the parties were proceeding with the litigation. When the question between them had been determined by decree, the wife, if she were the successful party, might obtain on a new petition a decree to secure her permanent maintenance according to her husband's means. The interlocutory proceedings for alimony and costs were coercive means of securing, if need be, by monition and excommunication, that the wife should be heard in the cause. How purely transitory they were would appear on even a slight examination of the textbooks and the authorities. The older writers described the payments for maintenance as hebdomadal. In case of appeal new provision was obtainable in the Court of Arches. The current expression which described the means of securing money for costs was taxation "from day to day." In *Westmeath v. Westmeath* (2) (2 Hag. Ecc. Supp. at p. 73), the answer made to an attempt to secure a taxation after decree was, that the costs were unpaid because of neglect to procure taxation *de die in diem*, while the suit was in progress. While the position of the wife pending a suit for judicial separation remained, in principle, very much the same after 1857 as it was before, her rights if she were successful in obtaining a decree were strengthened by definite provisions of the Matrimonial Causes Act, 1857, which gave her, during separation, rights as a *feme sole* as well as by statutory recognition of the practice under which

she became entitled to a permanent provision for her maintenance. Under the practice of the ecclesiastical courts, and ever since, alimony on judicial separation is ordered to be paid as from the date of the decree. To accept the suggestion that the suit for a judicial separation is a pending suit after the decree would involve the absurd consequence that alimony pendente lite and permanent alimony might be accruing at the same time, and, indeed, that a petition in respect of each might proceed simultaneously. The practice of this court, as illustrated by the order made in the registry, rests on the fact that the process resorted to before decree is a privileged procedure limited by the necessities of the case and not the exercise of a substantive right such as gives a cause of action. The necessity which can be so dealt with ceases when the decree is granted. To give a direction now for inquiry as to the wife's maintenance from March to November, 1927, while the litigation proceeded, would be a new departure, and in view of the hardships which often arise where a husband is petitioner it would involve mischievous consequences. The application, therefore, is refused.

Solicitors: *Sharpe, Pritchard & Co.*, for *Amphlett & Co.*, Colwyn Bay; *Jaques & Co.*, for *Porter & Co.*, Conway.

[Reported by C. G. MORAN, ESQ., Barrister-at-Law.]

REIGATE CORPORATION v. SURREY COUNTY COUNCIL

[CHANCERY DIVISION (Russell, J.), January 20, 25, February 9, 1928]

[Reported [1928] Ch. 359; 97 L.J.Ch. 168; 138 L.T. 691; 92 J.P. 46; 44 T.L.R. 308; 72 Sol. Jo. 154; 26 L.G.R. 278]

Highway—Repair—Highway running through tunnel—Liability for repair of walls and roof of tunnel—Local Government Act, 1888 (51 & 52 Vict., c. 41), s. 11 (2).

A landowner made a road on his estate, part of which ran through a tunnel. Brick walls and a roof were built, lining the tunnel, so as to ensure that no part of the soil, which would otherwise have formed the walls and roof of the tunnel, could fall on the surface of the road. Later the landowner dedicated the road as a highway. On a question as to liability for the cost of repairs to the walls and roof of the tunnel,

Held: (i) the walls and roof formed part of the highway: *R. v. Inhabitants of Lordsmere* (1) (1886), 54 L.T. 766, applied; *A.-G. v. Staffordshire County Council* (2), [1905] 1 Ch. 336, explained and distinguished; but, even if this were not so, the maintenance and repair of the walls and roof were necessary for the maintenance and repair of the road, and so the costs of the repair of the walls and roof were "costs of the maintenance and repair of [the] road." *Sandgate U.D.C. v. Kent County Council* (3) (1898), 79 L.T. 425, applied.

(ii) the walls and roof did not constitute an inconvenience subject to which the highway had been dedicated. *Tarry v. Ashton* (4) (1876), 1 Q.B.D. 314, and *Fisher v. Prowse* (5) (1862), 6 L.T. 711, distinguished.

Notes. Section 11 (2) of the Local Government Act, 1888, has been repealed, but this case remains an authority as to what is included in a highway.

As to what is included in a highway and as to dedication subject to obstructions, see 19 HALSBURY'S LAWS (3rd Edn.) 58, 117-123; and for cases see 26 DIGEST 265, 374-375.

Cases referred to:

- (1) *R. v. Inhabitants of Lordsmere* (1886), 54 L.T. 766; 51 J.P. 86; 2 T.L.R. 623; 16 Cox, C.C. 65, C.C.R.; 26 Digest 364, 892.

- A** (2) *A.-G. v. Staffordshire County Council*, [1905] 1 Ch. 336; 74 L.J.Ch. 153; 92 L.T. 288; 69 J.P. 97; 53 W.R. 312; 21 T.L.R. 139; 3 L.G.R. 379; 26 Digest 353, 797.
- (3) *Sandgate U.D.C. v. Kent County Council* (1898), 79 L.T. 425; 15 T.L.R. 59, H.L.; 26 Digest 265, 65.
- (4) *Tarry v. Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry v. Ashton*, 24 W.R. 581; 26 Digest 433, 1519.
- B** (5) *Fisher v. Prowse, Cooper v. Walker* (1862), 2 B. & S. 770; 31 L.J.Q.B. 212; 6 L.T. 711; 26 J.P. 613; 8 Jur.N.S. 1208; 121 E.R. 1258; 26 Digest 265, 66.
- (6) *R. v. Kerrison* (1815), 3 M. & S. 526; 105 E.R. 708; 26 Digest 581, 2712.
- (7) *Hertfordshire County Council v. Great Eastern Rail. Co.*, [1909] 2 K.B. 403; 78 L.J.K.B. 1076; 101 L.T. 213; 73 J.P. 353; 25 T.L.R. 573; 53 Sol. Jo. 575; 7 L.G.R. 1006, C.A.; 26 Digest 587, 2778.
- C** (8) *Gully v. Smith* (1883), 12 Q.B.D. 121; 53 L.J.M.C. 35; 48 J.P. 309; 26 Digest 416, 1346.
- (9) *Silverton v. Marriott* (1888), 59 L.T. 61; 52 J.P. 677; 26 Digest 433, 1518.
- (10) *Warner v. Wandsworth District Board of Works* (1889), 53 J.P. 471; 26 Digest 444, 1616.
- D** (11) *Coverdale v. Charlton* (1878), 4 Q.B.D. 104; 48 L.J.Q.B. 128; 40 L.T. 88; 43 J.P. 268; 27 W.R. 257, C.A.; 26 Digest 329, 616.
- (12) *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q.B.D. 904; 53 L.J.Q.B. 449; 51 L.T. 148; 48 J.P. 676; 32 W.R. 776, C.A.; 26 Digest 328, 607.

E **Special Case** as to liability for the costs of repair of a tunnel through which a highway ran.

The following statement of facts is taken from the judgment :

The questions raised by this Special Case relate to a road at Reigate called "Tunnel Road," which runs north and south from the London Road into the Market Place, Reigate. The road is some 290 yards in length, and for a distance of about 56 yards it runs through a tunnel. The tunnel walls and roof consist of brick, the roof being arched. The soil above the crown of the arch is about 20 ft. deep.

"Tunnel Road" was constructed in 1823 by Earl Somers on, through, and under his own lands—namely, Castle Hill. It was constructed as a private road, and the tunnel, with its walls and roof, was constructed at the same time. At that time an ancient highway, a footway, ran along and across part of Castle Hill. This footway passed over the extreme southern end of the tunnel, having on its southern edge the south parapet wall of the tunnel. "Tunnel Road" continued to be a private road until 1858, in which year it would appear to have come under the control of the Turnpike Trustees as a result of a bargain with Earl Somers.

According to the facts as alleged in paras. 11, 12, and 13 of the Special Case, Reigate on Sept. 11, 1863, was created a municipal borough, and the mayor, aldermen and burgesses of that borough were incorporated by charter. On Aug. 21, 1865, the corporation resolved to adopt the Local Government Act, 1858. On June 4, 1866, the corporation, by virtue of the powers conferred on them by s. 41 of the Local Government Act, 1858, entered into an agreement with the Turnpike Trustees whereby the corporation undertook the maintenance and repair of the road, including the walls of the tunnel and banks, and the agreement contained a provision for its termination on twelve months' notice given by either party. No such notice was given and the agreement continued in force until the expiration of the turnpike trust in 1881. After the Local Government Act, 1888, came into force until Jan. 9, 1923, "Tunnel Road" was treated as a district-assisted road, the Surrey County Council making voluntary contributions, under s. 11 (10), towards the costs of its maintenance and repair. No repairs were during that period made to the walls or roof of the tunnel. "Tunnel Road" became a main road on Jan. 9, 1923; and on Oct. 13, 1923, the Reigate Corporation, in pursuance of s. 11 (2) of

the Act of 1888, claimed to retain the powers and duties of maintaining and repairing it. The Surrey County Council thereupon became liable to make to the corporation an annual payment "towards the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of such road." In 1924 it became necessary to carry out certain repairs and works to the tunnel. The cost of carrying out the work came to £317. A

Since Feb. 16, 1922, the corporation have been owners of all the land on each side of the road and over the tunnel with the exception that they do not own the property on the eastern side of the road from the southern end of the tunnel to the market-place. On the soil over the tunnel there is a cottage, erected about the year 1867, which is now the property of the corporation, and, in the walls of the tunnel there are doors and gates leading into vaults, owned by the corporation, which lead out of the tunnel in and under the adjacent soil. B

Para. 23 of the Special Case asked: "Whether in the circumstances aforesaid the said sum of £317 is part of the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of the said road toward which the county council are required by s. 11 (2) of the Local Government Act, 1888, to make an annual payment." C

Maurice Fitzgerald, for the plaintiffs, the corporation, referred to *R. v. Inhabitants of Lordsmere* (1); *Sandgate U.D.C. v. Kent County Council* (3). D

R. A. Glen, for the defendants, the county council, referred to *R. v. Kerrison* (6); *Hertfordshire County Council v. Great Eastern Rail. Co.* (7); *Tarry v. Ashton* (4); *Gully v. Smith* (8); *Silverton v. Marriott* (9); *Fisher v. Prouse* (5); *Warner v. Wandsworth District Board of Works* (10); *A.-G. v. Staffordshire County Council* (2); *Coverdale v. Charlton* (11); *Wandsworth Board of Works v. United Telephone Co.* (12); *Sandgate U.D.C. v. Kent County Council* (3). E

Cur. adv. vult.

Feb. 9. The following judgment was read.

RUSSELL, J., stated the facts and continued: The substantial question which I have to decide is this, whether costs incurred by the Reigate Corporation in keeping the roof, walls, and parapets of the tunnel in repair are costs within the meaning of s. 11 (2) of the Local Government Act, 1888. The corporation contend that the walls and roof of the tunnel are part of the road, having been constructed simultaneously with the road and as part and parcel of it. Alternatively, they say that if the walls and roof of the tunnel do not form part of the road they are works which it is necessary to maintain in order efficiently to maintain and repair the surface of the road, and the cost of such maintenance is properly part of the cost of the maintenance and repair of the road. The council, on the other hand, say that the walls and roof of the tunnel cannot be said to be and are not part of the road, nor are they works erected for the protection of the surface of the road, or for any other purpose than the support of the land above. The case, they say, is simply one of a highway having been dedicated with an existing inconvenience attached thereto, and that the authorities establish the proposition that all repairs required to be done to such an existing inconvenience must be done by its owner, that is, by the corporation as the owner of the adjacent land which it supports. A subsidiary point was also urged—namely, that in no event could the council be liable to repair the southerly portion of the tunnel which supports the ancient footpath. F

I will first of all deal with the main point. There is no direct authority that I can find, or that has been cited to me, in relation to highways running through tunnels, and no doubt much must depend upon the facts in each case. Here the landowner made the road on his own land, in part running through it by means of a tunnel. Simultaneously he erected the brick walls and roof. These ensure that no part of the soil—which would otherwise form the walls and roof of the tunnel—can fall on to the surface of the road. The fall of large quantities of soil would G H I

A choke up and obstruct the road; even the risk of the fall of smaller quantities would deter people from using the road. There is authority for the view that a wall supporting a road made on the slope of a hill forms part of the roadway—*R. v. Inhabitants of Lordsmere* (1). On the same principle I can see no logical reason for holding that a wall whose purpose is to keep the soil on the higher levels of the slope from coming on to the road should not also be held to be part of the road.

B It is suggested that *A.-G. v. Staffordshire County Council* (2) is an authority to the contrary. I do not so read it. There the road was cut on the side of a hill and had walls on each side. The decision was simply that on the evidence in the case neither the upper nor lower walls were out of repair, and that the court would not make any order as to what steps the road authority should take for the purpose of keeping their roads in repair. There being no authority which prevents me from

C so holding, I am prepared to hold, and do hold, that the walls and roof of the tunnel which were erected simultaneously with the making of the road, and which operate to keep, and are necessary to keep, the surface of the road free from that which would or might otherwise obstruct it, may properly be said to form part of the roadway.

If I am wrong in this, another view is open. If the walls and roof are not part

D of the road, yet they may constitute something, apart from the road, which it is necessary to maintain and repair for the purpose of maintaining and repairing the road; something which, if allowed to get into disrepair, may bring about the obstruction and disrepair of the highway. In other words, that the case is analogous to the *Sandgate Case* (3), the repair and maintenance of the walls and roof of the tunnel corresponding to the repair and maintenance of the sea wall and

E groynes in that case. Here, in my opinion, the maintenance and repair of the tunnel walls and roof are necessary for the maintenance and repair of the road, even though the walls and roof form no part of the road, and the costs of such maintenance and repair are costs within s. 11 (2) of the Act of 1888.

I can find no support in the authorities cited for counsel for the defendants' proposition that the walls and roof of this tunnel must be regarded as an inconvenience, subject to which the road was dedicated as a highway, and that the owner of the inconvenience must repair it. The cases cited by him seem to me to have no bearing on, or relation to, a case like the present one. He cited several authorities in support of his contention, of which the principal one and the real basis of his proposition appeared to be *Tarry v. Ashton* (4). All that was decided in that case was that the owner of a heavy lamp attached to his house and projecting

G over the highway was liable in damages to a passer-by upon whom, owing to its being out of repair, it fell; and that on the footing that it was his duty to keep in repair the lamp which, for his own purposes, he kept projecting over the highway. In *Fisher v. Prowse* (5) it was no doubt held that a highway may be dedicated subject to existing obstructions, such as cellar flaps and steps, and that the owner of the obstruction is not liable for damages caused by it, provided he maintains it

H in its original condition as to repair and as to extent of obstruction. Nor, as was pointed out by DENMAN, J., in *Warner v. Wandsworth Board of Works* (10), is the road authority bound to remove the obstruction. But nowhere in the authorities cited do I find any justification for the view that the walls and roof of this tunnel constitute an inconvenience or obstruction subject to which the highway was dedicated. As already indicated, I take the view on the facts of this case that

I they either form part of the highway or are necessary for the maintenance of the highway.

There remains for consideration a subsidiary point raised on behalf of the Surrey County Council, in regard to that portion of the southern end of the tunnel over which the old footpath runs. That arises under s. 97 of the Local Government Act, 1888, which runs thus :

"Nothing in this Act with respect to main roads shall alter the liability of any person or body of persons, corporate or unincorporate, not being a highway authority, to maintain and repair any road or part of a road."

The contention is that Earl Somers, having in 1823 tunnelled under an existing highway, the old footpath, he thereupon became liable *ratione nocumenti* to repair that part of the tunnelled road which went under the old footpath, and that that liability is preserved by s. 97 and rests with his successors in title to the soil—namely, the corporation. The answer to this appears to me to be that s. 97 does not preserve the liability *ratione nocumenti* in the present case, because the corporation are not only successors in title to Lord Somers, but are also a highway authority. Their liability to repair that portion of the tunnel does not arise *ratione nocumenti*, but arises in the same way as their liability in regard to the rest of the tunnel.

The result is that my answer to the question raised by para. 23 of the Special Case is in the affirmative. I accordingly declare that the defendants are liable to make an annual payment towards the costs incurred by the plaintiffs from time to time in keeping the roof, walls, and parapets of the said tunnel in repair, and I direct judgment to be entered for the plaintiffs for the sum of £317 without costs.

Solicitors: *Westbury, Preston & Stavridi*, for *Grece & Patten*, Redhill; *Wyatt & Co.*, for *T. W. Weeding*, Kingston-on-Thames.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

FITZGERALD v. NATIONAL BANK, LTD.

[KING'S BENCH DIVISION (Talbot, J.), December 20, 1928]

[Reported [1929] 1 K.B. 394; 98 L.J.K.B. 382; 140 L.T. 406]

Will—Satisfaction of debt by legacy—Debt carrying interest accruing from day to day—Original debt and accrued interest owing at death—Legacy of amount of original debt.

A debtor who in September, 1925, had borrowed £100, repayable on demand, at 5 per cent. per annum interest accruing from day to day, made a will in February, 1926, which contained a legacy of £100 free of duty to the creditor, but no direction to pay debts. The debtor died in May, 1926, without having repaid the £100 or paid any of the accrued interest.

Held: the fact that the debt carried interest from day to day did not rebut the presumption of satisfaction, and the creditor was, therefore, not entitled to be paid the £100 debt in addition to the legacy.

Notes. As to satisfaction of debt by legacy, see 14 HALSBURY'S LAWS (3rd Edn.) 606; and for cases see 20 DIGEST 478-488.

Cases referred to:

- (1) *Talbott v. Duke of Shrewsbury* (1714), Prec. Ch. 394; Gilb. Ch. 89; 2 Eq. Cas. Abr. 352; 24 E.R. 177; 20 Digest 480, 2041.
- (2) *Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 667; 75 L.J.Ch. 304; 94 L.T. 475; 54 W.R. 311; 22 T.L.R. 249; 50 Sol. Jo. 240; 20 Digest 483, 2092.
- (3) *Re Fletcher, Gillings v. Fletcher* (1883), 38 Ch.D. 373; 57 L.J.Ch. 1032; 59 L.T. 313; 36 W.R. 841; 4 T.L.R. 486; 20 Digest 480, 2045.
- (4) *Seaman v. Dee* (1672), 2 Lev. 40; 3 Keb. 15; 1 Vent. 198; 83 E.R. 443; 24 Digest (Repl.) 711, 6984.
- (5) *Clark v. Sewell* (1744), 3 Atk. 96; 26 E.R. 858, L.C.; 20 Digest 483, 2087.

Action tried by TALBOT, J., as a short cause.

The plaintiff, Michael Fitzgerald, sued the defendants, the National Bank, Ltd.,

A as the executors of his uncle, J. G. Fitzgerald, to recover £100, being the amount of a loan from him to the deceased in September, 1925, together with interest at 5 per cent.

On Sept. 23, 1925, the deceased gave the plaintiff an acknowledgment in the following terms :

B "This is to certify that my nephew, Maurice Fitzgerald, Esq., of Ballina House, Killmallock, Co. Limerick, has lent me the sum of £100 at interest of 5 per cent. per annum, and that he or his assigns is entitled to be paid the said £100 at any time he desires to call it in or be paid by my executors as a first claim on the residue of my estate after my death.—J. G. FITZGERALD."

C On Feb. 27, 1926, the deceased made his will, which contained no directions to pay debts, but gave his nephew, Michael Fitzgerald, the plaintiff, a legacy of £100 free of duty. On May 7, 1926, the testator died, and soon afterwards the plaintiff handed the above acknowledgment to the defendants as the executors of the deceased and applied to be paid £100 and interest. The defendants' solicitors contended that the legacy was given in satisfaction of the debt, and that the executors could not pay both legacy and debt. On Sept. 18, 1926, the defendants paid the plaintiff the amount of the legacy. The plaintiff issued his writ on Sept. 17, 1928, and on Oct. 31, 1928, the defendants paid him £3 19s. in respect of interest on the £100 from Sept. 23, 1925, to Sept. 18, 1926, at the rate of 5 per cent. less tax.

D G. V. Cameron for the plaintiff.

E H. L. Murphy, for the defendants, referred to *Talbott v. Duke of Shrewsbury* (1); *Re Rattenberry* (2) ([1906] 1 Ch. at p. 672), per SWINFEN EADY, J.; *Re Fletcher* (3) (38 Ch.D. 373), per NORTH, J.; *Seaman v. Dee* (4).

G. V. Cameron, in reply, referred to *Clarke v. Sewell* (5).

F **TALBOT, J.**, stated the facts and continued : The question in this case is whether the debt of £100 which the uncle, James G. Fitzgerald, owed to his nephew, the plaintiff Michael Fitzgerald, must be taken to have been satisfied by the payment of the legacy of £100, which the uncle bequeathed to the plaintiff, so as to preclude the plaintiff from recovering the debt from the defendants, the executors of the uncle. There is a well-established presumption of law that where a debtor leaves by will to his creditor a legacy of an amount equal to or greater than the debt, the legacy when paid must be deemed to have been given in satisfaction of the debt. **G** Although this presumption has often been criticised by judges, there can be no doubt that it still exists. The argument in this case has mainly been directed to the contention that in the present circumstances the debt must necessarily be different from the legacy by reason of the fact that the debt carries interest, and therefore the sum due in respect of debt and interest must be an uncertain amount. It is said that, where a debt carries interest from day to day, there cannot be a presumption that a legacy of an amount equal to the debt was intended to be given **H** in satisfaction of the debt. If that argument were valid, it is inconceivable that there should be no authority to support it during the long period which has elapsed since the rule was first established. In the absence of any such authority, I think I am bound to follow the presumption that where a man owes a sum of money to another, and then leaves by will to his creditor as a legacy a sum equal to or greater **I** than the amount of the debt, the creditor must not have both legacy and debt, and to hold that this presumption is not rebutted by the fact that the debt carries interest from day to day. In my opinion, the plaintiff is not entitled to recover the debt of £100, and accordingly there must be judgment for the defendants.

Judgment for defendants.

Solicitors : *Herbert Z. Deane & Co.*; *Stephenson, Harwood & Tatham.*

[*Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.*]

ESHUGBAYI ELEKO *v.* NIGERIA GOVERNMENT (ADMINISTRATION OFFICER)

[PRIVY COUNCIL (Lord Hailsham, L.C., Lord Buckmaster and Lord Warrington),
April 30, May 1, June 19, 1928]

[Reported [1928] A.C. 459; 97 L.J.P.C. 97; 139 L.T. 527;
44 T.L.R. 632; 72 Sol. Jo. 452]

Habeas Corpus—Application for writ—Obligation of judge to hear although application refused by other judge—Application of principle to Supreme Court of Nigeria.

Although by the Supreme Court of Judicature Act, 1873, the courts have been combined in the one High Court of Justice, each judge of that court still has jurisdiction to entertain an application for a writ of habeas corpus, and both in term time and in vacation he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application. The same principle must apply in the case of the judges of the Supreme Court of Nigeria.

Notes. This case must be read subject to the observations on it of the Queen's Bench Divisional Court in *Re Hastings* (No. 2), [1958] 3 All E.R. 625, in which the history of the habeas corpus and the authorities on jurisdiction to grant the writ were reviewed. The Divisional Court held that the right to apply to the Queen's Bench Division or any judge thereof is exhausted by an application to the Queen's Bench Divisional Court, and doubted whether an applicant for habeas corpus has the right to apply successively from judge to judge of the same Division except during the vacation. See also *Re Hastings* (No. 3), [1959] 1 All E.R. 698.

Considered: *Re Carroll*, [1930] All E.R.Rep. 189; *Re Hastings* (No. 2), [1958] 3 All E.R. 625.

As to the courts or judges to whom an application for habeas corpus may be made, and as to the renewal of such an application, see 11 HALSBURY'S LAWS (3rd Edn.) 38, 39; and for cases see 16 DIGEST 258. For the Habeas Corpus Act, 1640, and the Habeas Corpus Act, 1679, see 4 and 6 HALSBURY'S STATUTES (2nd Edn.) 133 and 83 respectively.

Cases referred to:

- (1) *Ex parte Bell Cox* (1887), 20 Q.B.D. 1; 57 L.J.Q.B. 98; 58 L.T. 323; 36 W.R. 12, C.A.; reversed sub nom. *Cox v. Hakes* (1890), 15 App. Cas. 506; 60 L.J.Q.B. 89; 63 L.T. 392; 54 J.P. 820; 39 W.R. 145; 6 T.L.R. 465; 17 Cox, C.C. 158, H.L.; 16 Digest 250, 508.
- (2) *Ex parte Bouvy* (No. 2) (1900), 18 N.Z.L.R. 601; 16 Digest 259, s.
- (3) *Re Loo Len* (No. 2), [1924] 1 D.L.R. 910; 1 W.W.R. 735; 41 Can. Crim. Cas. 388; 33 B.C.R. 213; Digest Supp.
- (4) *Crowley's Case* (1818), 2 Swan. 1; Buck, 264; 36 F.R. 514, L.C.; 16 Digest 262, 666.
- (5) *Ex parte Partington* (1845), 13 M. & W. 679; 2 Dow. & L. 650; 14 L.J.Ex. 122; 9 J.P. 443; 9 Jur. 92; 153 E.R. 284; 16 Digest 258, 611.

Appeal by special leave against the judgment of the full court of the Supreme Court of Nigeria, dated June 10, 1926, affirming a judgment of TEW, J., dated April 26, 1926.

The facts and arguments are set out in the judgment.

Montgomery, K.C., and *Horace Douglas* for the appellant.

Stafford Cripps, K.C., *The Solicitor-General for Nigeria* (*J. C. Howard*) and *Pocock* for the respondent.

June 19. **LORD HAILSHAM, L.C.**—The facts which give rise to this appeal can be shortly stated, but the question of law involved is one of grave constitutional

A importance to His Majesty's subjects in this country as well as in the overseas dominions. By the Deposed Chiefs' Removal Ordinance of 1917, as amended in 1925, it was provided that:

B "When a native chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the governor . . . the governor may :
C (a) if native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office . . . by an Order under his hand direct that such chief or native shall within such time as shall be specified in the Order leave the area over which he had exercised jurisdiction or influence, and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent of the governor.
D (2) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid as directed by the governor . . . shall be liable to imprisonment for six months, and the governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the governor may by such Order direct."

On Aug. 6, 1925, the acting governor purported to make an order under the said ordinance in the following terms :

E "Whereas Eshugbayi, a native chief holding the office of Eleko in the colony, has with my sanction been deposed and removed from his office, and whereas native law and custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office : Now therefore I do hereby direct that the said Eshugbayi shall leave the said colony and the province of Abeokuta Ijebu and Ondo within twenty-four hours of the service of this Order, and that he shall not return to any of the said areas
F without my consent."

On Aug. 8, 1925, the acting governor made a further order reciting the order of Aug. 6, reciting that the appellant had refused or neglected to comply with it, and ordering that the appellant should be deported forthwith to Oyo in the province of Oyo.

G Immediately on service of the order of Aug. 6 the appellant gave notice of motion for leave to set aside the order and to stay execution upon it. This motion was heard on Aug. 7 and 8 by the acting Chief Justice of Nigeria, and on Aug. 8 the motion was dismissed. On the dismissal of the motion the appellant gave notice of motion on Aug. 8 for leave to issue a writ of habeas corpus, and on Aug. 10 leave was granted for a rule nisi for a writ of habeas corpus returnable on Aug. 13. On Aug. 13 cause was shown against the rule and the rule was discharged on technical grounds without going into the merits. Meanwhile the appellant on the same Aug. 8 had issued a writ against the acting governor and the Chief Secretary of the Government of Nigeria, claiming a declaration that the order of Aug. 6, 1925, was void, and asking for an injunction to restrain the defendants from taking any steps under the order. On Aug. 19 the Attorney-General moved to stay or dismiss this action as being frivolous and vexatious and an abuse of the process of the court.
H The motion was heard by the acting Chief Justice and on Sept. 7, 1925, he ordered that the action should be dismissed on these grounds. On Sept. 18, 1925, the appellant gave a fresh notice of motion for leave to issue a writ of habeas corpus, and on Oct. 12, 1925, the acting Chief Justice gave judgment refusing the motion. The learned judge held that the orders of Aug. 6 and 8 had been validly made and that the detention of the appellant was therefore lawful. On Dec. 4, 1925, the appellant gave a fresh notice of motion for a writ of habeas corpus. This motion was heard before Tew, J., on Dec. 8, 1925, when the Attorney-General took a preliminary objection that a similar application based on the same material had

been made by the appellant and had been dismissed by the acting Chief Justice, and that in view of that refusal the application could not be entertained; and on Dec. 14, 1925, the learned judge gave judgment upholding the objection and dismissing the motion on that ground. The appellant appealed against this decision, and, on the hearing of the appeal, took the point that there was no evidence that the previous application had been made or that it had been based on the same ground; and the court directed that the case should be returned to the learned judge in order that evidence might be filed upon these points. Accordingly, on Mar. 9, 1926, an affidavit was filed by the Solicitor-General, and on Mar. 15, 1926, TEW, J., re-heard the motion and dismissed it on the same ground as before. From this decision the appellant again appealed, and on June 1, 1926, the full court in a considered judgment dismissed the appeal and upheld the view of TEW, J., that the preliminary objection prevailed, and that he had no jurisdiction to entertain the application. It is from this decision that the present appeal is brought before the Board.

On the hearing before this Board the appellant contended, in the first place, that there never had been a decision on the merits of his application and that the dismissal of the second motion for a habeas corpus by the acting Chief Justice had been merely on technical grounds. Even if this contention were relevant, it was not in fact made out. In their Lordships' view it is clear from a perusal of the judgment that the merits were most carefully considered by the acting Chief Justice, and that the refusal was based expressly on the learned judge's view on the merits of the application. But it was further contended on behalf of the appellant that by the common law of this country, which applies in Nigeria, it is the right of any imprisoned person to apply successively to every tribunal competent to issue a writ of habeas corpus, and that each tribunal must determine such an application on its merits unfettered by the decision of any other tribunal of co-ordinated jurisdiction, even if the grounds urged are exactly the same. On behalf of the respondent, counsel admitted the existence of the right to make successive applications; but he argued that the applications must be to different courts. He pointed out that in the present case each application had been made to the Supreme Court of Nigeria, and he contended that since that court had determined the matter by dismissing the application on Oct. 12, no fresh application based upon the same material could be entertained by that court. In support of this argument he cited the language of LORD ESHER in *Ex parte Bell Cox* (1) (20 Q.B.D. at p. 13):

"It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the courts in succession."

He pointed out that, although the decision of the Court of Appeal had been overruled in the House of Lords, where the case is reported under the name *Cox v. Hakes* (1), none of the learned Lords had dissented from LORD ESHER's statement of the law, and LORD BRAMWELL's language (15 App. Cas. at p. 523) seemed to indicate that his view of the old practice was the same. He further called attention to the fact that no instance could be found in the books of applications being made to successive judges of the same court, and he cited decisions in New Zealand in *Ex parte Bouvy* (2) and of the Court of Appeal of British Columbia in *Re Loo Len* (No. 2) (3) to the same effect.

This constitutes a formidable body of judicial opinion, and their Lordships have thought it right, therefore, to examine with some care the earlier history of the writ. This will be found set out in HALE'S PLEAS OF THE CROWN, vol. II, p. 143; in BACON'S ABRIDGEMENT under the title "Habeas Corpus, Section B"; in SIR WILLIAM BLACKSTONE'S COMMENTARIES, vol. III, p. 131 et seq.; and in the discussion of BLACKSTONE's opinion appearing in LORD ELDON's judgment in *Crowley's Case* (4) (2 Swan. at p. 39 et seq.). From these authorities it appears that the writ of habeas corpus was originally issuable out of the Court of King's Bench and out of the Court of Chancery; but that in very early days the Courts of Common Pleas

A and Exchequer had claimed the right to issue the writ in protection of their own officers and suitors, and that this practice had been gradually extended to other cases. In the 17th century the Habeas Corpus Act, 1640, expressly recognises the right and duty of the Court of Common Pleas to order the writ to issue; and the Habeas Corpus Act, 1679, enacts that it shall be lawful to move and obtain habeas corpus as well out of the High Court of Chancery or Court of Exchequer as out of the Courts of King's Bench or Common Pleas or either of them. This latter **B** Act further provided that the Lord Chancellor or any one of His Majesty's justices might grant a habeas corpus in vacation and imposed heavy penalties upon any judge who wrongfully refused to entertain the application. It was conceded for the respondent that under the terms of this statute application could be made in vacation to successive judges of the same court. This led to the curious result **C** upon the respondent's argument that if application were made in vacation it could be renewed to each judge of the court, but that if it were made in term it could only be made once to the Court of Chancery and once to each of the three Courts of Common Law. But a far more serious consequence of the respondent's argument would be the effect upon the right to apply for this writ of the Judicature Act, 1873. That statute combined into one court the old High Court of Chancery, the **D** Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer, together with the Admiralty and Probate Courts and the Court for Divorce and Matrimonial Causes. If, therefore, the respondent is right in contending that an application for a writ of habeas corpus can only be entertained once by any one court, it necessarily follows that the effect of the Judicature Act must have been to deprive the subject of the right which he had previously enjoyed of applying **E** successively to the Court of Chancery and to each of the three Common Law Courts, and to limit him in future to one application to the Supreme Court of Judicature. Their Lordships would be reluctant to reach such a conclusion unless compelled to do so by clear words. The writ of habeas corpus is a high prerogative writ for the protection of the liberty of the subject, and it would be a startling result if a statute enacted primarily for simplification of procedure should have materially cut down **F** that protection. But, in fact, their Lordships do not think that the Judicature Act has had this result, or that the contention of the respondent is well founded.

It is true that there is no reported case before the year 1873 of applications being made to successive judges of the same court, but it must be remembered that the Common Law Courts usually sat in banco so that an application to the court was in effect an application to all the judges of the court sitting together; and there is **G** a precedent for application being made to a judge of the Court of Exchequer sitting in chambers and a subsequent application being made to the Court of Exchequer in *Ex parte Partington* (5), where PARKE, B., says (13 M. & W. at p. 683):

“This case has already been before the Court of Queens' Bench, on the return of a habeas corpus, and before my Lord Chief Baron at chambers, on a subsequent application for a similar writ. In both instances the discharge was **H** refused. The defendant, however, has a right to the opinion of every court as to the propriety of his imprisonment, and therefore we have thought it proper to examine attentively the provisions of the statute, without considering ourselves as concluded by these decisions.”

I If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that although by the Judicature Act the courts have been combined in the one High Court of Justice, each judge of that court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application. The same principle must apply in the case of the judges of the Supreme Court of Nigeria. It follows that, in the opinion of this Board, the learned judge

was wrong in refusing to hear the application in the present case on its merits, and the appeal must be allowed. In expressing that view, their Lordships must not be taken to be offering any opinion on the merits of the application or on the validity of the orders impugned. These matters will be investigated by the learned judge who hears the application and will be decided by him on the evidence already filed and any further evidence which may be placed before him. The appellant must have the costs of his appeal here and below; the costs of the application before Tew, J., must abide the result of the re-hearing. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors: *E. F. Hunt; Burchells.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

G. AND T. EARLE, LTD. v. HEMSWORTH RURAL DISTRICT COUNCIL

[COURT OF APPEAL (Scrutton, Lawrence and Greer, L.JJ.), July 17, 1928]

[*Reported* 140 L.T. 69; 44 T.L.R. 758]

Chose in Action—Assignment—Building contract—Retention fund arising before assignment—Money payable after date of assignment—Action under assignment by assignees against building owners—Need to join assignors—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 136.

In November, 1922, the defendants entered into a building contract with a firm of contractors for a lump sum. The contract provided for interim payments, but no money was to become payable except on the architect's certificate in writing. The certificates were to be issued when work to the value of £1,000 had been executed and thereafter at monthly intervals. The amount to be certified was to be at the rate of 90 per cent. of the value of the work, and the balance of 10 per cent. was to be retained until the sum so retained (called "the retention fund") amounted to £2,412, after which the contractors were to be paid monthly to the full value of work executed and material supplied. The contract was varied by consent, and, in the events which happened, the retention fund amounted to £1,000 at the beginning of 1924, and this sum was included without distinction in the architect's final certificate in January, 1927. The contractors had been buying cement from the plaintiffs, and, being in arrears of payment and desirous of obtaining further credit, in April, 1924, they assigned the retention fund to the plaintiffs. Due notice of the assignment was given to the defendants who acknowledged it in May, 1924. The contractors had issued a number of debentures to a bank charging their property, both present and future, and there was a proviso that the contractors were not to be at liberty to create any mortgage or charge on any of their assets in priority to the debentures. In October, 1924, a receiver was appointed for the debenture holders and shortly thereafter a resolution for the voluntary winding-up of the contractors was passed. The receiver refused to acknowledge the plaintiffs' right to payment under the assignment in priority to the debenture holders. On the architect's final certificate being given, the defendants, declining to interplead, paid the retention fund to the receiver for the debenture holders. On a claim by the plaintiffs against the defendants under the assignment,

Held: the retention fund arose out of an existing contract, and, although it did not become payable until after the date of the assignment, it was a debt

A or other legal thing in action which could be assigned and sued for without joining the assignor as a party; the assignment was within the Law of Property Act, 1925, s. 136, and, therefore, the plaintiffs were entitled to recover on the assignment from the defendants.

B **Notes.** As to assignments under the Law of Property Act, 1925, see 4 HALSBURY'S LAWS (3rd Edn.) 484-492; and for cases see 8 DIGEST (Repl.) 552-556. For the Law of Property Act, 1925, c. 136, see 20 HALSBURY'S STATUTES (2nd Edn.) 715.

Cases referred to:

- (1) *Brice v. Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 8 Digest (Repl.) 553, 78.
- (2) *Walker v. Bradford Old Bank, Ltd.* (1884), 12 Q.B.D. 511; 53 L.J.Q.B. 280; 32 W.R. 644, D.C.; 8 Digest (Repl.) 554, 89.
- (3) *Re Toward, Ex parte Moss* (1884), 14 Q.B.D. 310; 54 L.J.Q.B. 126; 52 L.T. 188, D.C.; 5 Digest 695, 6123.
- (4) *Drew v. Josolyne* (1887), 18 Q.B.D. 590; 56 L.J.Q.B. 490; 57 L.T. 5; 35 W.R. 570; 3 T.L.R. 482, C.A.; 7 Digest 417, 340.
- (5) *Torkington v. Magee*, [1902] 2 K.B. 427; 71 L.J.K.B. 712; 87 L.T. 304; 18 T.L.R. 703, D.C.; reversed [1903] 1 K.B. 644; 72 L.J.K.B. 336; 88 L.T. 443; 19 T.L.R. 331, C.A.; 8 Digest (Repl.) 556, 98.

D **Appeal** from a judgment of WRIGHT, J.

On Nov. 21, 1922, the defendants, Hemsworth Rural District Council, entered into a building contract for a lump sum with a firm of contractors for the construction of a number of cottages under a housing scheme. By cl. 29 of the contract

E “(i) Interim payments. No money shall become due to the contractor unless and until the architect shall certify in writing the amount thereof and that the contractor is entitled thereto. (ii) When work to the value of £1,000 has been executed and thereafter at monthly intervals the architect shall certify in writing to the contractor and the employers the amount from time to time payable to the contractor under the contract and shall issue such monthly certificate not later than the fifteenth day of each month following that in which the first certificate is given and the employers shall within fourteen days of the date of issue of the certificate pay to the contractor the sum so certified. (iii) The amount to be certified by the architect on his first and monthly certificates as due to the contractor shall be at the rate of 90 per cent. of the value of the work. The balance of 10 per cent. of the value of the work shall be retained until the sum so retained (hereinafter called ‘the retention fund’) amounts to £2,472 after which the contractor shall be entitled to be paid monthly to the full value of all work executed and material supplied. One half of the retention fund shall be paid (subject to the conditions set out herein) to the contractor at the completion or occupation of the works and the other half together with any further sum found due to the contractor at the final adjustment of the accounts by the quantity surveyor shall be paid six months after completion or occupation of the works provided that all defaults for which the contractor is liable are made good and that he has otherwise discharged his liabilities under the contract. (iv) The sums forming the retention fund shall be deposited by the employers as they accrue in a bank to be agreed.”

I The contract was varied by consent, and, at the beginning of 1924, the retention fund amounted to £1,000, two payments of £500 and £972 respectively to the contractors having reduced it to that amount. The £1,000 was never deposited at the bank and remained a merely notional fund, but both parties treated it as a separate sum capable of being earmarked. On Jan. 28, 1927, it was included without distinction in the architect's final certificate for £1,848 10s. 2d. The plaintiffs, G. & T. Earle (1925), Ltd., had been supplying cement to the contractors

who were in arrears with their payments for the cement to the sum of £671. The contractors being desirous of obtaining further credit, on April 7, 1924, assigned to the plaintiffs the retention fund :

"In part reduction of the amount now, or to be, owing from us to you for goods supplied by you, we hereby assign to you all moneys now or hereafter to become due to us from [the defendants] for retention moneys in respect of the Grimethorpe housing scheme, and for which your receipt shall be a sufficient discharge. It is understood that we are only to be credited with the amount actually paid to you under the assignment as and when the same is received by you."

Due notice of the assignment was given by the plaintiffs to the defendants on April 8, 1924, and this was acknowledged on May 26, 1924. By that date, the contractors had issued a number of debentures to the Manchester and County Bank, which were dated at various periods from Feb. 1, 1900, to Feb. 2, 1924, and they charged the undertaking and property, both present and future, of the contractors, the charge being a specific charge on their freehold and leasehold property, machinery, goodwill and uncalled capital, and a floating charge on all their other assets, subject to a proviso that the contractors were not to be at liberty to create any mortgage or charge on any of the assets in priority to the debentures. In October, 1924, a receiver for the debenture holders was appointed and he duly entered into possession. Seven days after his appointment, a resolution was passed for the voluntary winding-up of the contractors. The receiver refused to recognise the plaintiffs' right to payment under their assignment in priority to the debenture holders, and on the architect's final certificate being given, the defendants declined to interplead and paid the retention fund to the receiver. The plaintiffs claimed the £1,000 retention fund from the defendants, and were held entitled by *WRIGHT, J.*, to recover it on their assignment. The defendants appealed.

W. Norman Raeburn, K.C., and *N.L.C. Macaskie* for the defendants.
Alexander Neilson, K.C., and *W. H. Owen* for the plaintiffs.

SCRUTTON, L.J.—I begin my judgment in this case by saying that I entirely agree with the judgment of *WRIGHT, J.*, but, out of deference to the argument that counsel for the defendants has presented with his usual fairness and clearness, I will say a few words.

The defendants, who are appealing, have put themselves in the unfortunate position of paying a sum of money to one person and finding themselves sued for the same sum of money by a second person, and, unfortunately, they have only themselves to thank for it. They might very well have interpleaded and left the two contending parties to fight for the sum themselves, but, in spite of that information being given to them, they have chosen to pay one of the contending parties and now find themselves liable to pay the other contending party a second time. I cannot say anything more about it because they acted under the advice of a gentleman who is dead. The question arises in this way. A firm for whom Messrs. Wagstaff & Sons were architects were executing a building scheme for the defendants, or two schemes at least. The particular scheme in question relates to what is called the Grimethorpe contract, and that contract, which is based on the specification and priced bill of quantities, was for the sum of £49,459 8s. 3d., referred to as the contract price. When the question arises as to how the contract price is to be paid, one refers to cl. 29 [*HIS LORDSHIP* read cl. 29 (i), (ii) and part of (iii), and continued:] The certificates proceeded so far that £2,472 was being retained by the defendants, and being retained because the contractor had done work of that value for which he would be entitled to be paid, though the sum was not yet payable. If the contract had been carried out, which it was not because it was varied, the proceedings would have gone on in this way [*HIS LORDSHIP* read the remainder of cl. 29 (iii) and (iv) and continued:] It is

A curious that the contract uses the word "accrue," because the word "accrue," after being used by LORD ESHER in *Brice v. Bannister* (1), is used again by the Divisional Court in *Walker v. Bradford Old Bank, Ltd.* (2) as describing the debt that can be assigned—"If an accruing debt arising out of contract can be assigned," and the words here used about the retention fund are "as they accrue." The terms of the contract were not carried out, but what happened was that, in the case of the Grimethorpe contract, first of all £972 was paid to the contractors, reducing the retention money to £1,500, and then on completion of half the number of the houses the £1,500 was further reduced by £500, leaving, therefore, a retention fund of £1,000 on the Grimethorpe contract, the remaining £1,000 to be retained until the last and final certificate. A final certificate was given ultimately which showed that £1,848 was due to the contractors. In the meantime, the contractors, wanting cement to complete their houses and having got a certain amount from the plaintiffs for which they had not paid, desired to have still more cement, and in order to obtain it, on April 7, 1924, they assigned to the suppliers of the cement, the plaintiffs,

D "In part reduction of the amount now or to be owing from us to you for goods supplied by you, we hereby assign to you all moneys now or hereafter to become due to us from the [defendants] for retention moneys."

E At that time all the retention fund had accrued; it had not been put in the bank as originally proposed, but it had all been deducted and it had been reduced to £1,000, labelled retention moneys, by these two payments out in variation of the contract, but there was a fund of £1,000 retention moneys already earmarked, and earmarked because it represented the value of work already done under the contract.

F The question is whether that assignment is a good assignment. The person to whom the defendants in fact paid the money is the receiver for the debenture holders under the original contract, who had a floating charge on all assets of the contractors which crystallised, to use a phrase used in the cases, some time after the date of this assignment, when a receiver was appointed in consequence of some default or other under the terms of the debentures. The question then is, as raised by counsel for the defendants, whether this is such an assignment of, to use the language of the Law of Property Act, 1925, s. 136, a debt or other legal thing in action that the assignee can sue without joining the assignor as a party. As I understood counsel's argument, that is the sole question. I have not followed that he has gone into the extremely interesting and intricate question of equitable priorities, apart from the question of who are the proper parties, and I take his objection to be: This is not an assignment of a debt or other legal thing in action and, not being such an assignment, it cannot be sued for in any proceeding unless the assignor is joined as a party. In the view I take of the cases which have been cited (I am not going through them again; WRIGHT, J., has gone through them and I have listened to them as counsel cited them), it has been effectively determined by a series of cases binding on us now that where the thing assigned arises out of an existing contract, although it may not become payable until a later date than the assignment, it is a debt or other legal thing in action which can be assigned and sued for without joining the assignor as a party. Two of the three cases which counsel cited to us on the question of these agreements, first of all I *Re Toward, Ex parte Moss* (3), which was a ship case in which MATHEW, J., treated the assignment of a retention fund under a building contract as being clearly within the language of the Supreme Court of Judicature Act, 1873, and, secondly, the decision in *Drew v. Josolyne* (4), where, under the building contract itself, the retention fund was treated as a matter that might be assigned under the language of the Judicature Act, the language of the Divisional Court in *Walker v. Bradford Old Bank, Ltd.* (2), "If an accruing debt arising out of contract can be assigned," and the very wide definition of CHANNELL, J., in *Torkington v. Magee* (5), appear to me to show that the judge below has taken the right view when he

decided that this particular retention fund assignment is a matter which comes within the language of the Judicature Act or the Law of Property Act, 1925, and, indeed, to my own knowledge, it has been constantly acted on by builders and their assignees and persons concerned with them in building contracts for a very considerable time.

I, therefore, come to the conclusion that this appeal must be dismissed with the usual consequences, and I do not suppose it is any consolation to the defendants to know it is entirely their own fault that they have to pay the price in this way instead of interpleading and seeing somebody else fight it at somebody else's expense.

LAWRENCE, L.J.—I am of the same opinion.

GREER, L.J.—I agree.

Appeal dismissed.

Solicitors: *Emmett & Co.*, for *C. E. Scholefield*, Hemsworth; *Gregory, Rowcliffe & Co.*, for *Holden, Scott & Co.*, Hull.

[*Reported by T. W. MORGAN, Esq., Barrister-at-Law.*]

Re CATCHPOOL. HARRIS v. CATCHPOOL

[CHANCERY DIVISION (Russell, J.), March 7, 8, 12, 1928]

[Reported [1928] Ch. 429; 97 L.J.Ch. 181; 139 L.T. 17;
72 Sol. Jo. 226]

Settled Land—Land held under one and the same settlement—Vesting in trustees—“Trustees (if any) of the settlement”—Law of Property Act, 1925 (15 Geo. 5, c. 20), Sched. I, Part IV, para. 1 (3).

Where, prior to the coming into operation of the Law of Property Act, 1925, the entirety of the land is settled land held under one and the same settlement, it vests, under Sched. I, Part IV, para. 1 (3), to the Act, in the trustees (if any) of the settlement under the old law as joint tenants under the statutory trusts, and, if there are no such trustees, the land vests in the Public Trustee on the statutory trusts pending their appointment.

Notes. As to transitional provisions under the Law of Property Act, 1925, as to land held in undivided shares, see 27 HALSBURY'S LAWS (2nd Edn.) 629-635; and for cases on the subject, see 40 DIGEST (Repl.) 858-863. For the Law of Property Act, 1925, Sched. I, Part IV, see 20 HALSBURY'S STATUTES (2nd Edn.) 859; and for the Settled Land Act, 1925, s. 30, see 23 HALSBURY'S STATUTES (2nd Edn.) 82.

Case referred to:

(1) *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62; 96 L.J.Ch. 388; 137 L.T. 281; 43 T.L.R. 578; 71 Sol. Jo. 451, C.A.; 40 Digest (Repl.) 847, 3235.

Adjourned Summons.

Thomas Catchpool, by his last will, settled all his real estate on certain trusts. He died on May 4, 1877, and on Dec. 23, 1915, the last surviving trustee of the settlement died, having by his will appointed his wife, the defendant Florence Emma Catchpool, sole executrix. Prior to the coming into operation of the Law of Property Act, 1925, she was the sole surviving personal representative of the testator's will. This summons was issued by the tenant for life asking: (1) Whether by virtue of para. 1 (3) of Part IV of Sched. I to the Law of Property Act, 1925, the entirety of the land was now vested in the said Florence Emma Catchpool, the

A executrix, by representation of the testator, on the statutory trusts, as being, under s. 30 (3) of the Settled Land Act, 1925, the trustee of the settlement; or (2) whether at the commencement of the Law of Property Act, 1925, there were no trustees within the meaning of the said sub-paragraph, and, under proviso (i) thereof, the entirety of the property, pending the appointment of such trustees, vested in the Public Trustee; and (3) that in the event of the court holding that the entirety of the land was now vested in the Public Trustee, certain named persons should be appointed trustees of the settlement, and that, the Public Trustee not having been requested to act, service on him might be dispensed with.

H. A. Rose, for the plaintiff, referred to *Re Ryder and Steadman's Contract* (1).

C *C. R. R. Romer*, for the defendants, Florence Emma Catchpool, the persons entitled in remainder, and the Public Trustee, referred to *Re Ryder and Steadman's Contract* (1).

Cur. adv. vult.

D Mar. 12. **RUSSELL, J.**, read the following judgment: It is clear that this case falls within para. 1 (3) of Part IV of Sched. I to the Law of Property Act, 1925. The entirety of the land was settled land held under one and the same settlement, namely, the will of Thomas Catchpool. Under the provisions of para. 1 (3) the land would, on the coming into operation of the Act, vest in the trustees of the settlement if there were any such trustees, and if there were no such trustees then it would vest in the Public Trustee pending their appointment.

E The question to be decided is whether, at the relevant moment of time, there were, or were not, any trustees of the settlement within the meaning of para. 1 (3). This depends on whether one is to look for persons who would be trustees of the settlement within the provisions of the old Settled Land Acts, or for persons who would be trustees of the settlement within the provisions of the Settled Land Act, 1925. If the former, then, in the present case, none are to be found; if the latter, then the legal personal representative of the testator is available under s. 30 of the Settled Land Act, 1925. It has been decided by the Court of Appeal that, for the purpose of ascertaining under para. 1 (2) whether land is not settled land, or under para. 1 (3) whether land is settled land, you must have regard to the law as it existed before the commencement of the Act: *Re Ryder and Steadman's Contract* (1). In my opinion, it follows from that decision, and the reasons given in the judgments in support of it, that the words "the trustees (if any) of the settlement" refer to persons who were trustees of the settlement under the old law. **F** **SARGANT, L.J.**, in particular, uses language which appears to me to lead to this result, where he says ([1927] 2 Ch. at p. 80):

H "Now the transitional provisions in Part IV are for the very purpose of changing the legal position existing previously to the Act into a new legal position, to take effect under and subsequent to the Act. And, when in the course of so doing the Act defines the position existing previously to the Act, the definition must naturally, and indeed almost inevitably, refer to the law as it stood before the Act, and can hardly, without some confusion of thought, be importing into that definition a state of law which is only to exist after the Act."

I The result is that the land has vested in the Public Trustee pending the appointment of trustees. Here the Public Trustee has not become entitled to act in the trust, therefore, if trustees of the settlement are appointed, the land will vest in them as joint tenants on the statutory trusts. I am, accordingly, asked to appoint trustees of the settlement. I will make a declaration in the terms of the second alternative in para. (1) of the summons. I will appoint the persons named in the summons to be trustees of the settlement, and I dispense with service on the Public Trustee.

Solicitors: *Charles Russell & Co.*, for *Elwes, Turner & Smith*, Colchester.

[*Reported by A. W. CHASTER, Esq., Barrister-at-Law.*]

McCREANNEY v. McCREANNEY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Bateson, J.), January 12, 18, 1928]

[Reported 138 L.T. 671; 92 J.P. 44; 26 L.G.R. 185]

Husband and Wife—Summary proceedings—Maintenance—Payment of weekly sum to wife—Undertaking by wife not to compel husband to allow her maintenance other than agreed weekly sum—Failure by husband to continue payments under separation agreement—Summons by wife for maintenance—Jurisdiction of justices—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39), s. 4, as amended by Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 Geo. 5, c. 51), s. 1 (1).

By a separation agreement a husband undertook to pay his wife a weekly sum by way of maintenance, and the wife undertook that she would not at any time thereafter "by any means whatsoever endeavour to compel the husband to allow her any . . . maintenance other than" the weekly sum. On the husband failing to continue the payments under the agreement, the wife took out a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, for an order against her husband for wilfully neglecting to provide reasonable maintenance for her and her child. The justices dismissed the summons on the ground that her undertaking in the agreement ousted their jurisdiction.

Held: the justices had jurisdiction to make a maintenance order to the amount of the weekly sum provided for in the agreement, if they found that the husband had failed to provide the maintenance contracted for in the agreement.

Notes. The Summary Jurisdiction (Married Women) Act, 1895, s. 4, has been applied, with modifications, by s. 1 (2), and amended by s. 6, of the Married Women (Maintenance) Act, 1949.

Referred to: *Iles v. Iles* (1931), 145 L.T. 71.

As to an application by a wife for maintenance where there has been a separation by consent, see 12 HALSBURY'S LAWS (3rd Edn.) 484-485; and for cases see 27 DIGEST (Repl.) 701-703. For the Summary Jurisdiction (Married Women) Act, 1895, s. 4, and the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1, see 11 HALSBURY'S STATUTES (2nd Edn.) 849, 864. For the Married Women (Maintenance) Act, 1949, s. 1 and s. 6, see 29 HALSBURY'S STATUTES (2nd Edn.) 736, 738.

Case referred to:

- (1) *Diggins v. Diggins*, [1927] P. 88; 96 L.J.P. 14; 136 L.T. 224; 90 J.P. 208; 43 T.L.R. 37, D.C.; 27 Digest (Repl.) 714, 6809.

Appeal from an order of the justices of the City of Liverpool.

On Nov. 9, 1927, the justices dismissed a summons taken out by May Catherine McCreanney, the applicant, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, for an order against her husband, John Hubert McCreanney, the respondent, for wilfully neglecting to provide reasonable maintenance for her and her infant child. No notes were taken at the hearing, but it appeared from an affidavit of the solicitor to the wife that an agreement of separation made on Mar. 8, 1927, between the wife and the husband was produced in court and admitted. By this, the husband undertook to pay to the wife by way of maintenance the sum of 17s. 6d. weekly, and the wife undertook that she would not at any time hereafter molest or disturb the husband "or by any means whatsoever endeavour to compel the husband to allow her any alimony or maintenance other than the said sum of 17s. 6d. per week." The husband admitted that he had only made three weekly payments under the agreement. No witnesses were called. The

- A solicitor for the wife cited *Diggins v. Diggins* (1) as authority for the justices to make the order, contending that, the contractual obligation of the husband having been broken, the justices had jurisdiction to make the order. The husband's solicitor submitted that, by the undertaking of the wife not by any means whatever to endeavour to compel the husband to allow her any alimony or maintenance other than the said sum of 17s. 6d. a week, the justices' jurisdiction was ousted, and the
- B wife's sole remedy was in the county court. The justices adopted this view and dismissed the summons. The wife appealed.

The relevant part of the Summary Jurisdiction (Married Women) Act, 1895, s. 4, as amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (1), provides :

- C "Any married woman . . . whose husband shall have been guilty of . . . wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain . . . may apply to any court of summary jurisdiction acting within the city, borough, petty sessional or other division or district . . . in which the cause or complaint shall have wholly or partially arisen for an order or orders under this Act. . . ."
- D *C. E. Jones*, for the wife, referred to *Diggins v. Diggins* (1). The husband did not appear, and was not represented.

Cur. adv. vult.

- Jan. 18. **LORD MERRIVALE, P.**, read the following judgment.—This case raises a question not expressly covered by any recent decision. These parties separated under an agreement whereby the husband contracted for payments for
- E maintenance at the rate of 17s. 6d. per week for a period which has not expired, and the wife bound herself not by any means whatsoever to endeavour to compel the husband to allow her any "alimony or maintenance other than the said sum of 17s. 6d. per week." The agreed payments not being kept up, the wife proceeded before justices by summons under the Summary Jurisdiction (Separation and
- F Maintenance) Acts, 1895 to 1925, for an order on the husband for weekly payments on the ground that he had wilfully neglected to maintain her. This application was opposed on the ground that the proper forum to determine the wife's claim was the county court, and, moreover, that the wife had bound herself expressly not to proceed for maintenance under these statutes, and could not bring her case within the ruling of this court in *Diggins v. Diggins* (1). We are of opinion that,
- G if the justices find that the husband has failed to provide for the wife the maintenance contracted for by this agreement, they have jurisdiction to make an order for weekly payments to the wife—at any rate, to the amount of 17s. 6d. per week. This is advantageous to the wife in view of getting an expeditious decision and at small cost and to the husband in that, whereas a county court judge must give judgment against him in case of default, whether wilful or not, the justices will not make an order unless wilful default is proved. It is an admissible course under
- H the statutes taking the language used therein in its everyday meaning; and the manifest intention of the Act of 1925 to simplify procedure for the classes of married women who come within its terms ought not to be defeated by argumentative subtleties. This case, therefore, must go back to the justices to be determined on its merits.

- I **BATESON, J.**—I agree.

Appeal allowed.

Solicitors: *Ronald G. Taylor*, for *R. E. Warburton*, Liverpool.

[*Reported by C. G. MORAN, Esq., Barrister-at-Law.*]

MORELLI v. FITCH AND GIBBONS

[KING'S BENCH DIVISION (Acton and Branson, JJ.), July 12, 1928]

[Reported [1928] 2 K.B. 636; 97 L.J.K.B. 812; 140 L.T. 21;
44 T.L.R. 737; 72 Sol. Jo. 503]

Sale of Goods—Implied condition of fitness—Merchantable quality—Sale by description—Bottle of ginger wine—Defective bottle—Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 14 (2).

The plaintiff requested the defendants, who sold liquor by retail at an off-licence shop, to sell him a bottle of Stone's ginger wine, and after purchasing the bottle took it home with him. While endeavouring to extract the cork by means of a corkscrew, the neck of the bottle came away, with the result that the plaintiff injured his hand.

Held: the sale was one by description from a seller who dealt in goods of that description within the Sale of Goods Act, 1893, s. 14 (2); the bottle was not of merchantable quality; and, therefore, the implied condition prescribed by s. 14 (2) had been broken, and the plaintiff was entitled to damages.

Wren v. Holt (1), [1903] 1 K.B. 610 and *Bristol Tramways, &c., Carriage Co. v. Fiat Motors, Ltd.* (2), [1910] 2 K.B. 831, followed.

Dictum of VAUGHAN WILLIAMS, L.J., in *Wren v. Holt* (1) ([1903] 1 K.B. at p. 615) not followed.

Notes. Considered: *Daniels and Daniels v. White & Sons, Ltd., and Tarbard*, [1938] 4 All E.R. 258.

As to implied terms as to quality or fitness of goods under a contract of sale, see 29 HALSBURY'S LAWS (2nd Edn.) 63-67; and for cases see 39 DIGEST 438 et seq. For the Sale of Goods Act, 1893, s. 14, see 22 HALSBURY'S STATUTES (2nd Edn.) 993.

Cases referred to:

- (1) *Wren v. Holt*, [1903] 1 K.B. 610; 72 L.J.K.B. 340, 88 L.T. 282; 67 J.P. 191; 51 W.R. 435; sub nom. *Holt v. Wren*, 19 T.L.R. 292, C.A.; 39 Digest 450, 782.
- (2) *Bristol Tramways, &c., Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443; 26 T.L.R. 629, C.A.; 39 Digest 418, 512.

Appeal by the defendants from a judgment of His Honour JUDGE CRAWFORD at Edmonton County Court in which he awarded the plaintiff £21 damages for personal injuries. The facts appear in the judgment of ACTON, J.

By the Sale of Goods Act, 1893, s. 14 (2):

"Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

Sir R. Mitchell Banks, K.C., and *E. T. Rhymer*, for the defendants, referred to *Wren v. Holt* (1).

F. Soskice, for the plaintiff, referred to *Wren v. Holt* (1), and *Bristol Tramways, &c., Carriage Co. v. Fiat Motors, Ltd.* (2).

ACTON, J.—This is an appeal from a decision of His Honour JUDGE CRAWFORD in a case tried before him in which the plaintiff, Mr. Charles Morelli, claimed from Messrs. Fitch and Gibbons, the defendants, damages for personal injuries arising out of a breach of the defendants' alleged implied warranty of fitness in regard to a bottle supplied under a contract of sale.

The facts are very short and very simple, but they give rise, no doubt, as counsel for the defendants has said, to a question of some importance to those who deal in wares of the kind with which this case is concerned. The plaintiff was a

A person who, desiring to purchase a certain kind of cordial wine, went to the shop of the defendants, who are retail dealers of wines and spirits, and apparently other cordials and so forth, which they sell in bottles. The plaintiff was a person who had dealt with them on several occasions in the ordinary course of their business before the particular purchase with which we are concerned. On Jan. 21, 1928, he went into the shop and was served by the wife of the manager, a Mrs. Martin.

B He asked her for a bottle of ginger wine and, on her saying interrogatively, "2s. 6d.?" he said: "No, I want Stone's ginger wine at 2s. 9d." She then got a bottle of this particular kind of ginger wine from the shelf, wrapped it up in paper, handed it to the plaintiff, who paid the sum of 2s. 9d. for it, took it away with him, and went home. What took place next was that the plaintiff, desiring to consume the contents of this bottle of ginger wine, applied a corkscrew to the cork in the bottle and, holding the bottle in his left hand, pulled the corkscrew with his right hand. The result was that the neck of the bottle came away altogether from the bottle; the bottle fell to the ground and the hand, that is to say, the left hand, with which the plaintiff had been holding the bottle, was somewhat severely cut and it was in respect of the cuts on that hand and the consequences thereof that this action for damages was brought as on a breach of

C warranty arising out of the contract of sale between him and the defendants. In the result, the learned judge arrived at certain findings of fact which he has set out with great care in his note of the trial which is now before us. These findings were as follows:

E "(i) I believed and accepted the evidence given by the plaintiff. I find that his evidence is accurate in all material respects. (ii) I find that the corkscrew used was proper and suitable for the purpose of extracting the cork. (iii) I find that the plaintiff attempted to extract the cork in a reasonable and proper manner and with due care. (iv) I find that the bottle broke when the cork was so being extracted. (v) I find that there was some defect in the bottle which rendered it unfit for the purpose for which it was required by reason of its being in such a condition that when the cork was being extracted in a

F proper and reasonable manner it broke and that by reason of such defect it was not of merchantable quality. (vi) I find that the bottle of ginger wine was bought by description from the defendants and that they dealt in goods of that description."

G It is on these facts, and the findings at which the learned judge arrived on the facts, that this appeal is brought by the defendants, who contend that the learned judge was wrong in law in the conclusions at which he arrived.

Under the finding No. (v), there is one point to which, perhaps, it is expedient to refer in passing in order that it may be laid aside. The finding under that head, that there was some defect in the bottle which rendered it unfit for the purpose for which it was required, seems by implication to have some reference

H to s. 14 (1) of the Sale of Goods Act, 1893, but it is, as I understand, common ground between counsel on either side that the question which the learned judge was asked to determine, and did determine, was a question outside and independent of s. 14 (1), and was a question arising under s. 14 (2), the familiar words of which are as follows: [His Lordship read s. 14 (2) and continued:] It is, perhaps, strictly unnecessary but desirable for the sake of clarity to point out that, if the

I present action was founded on the assumption that there was in this case such an implied condition as is dealt with in s. 14 (2), and a breach of that implied condition, the plaintiff treated, as he was entitled to do, the breach of that condition as a breach of warranty, and sought damages accordingly for a breach of warranty.

The question then arises whether, as counsel for the defendants has argued, the learned judge was wrong in the conclusion at which he arrived. The argument that he was wrong really began with the contention that the learned judge was wrong in law in finding, as he did, under No. (vi) of his findings, that the bottle of ginger wine in question was bought by description from the defendants. Now

that which was bought, as appears from the evidence, in regard to which there is no controversy or question, was a bottle of Stone's ginger wine, which appears to be a well-known brand of that kind of cordial, at the price of 2s. 9d., which appears to be the well-known and recognised price for a bottle of that particular commodity. Having regard to the decision in *Wren v. Holt* (1), and the later case of *Bristol Tramways, &c., Carriage Co., Ltd. v. Fiat Motors, Ltd.* (2), it seems to me clear that there was here, as the learned judge has decided, a sale by the defendants to the plaintiff of a bottle of ginger wine at the price of 2s. 9d. by description, and there is no question in the present case that the defendants deal in goods of that description. In this context, perhaps, special reference should be made to the passage to which our attention has been drawn in *Bristol Tramways, &c., Carriage Co., Ltd. v. Fiat Motors, Ltd.* (2), (in the judgment of FARWELL, L.J., [1910] 1 K.B. at p. 840). The learned lord justice there says :

"The implied condition that the goods are of merchantable quality applies to all goods bought from a seller who deals in goods of that description, whether they are sold under a patent or trade name, or otherwise; the only proviso in sub-s. (2), namely, examination by the buyer, is negatived by LAWRENCE, J.'s finding of fact in this case. The phrase 'merchantable quality' seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products, such as grain, wool or flour, than to a complicated machine, but it is clear that it extends to both: the definition of 'goods' in s. 62 makes that word include 'all chattels personal other than things in action and money,' and 'quality of goods' includes their state or condition."

It seems to me clear that, having regard to these decisions, and especially to the passage which I have quoted from FARWELL, L.J., it is impossible to say that the learned judge was otherwise than perfectly right in coming to the conclusion that there was here a sale of goods, namely, this bottle of Stone's ginger wine, by description by the defendants to the plaintiff. Therefore, in my opinion, the bottle of Stone's ginger wine was a chattel, which was bought by description from a seller who dealt in goods of that description, although he was not the manufacturer thereof, and therefore, according to the provisions of s. 14 (2) of the Sale of Goods Act, there was, as the learned judge decided, an implied condition that the goods should be of merchantable quality.

That being so, on the findings of fact of the learned judge, which are, indeed, not assailed for the purpose of the present appeal, it seems to me impossible to say that he was wrong in arriving at the conclusion that there was a breach of that implied condition or warranty that the goods should be of merchantable quality. That there was some defect in the bottle which rendered it unfit for the purpose for which it was required is, as I have pointed out, a matter which we can pass over, but the defect was one which also rendered it not of merchantable quality. With regard to the proviso to the subsection, it equally appears from the findings of the learned judge that the defect which he finds to have existed in this bottle, as the result of which it broke and injured the plaintiff's hand, was a defect which no such examination as was available to the plaintiff of the article which he had purchased would, or could, reasonably have revealed to him.

In these circumstances, my decision is that the learned judge was right throughout in the conclusions of law at which he arrived on the facts as he found them, and that there was no reason whatever why it was not open to him to find the facts as he did. Although it is outside our province to inquire into the facts, provided that there is evidence to support those facts, I think it may fairly be said that there can be little doubt that any tribunal of fact would have arrived at the same conclusion on the facts as that at which the learned judge arrived. In these circumstances, in my opinion, this appeal fails and ought to be dismissed.

BRANSON, J.—I agree. The first ground on which it was contended on behalf of the defendants that the learned judge was wrong was that he was wrong in

A law in holding that the purchase in this case was a purchase by description within s. 14 (2) of the Sale of Goods Act, 1893. In support of that contention, reference was made to a passage in the judgment of VAUGHAN WILLIAMS, L.J., in *Wren v. Holt* (1), in which he says ([1903] 1 K.B. at p. 615):

B "I do not think, taking the generally accepted view of lawyers as to the meaning to be attached to the words 'by description' as applied to a sale, that a sale of goods over a counter, where the seller deals in the description of goods sold, is a sale of goods by description within this subsection."

C I confess that the meaning of the learned lord justice is not very clear to my mind, and were it not for the fact that, in that case, the sale, which the court held was in substance a sale over the counter of Holden's beer, was held to be a sale by description, I think one might have to consider further the question of the meaning of that passage. But, in view of the decision of the Court of Appeal in *Wren v. Holt* (1), that a sale of beer in a beerhouse, which, on the findings of the jury, the court held to be in substance a sale of Holden's beer, was a sale by description and brought the case within s. 14 (2), it seems to me to be clear beyond argument that the sale in this case of Stone's ginger wine across the counter was equally a sale which the learned county court judge, acting as the tribunal of fact in this case, as the jury acted in the other, was entitled to find to be a sale by description so as to bring the case within s. 14 (2). The same thing follows from a consideration of *Bristol Tramways, &c., Carriage Co., Ltd. v. Fiat Motors, Ltd.* (2). I do not propose to refer to that again, as my Lord has read the most relevant passage in the case in the course of his judgment.

E The next point taken was that there was no evidence on which the learned county court judge could come to the conclusion that this bottle was not of merchantable quality, for it was contended that the defect in it, which caused it to break, was not a defect which an ordinary reasonable examination would have disclosed, and, therefore, inasmuch as the plaintiff, if he had been minded to resell, could have resold, it could not be said that the bottle was not of merchantable quality. In my view, that contention is entirely unsound. I think that the question whether the article is of merchantable quality or not depends on the true state of the article and not on whether its state can be discovered by a reasonable examination of it. That that is so seems to me to follow quite clearly from the proviso to s. 14 (2) of the Sale of Goods Act, which makes it clear that, even if the buyer has examined the goods, the implied condition makes the seller liable for a latent defect in those goods. This ground also, to my mind, fails, and the result is that I agree that the learned county court judge has come to a correct conclusion on the law of this case. I agree, if it is open to me to express an opinion on a question of fact which has been found by the learned judge, that, on the evidence, I should probably have come to the same conclusion myself. In the result, I think this appeal should be dismissed with costs.

H *Appeal dismissed.*

Solicitors: *Avery, Son & Fairbairn; Palmer & Robinson.*

[Reported by T. R. F. BUTLER, ESQ., Barrister-at-Law.]

LONDON COUNTY COUNCIL *v.* HACKNEY BOROUGH COUNCIL

[KING'S BENCH DIVISION (Wright, J.), April 20, 23-27, May 25, 1928]

[Reported [1928] 2 K.B. 588; 97 L.J.K.B. 694; 139 L.T. 407;
92 J.P. 138; 44 T.L.R. 592; 26 L.G.R. 366; 1 B.R.A. 249]

Rates—Rateable occupation—Disused school—Caretaker and family living on premises—Furniture for caretaker and valueless articles left there—Repairs carried out—Visits by architects and others to consider new use—Structural alterations needed before new use.

Up to Mar. 31, 1926, an education authority used a building vested in them as an industrial boarding school. On that date the authority, having decided to discontinue this use permanently, closed the school and began to remove from it their furniture and equipment. By April 21, 1926, all furniture and equipment had been removed except some furniture which was left in two rooms for the use of a caretaker, and two large cupboards and a mangle which were left until September, 1926, because they were of so little value as scarcely to be worth removing. From April, 1926, onwards there was no purpose for which the authority could have used the building without carrying out extensive alterations, incapable of being completed within a year, but a caretaker resided in part of the building with his family, and so the gas, water and electric light were not disconnected. The authority did not decide whether to sell or use, and, if use, for what purpose, the building until March 31, 1927, when they decided to carry out extensive structural alterations to turn part of the building into an elementary day school and the rest into offices, and to build a new open-air school in the grounds. This work was commenced after April, 1927, and completed in May, 1928. Before it began the only people who came to the building were workmen to repair defects in gas, plumbing and roofing, and architects and surveyors to prepare plans for various suggested future uses of the building.

Held: there was no rateable occupation of the building from Mar. 31, 1926, to Mar. 31, 1927, because in that period (i) it was neither being used nor capable of being used for any beneficial purpose of the education authority but was simply vacant premises: *Booth Overseers v. Liverpool Warehousing Co.* (1) (1901), 85 L.T. 45; and dicta in *Liverpool Corpn. v. Chorley Union Assessment Committee and Withnell Overseers* (2), [1913] A.C. 197, 208, 211; [1912] 1 K.B. 270, 288, applied; *R. v. Melladew* (3), [1907] 1 K.B. 192; *Borwick v. Southwark Corpn.* (4), [1909] 1 K.B. 78; *Southend-on-Sea Corpn. v. White* (5) (1900), 83 L.T. 408; *Gage v. Wren* (6) (1902), 87 L.T. 271, distinguished; (ii) the caretaker fulfilled no functions towards the beneficial user or enjoyment of the premises, however useful he may have been in safeguarding the interests of the education authority as owners, and so his occupation was not rateable: *North Dublin Union Guardians v. Scott* (7) (1850), 1 Ir.C.L.R. 76, followed; *Yates v. Chorlton-upon-Medlock Union* (8) (1883), 48 L.T. 872; *Hicks v. Dunstable Overseers* (9) (1883), 48 J.P. 326; and *Bertie v. Walthamstow Overseers* (10) (1904), 68 J.P. 545, distinguished; (iii) the carrying out of repairs and the visits by architects and surveyors were merely preservation of the premises for the education authority as owners, and, as to the visits, had reference to future or prospective user only, and so were not acts of beneficial occupation.

Per **Curiam**: "Beneficial" in this connection [i.e., "beneficial occupation" attracting liability to rates] does not connote pecuniary profit: it is enough in the case of a public body . . . that the occupation is of benefit or advantage to them in the performance of their public duties. If there be any benefit, any question of its quantum can be raised only on appeal against the rate.

A *Rates—Distress for rates—Replevin—Occupation of premises not beneficial—Premises assessed and rated—No appeal—Rate unpaid—Distress—No request to state case—Jurisdiction of justices to issue warrant.*

The building was assessed and rated for the year ending Mar. 31, 1927. The education authority made no appeal against the rate, but refused to pay it, and justices issued a distress warrant in respect of the unpaid rate. The authority did not ask the justices to state a Case, and the distress was levied on a tramway-car belonging to the education authority, who did not appeal to quarter sessions against the distress but brought an action for replevin.

B **Held:** the only remedy open to the authority was to appeal to quarter sessions, because their occupation (by their caretaker) of premises within the parish, although it was not beneficial, gave the justices jurisdiction to issue the warrant and so the distress was not unlawful, and, therefore, the replevin action was not maintainable: *Jones v. Mersey Docks* (11) (1861), C.B.N.S. 812 (on appeal (1865), 11 H.L.Cas. 443); *Birmingham Churchwardens v. Shaw* (12) (1849), 10 Q.B. 868; and *R. v. Bradshaw* (13) (1860), 29 L.J.M.C. 176, followed. *Jones v. Mersey Docks* (11) (1865), 11 H.L.Cas. 443, explained.

D **Notes.** Referred to: *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K.B. 585; *Associated Cinema Properties, Ltd. v. Hampstead Borough Council*, [1943] 2 All E.R. 696; *Re London and North Eastern Rail Co.'s Appeal*, [1946] K.B. 27.

As to an application for a distress warrant for unpaid rates and as to replevin, see 12 HALSBURY'S LAWS (3rd Edn.) 175-185, 194; as to rateable occupation, see 27 HALSBURY'S LAWS (2nd Edn.) 351-357. For cases see 18 DIGEST (Repl.) 390-393 and 38 DIGEST 427-439.

Cases referred to:

- (1) *Bootle Overseers v. Liverpool Warehousing Co., Same v. Webster* (1901), 85 L.T. 45; 65 J.P. 740; 17 T.L.R. 550, D.C.; 38 Digest 426, 14.
- F** (2) *Liverpool Corp'n. v. Chorley Union Assessment Committee and Withnell Overseers*, [1912] 1 K.B. 270; 81 L.J.K.B. 426; 106 L.T. 205; 76 J.P. 161; 10 L.G.R. 165; Konst. and W. Rat. App. 252, C.A.; on appeal, [1913] A.C. 197; 82 L.J.K.B. 555; 108 L.T. 82; 77 J.P. 185; 29 T.L.R. 246; 57 Sol. Jo. 263; 11 L.G.R. 182; 1 B.R.A. 72, H.L.; 38 Digest 428, 36.
- (3) *R. v. Melladew*, [1907] 1 K.B. 192; 76 L.J.K.B. 262; 96 L.T. 189; 71 J.P. 125; 23 T.L.R. 207; 51 Sol. Jo. 169; 5 L.G.R. 177; 2 Konst. Rat. App. 530, C.A.; 38 Digest 426, 15.
- G** (4) *Borwick v. Southwark Corp'n.*, [1909] 1 K.B. 78; 78 L.J.K.B. 121; 99 L.T. 841; 73 J.P. 38; 7 L.G.R. 10, D.C.; 38 Digest 426, 16.
- (5) *Southend-on-Sea Corp'n. v. White* (1900), 83 L.T. 408; 65 J.P. 7; 17 T.L.R. 5, D.C.; 38 Digest 435, 86.
- H** (6) *Gage v. Wren* (1902), 87 L.T. 271; 67 J.P. 32; 18 T.L.R. 699, D.C.; 38 Digest 435, 87.
- (7) *North Dublin Union Guardians v. Scott* (1850), 1 I.C.L.R. 76; 2 Ir. Jur. 246; 16 Digest 472, 3534i.
- (8) *Yates v. Chorlton-upon-Medlock Union, Almond v. Same* (1883), 48 L.T. 872; 47 J.P. 630, D.C.; 38 Digest 432, 65.
- (9) *Hicks v. Dunstable Overseers* (1883), 48 J.P. 326, D.C.; 38 Digest 433, 66.
- I** (10) *Bertie v. Walthamstow Overseers* (1904), 68 J.P. 545; 2 L.G.R. 1178, D.C.; 38 Digest 433, 69.
- (11) *Mersey Docks and Harbour Board v. Jones, Same v. Cameron* (1861), 8 C.B.N.S. 114; 30 L.J.M.C. 185; 9 W.R. 484, C.P.; affirmed 9 C.B.N.S. 812; 30 L.J.M.C. 239; 9 W.R. 706, Ex. Ch.; on appeal sub nom. *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H.L.Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 Jur.N.S. 746; 13 W.R. 1069; 11 E.R. 1405, H.L.; 38 Digest 466, 286.

- (12) *Birmingham Churchwardens v. Shaw* (1849), 10 Q.B. 868; 116 E.R. 329; sub nom. *Re Birmingham New Library, Ex parte Birmingham Overseers*, 18 L.J.M.C. 89; 13 Jur. 357; sub nom. *R. v. Birmingham Justices*, 3 New Sess. Cas. 445; sub nom. *R. v. Shaw, Birmingham Justices*, 3 New Mag. 115; 13 L.T.O.S. 23; 13 J.P. 395; 38 Digest 496, 502.
- (13) *R. v. Bradshaw* (1860), 2 E. & E. 836; 29 L.J.M.C. 176; 6 Jur.N.S. 629; 8 W.R. 435; 121 E.R. 313; sub nom. *R. v. Warwickshire Justices*, 2 L.T. 233; 24 J.P. 727; 18 Digest (Repl.) 393, 1427.
- (14) *Hackney Borough Council v. Metropolitan Asylums Board* (1924), 131 L.T. 136; 88 J.P. 129; 40 T.L.R. 645; 22 L.G.R. 397; 2 B.R.A. 1063, D.C.; 38 Digest 427, 17.
- (15) *R. v. Morgan* (1834), 2 Ad. & El. 618, n.; 111 E.R. 238; 38 Digest 629, 1488.
- (16) *R. v. St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581; 46 L.J.M.C. 243; 25 W.R. 827; sub nom. *Willing v. St. Pancras Assessment Committee*, 37 L.T. 126; 41 J.P. 662; Ryde, Rat. App. (1871-85) 188; 38 Digest 423, 4.
- (17) *Staley v. Castleton Overseers* (1864), 5 B. & S. 505; 4 New Rep. 361; 33 L.J.M.C. 178; 28 J.P. 710; 10 Jur.N.S. 1147; 12 W.R. 911; 122 E.R. 920; sub nom. *R. v. Castleton Overseers*, 10 L.T. 606, 38 Digest 525, 725.
- (18) *Harter v. Salford Overseers* (1865), 6 B. & S. 591; 34 L.J.M.C. 206; 29 J.P. 647; 11 Jur.N.S. 1036; 13 W.R. 861; 122 E.R. 1313; 38 Digest 525, 726.
- (19) *Milward v. Caffin* (1779), 2 Wm. Bl. 1330; 1 Botts 290; 96 E.R. 779; 38 Digest 71, 483.
- (20) *Bristol Poor Governors v. Wait* (1834), 1 Ad. & El. 264; 6 C. & P. 591; 3 Nev. & M.K.B. 359; 2 Nev. & M.M.C. 254; 3 L.J.M.C. 71; 110 E.R. 1207; 38 Digest 427, 29.
- (21) *Rochdale Canal Co. v. Brewster*, [1894] 2 Q.B. 852; 64 L.J.Q.B. 37; 71 L.T. 243; 59 J.P. 132; 10 T.L.R. 595; 9 R. 680; Ryde & K. Rat. App. 143, C.A.; 38 Digest 447, 160.
- (22) *Marshall v. Pitman* (1833), 9 Bing. 595; 2 Moo. & S. 745; 1 Nev. & M.M.C. 270; 2 L.J.M.C. 33; 131 E.R. 737; 18 Digest (Repl.) 401, 1506.
- (23) *Fourth City Mutual Building Society v. East Ham Churchwardens and Overseers*, [1892] 1 Q.B. 661; 56 J.P. 440, D.C.; 18 Digest (Repl.) 391, 1409.
- (24) *Whenman v. Clark*, [1916] 1 K.B. 94; 85 L.J.K.B. 424; 114 L.T. 116; 80 J.P. 128; 60 Sol. Jo. 174; 14 L.G.R. 149; 1 B.R.A. 450, C.A.; 18 Digest (Repl.) 392, 1426.
- (25) *R. v. Hannam* (1886), 34 W.R. 355; 2 T.L.R. 234, C.A.; 18 Digest (Repl.) 409, 1578.
- (26) *Shillito v. Hinchliffe*, [1922] 2 K.B. 236; 91 L.J.K.B. 730; 127 L.T. 367; 86 J.P. 110; 20 L.G.R. 492; 2 B.R.A. 919, D.C.; 18 Digest (Repl.) 393, 1429.

Action for replevin tried before WRIGHT, J., without a jury.

The facts and arguments are sufficiently apparent from the headnote and judgment.

E. M. Konstam, K.C., and *E. H. Tindal Atkinson* for the plaintiffs.

Scholefield, K.C., and *Hubert Hull* for the defendants.

Cur. adv. vult.

May 25. **WRIGHT, J.**, read the following judgment.—In this case the plaintiffs claim damages for the seizure by the defendants by their bailiff of a tramway-car, the plaintiff's property, under a distress warrant issued by justices for non-payment of rates. The plaintiffs, having taken proceedings in replevin and given a replevin bond in the usual form, claim a declaration that the distress was illegal, and also damages and cancellation of the bond. The defendants claim that the rates were duly levied and were in arrear, that the distress warrant was issued as on a determination by justices acting within their jurisdiction and that the question of the legality of the distress could not be raised in these proceedings.

- A** The facts out of which the dispute arises are comparatively simple. The defendants were the overseers of the poor of the parish of St. John in the Hackney Union, in the County of London. Within their parish was a building called the Industrial School, Upton House, Urswick Road. Up to Mar. 31, 1926, the plaintiffs, as the education authority, managed that building as an industrial school, the premises being vested in them in virtue of the Education (London) Act, 1903, and the Children Act, 1908. They had taken over the management of the industrial school from their predecessors, the London School Board. The Home Secretary, who was the central authority for industrial schools, had granted a certificate dated April 1, 1909, for the premises (the number of inmates being limited to 150) under the Children Act, 1908. Towards the end of 1925 the plaintiffs decided to close Upton House as an industrial school by reason of representations from the
- C** Home Secretary that, owing to the decrease in the number of committals to such schools, Upton House had become unnecessary. The Home Secretary had further declined to authorise a proposal by the plaintiffs to continue the building as a Central Industrial School. On Nov. 21, 1925, the plaintiffs accordingly wrote to the Home Secretary resigning the certificate for the industrial school as from May 31, 1926, that being the close of their financial year. The Home Secretary,
- D** in reply, by a letter dated Dec. 2, 1925, stated that six months' notice was necessary, and the school would accordingly cease to be a certified school on May 21, 1926, though it might be closed earlier. From the date of the Home Secretary's letter no further new boys could legally be received in the school, and from May 21, 1926, the premises could no longer be legally used as an industrial school. It was, in fact, closed as such on Mar. 31, 1926.
- E** The plaintiffs immediately proceeded to remove the furniture, stores, documents, and other equipment, the main removal being complete by April 10, 1926, and the residue by April 21, 1926. Some necessary furniture was, however, left in two rooms for a caretaker, and, in addition, two large wooden cupboards and an iron mangle were not taken away till the following September. The mangle was described as scrap iron and the cupboards could not be removed except by breaking up, and then, I infer from a minute, they were only fit for firewood. These
- F** articles were left in the building, not as valuable things needing a store place, but as things of so little value as scarcely to be worth removing. The caretaker, who was graded in the plaintiff's service as a schoolkeeper, not because that truly described his functions because there was no school to keep, but, because the plaintiffs had no grade of caretaker, was a mere caretaker. He kept the place
- G** clean, answered the door, noted defects that needed repairs, and generally looked after the vacant premises. He lived at first in two rooms near the main door. Later, when joined by his family, he made a home with them in what had been the infirmary. The only people who came were various workmen to repair defects in gas, plumbing, or roofing, and some architects and surveyors who came to take measurements and make plans with a view to the future use of the buildings.
- H** Gas, water, and electric light were left without being disconnected. Only the two former were used, and that only by the caretaker. The plaintiffs supplied the caretaker with coal.

After April, 1926, the future use to which the building might be put was in doubt. It was early suggested that it might be made into an elementary school; it necessitated large structural alterations to change a boarding school for 150 boys

I into a day school for 350. It was not till Mar. 29, 1927, after many discussions, that it was finally decided to turn one part of the premises into an elementary school for 350 boys, and another part into offices for use by the plaintiffs as the education authority and also to build an open-air school in the grounds. This last scheme involved entirely new buildings; the two former schemes involved very expensive structural alterations. The whole work, which commenced after April, 1927, and has only now, in May, 1928, been completed, cost about £12,000. The buildings are now ready for use for their new purposes. It was only after considerable doubt and discussion that this plan was decided on at the end of

March, 1927. The plaintiffs were free to use the buildings for any of their purposes, or to sell them. Their valuer gave an estimate of value for the purposes of sale. There was some opposition in the educational committees to the idea of converting them in part into elementary school premises, since they would be less efficient, though less costly, than a newly-erected school building. They might have been pulled down and rebuilt as a school, or a housing scheme might have been carried out.

The rates in question duly appeared, as assessed on the premises in the rate book, for the periods ending Sept. 30, 1926, and Mar. 31, 1927. It was not disputed by the plaintiffs that the rate was, as regards form, duly made and confirmed. It is not disputed that the plaintiffs were in occupation during the material period of the premises. It is disputed that they were in beneficial occupation. It is accordingly disputed that they were duly assessed. The plaintiffs contend that there was no jurisdiction to rate them at all, as the only jurisdiction to rate is on the ground of beneficial occupation. The plaintiffs did not appeal against the rate, but they refused to pay. The defendants in due course lodged a complaint in respect of non-payment before the justices by a summons against the plaintiffs issued on May 14, 1927, which came on for hearing before the justices on June 16, 1927. The justices decided to issue the distress warrant. The plaintiffs did not ask for a Special Case for the opinion of the High Court. The distress was levied on a tramway car, the property of the plaintiffs, who did not appeal against the distress to quarter sessions but took proceedings in replevin, which have resulted in this action.

The main questions are, shortly, as follows: (i) Was there beneficial occupation by the plaintiffs of the premises during the relevant period? (ii) If not, are the plaintiffs entitled to take these proceedings? The defendants not only say that there was beneficial occupation, but they further say that if there was not the plaintiffs could only raise that issue by appeal from the rate in the first instance to quarter sessions, or, it may be, on the complaint before the justices, who were willing to state a Case for the High Court, or by appeal to quarter sessions against the distress. The plaintiffs reply that, as they had no beneficial occupation, there was no jurisdiction to rate them and any proceedings before justices or quarter sessions were *coram non iudice* and of no effect, so that the seizure under the distress warrant was illegal. Both these issues have been fully argued before me, and I shall give judgment on each.

Counsel for the plaintiffs took, but not very strenuously, a further point, viz., that the rate was in any case bad on its face, because the assessment was made on "the Industrial School, Upton House, Urswick Road." The defendants' answer was that the description was a correct description of the actual premises, even if the use of the building as an industrial school had been discontinued. I think that that answer is sound.

I shall deal first with the question whether the occupation by the plaintiffs of the premises was beneficial during the year of assessment. It is now clear law that "beneficial" in this connection does not connote pecuniary profit. It is enough in the case of a public body, such as the plaintiffs, that the occupation is of benefit or advantage to them in the performance of their public duties. Nor, in these proceedings, can any question be raised of the quantum of benefit if there be any benefit. Any question of quantum can only be raised on appeal against the rate. That the plaintiffs are in occupation is not disputed. They are owners of the premises and no one else is in occupation. By their caretaker they are in visible occupation. But occupation is not enough. The essentials to constitute rateability are thus stated by LORD ATKINSON in *Liverpool Corpn. v. Chorley Union Assessment Committee and Withnell Overseers* (2) ([1913] A.C. at p. 208): "(1) Does the appellant occupy this cemetery"—that being the locus in question—"for which he is rated? (2) If he does, is his occupation a thing of value?" To make the plaintiffs rateable both these questions must be answered, *mutatis mutandis*, in the affirmative. It is the second question which is now being considered.

A The main contention of counsel for the defendants is that the plaintiffs had beneficial occupation because they were keeping the premises in reserve for the purposes of their undertaking, and holding them available for use for any of their purposes whenever they should require them, and had at no time abandoned the intention to use them for some educational purposes, even if not the same as those for which they had used them previously. It was contended that with regard to
B vacant buildings the issue of rateability must be determined by considering what the owner's intention was, and the relevant intention of the plaintiffs in this case in the rating period in question was, as the contention ran, to use the premises in the future for some purpose of their undertaking. To escape rateability, it was contended, the plaintiffs must show that in the material period they had decided completely to abandon any user of the premises, as, for instance, by definitely
C deciding to let or sell. It was also said that the plaintiffs were putting the premises to the only use which they had intended or contemplated in the relevant period, viz., to keep them in reserve and available for any purpose when required.

Apart from principle and authority to which I shall refer, I do not think that these contentions are in consonance with the facts. The premises were before April, 1926, used as an industrial school and not otherwise. They were only
D capable rebus sic stantibus of being so used, and no other user had been intended or contemplated. They could not any longer, legally, after April, 1926, be so used, nor had the plaintiffs any longer any intention of so using them. They could not be used for any other purpose, educational or otherwise, without elaborate alterations incapable of being completed within the year. The original user having been finally abandoned, no fresh plan of enjoyment of the premises was
E decided on till Mar. 29, 1927, when a plan was formed which could only be put into service after elaborate structural changes. In the meantime the plaintiffs could well have sold or let the premises, or have decided to prepare to turn them to uses other than educational.

The only conclusion on these facts is that the premises in the relevant period were neither being used nor capable of being used for any beneficial purpose of
F the plaintiffs but were simply vacant premises. They were not being kept in reserve in the same sense as a furnished house, ready for the owner's occupation at any time, is kept in reserve, or as a warehouse, empty indeed, but ready at any time to receive goods for storage, is kept in reserve, as in *R. v. Melladew* (3), or as the empty warehouse kept by the owners "as a 'standby' for use at any moment when the exigencies of their business might make it desirable so to use it, and in
G readiness for such use," was kept in reserve, as in *Borwick v. Southwark Corpn.* (4). These seem to be the strongest authorities relied on by the defendants, but they appear to be clearly distinguishable from this case. In those cases, the premises, without alteration, were kept ready for a definite employment, and this was what was contemplated and intended and was the reason why they were acquired. In the present case there was no employment for which the premises
H were suited. Their future employment was uncertain and under deliberation and they could not be made ready for any probable prospective employment without elaborate re-equipment.

The principles applicable to vacant buildings or houses have been discussed in certain cases, not always very clearly. LORD ATKINSON, following LORD HALSBURY, put the matter thus in *Liverpool Corpn. v. Chorley Union Assessment Committee*
I *and Withnell Overseers* (2) ([1913] A.C. at p. 211) to which I have already referred:

"When the statute, therefore, enacts that the occupier of a house should be rated, it must mean that the person to be rated shall occupy the house as a house; that is, that he shall use the house for the purpose of living in it, or sojourning in it, or working in it, keeping animals in it, storing other chattels in it, or using it for some such other purpose as houses may reasonably be devoted to; and that, as a vacant house is not used for any of these purposes, it is not occupied as a house within the meaning of the statute."

It is, I think, clear that in this sense there was no user by the plaintiffs of their premises in the material period. In *R. v. Melladew* (3), FARWELL, L.J., puts the question thus ([1907] 1 K.B. at p. 203):

"The test, in a case like the present, of business premises, appears to me to be, Has the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it?"

BUCKLEY, L.J., in *Liverpool Corpn. v. Chorley Union Assessment Committee and Withnell Overseers* (2), thus states the problem ([1912] 1 K.B. at p. 288): "Are the corporation using the land for the purpose of their business or adventure and deriving benefit from it?" Such questions, I think, could only here be answered in a sense favourable to the plaintiffs' case.

Nor can the defendants, I think, derive any support for their contentions from cases of seasonal trades where in any year the profits can only be made during a short time and at the expense of a period of dormancy or vacancy, which, however, is a necessary condition of the fruitful or profitable period, such as the case of a shop in a seaside watering place (*Southend-on-Sea Corpn. v. White* (5)), or a boarding-house in a seaside town with a short season (*Gage v. Wren* (6)), where the vacancy of the premises during the idle season, both of residents and furniture, did not afford a relief from rateability. In the present case the period of vacancy follows on a complete cessation of the original user and an absence at the relevant times of any intended or contemplated new employment.

The relevant intention must, I think, have regard to employment of the premises in the rating year, and to an employment for which they were suited or readily capable of being suited in their then actual condition. This was the ground of the decision in *Bootle Overseers v. Liverpool Warehousing Co.*; *Same v. Webster* (1), which turned on a finding that in the rating year there was no intention to use the premises. This is quite different from keeping premises definitely and intentionally in reserve for purposes for which they are prepared. In such a case the contemplated and intended user is being enjoyed, just as the intended user is being enjoyed under different circumstances in *Liverpool Corpn. v. Chorley Union Assessment Committee and Withnell Overseers* (2). Counsel for the defendants also relied on *Hackney Borough Council v. Metropolitan Asylums Board* (14), but in that case beneficial occupation was held to be established from "an accumulation of facts," each of such facts being "one of small but not negligible moment." I cannot deduce from that case any guidance for the present case, which, as I regard the facts, is simply the case of an owner who has abandoned the user of certain premises in the way for which they had been acquired and equipped and has not decided as to their future disposal at any relevant time.

I shall consider next the contention that there is beneficial occupation (a) because of the presence of the caretaker, and (b) because of the cupboards and mangle left on the premises till September, 1926. In my judgment, neither of these facts constitutes any evidence of beneficial occupation in the circumstances of this case. The caretaker may be necessary to protect the premises from injury and damage and to facilitate the entry of the owners or of any persons calling on their behalf. But rating is on the occupier, that is on the beneficial occupier and not on the owner, and I do not think that the caretaker in this case fulfilled any functions towards the beneficial user or enjoyment of the premises during the year in question, however useful he may have been in safeguarding the interests of the plaintiffs as owners. It has been held that a mere caretaker does not render a house liable to be rated (*North Dublin Union v. Scott* (7)). See also *R. v. Morgan* (15). I may also refer to the observation of LORD ALVERSTONE, C.J., in *Bertie v. Walthamstow Overseers* (10) (68 J.P. at p. 546). If a man is a mere caretaker put in to preserve and guard the house from depredation—in other words, to take care of it—the master is not liable to be rated, because the master has no beneficial occupation. In the cases where it was held that the presence of the caretaker constituted beneficial occupa-

A tion by the owner, since the caretaker himself could not be rated as occupier (*Yates v. Chorlton-upon-Medlock Union* (8), either the caretaker was cultivating the ground and benefit was being derived therefrom (*Hicks v. Dunstable Overseers* (9)), or the caretaker was rendering valuable services in other respects to the owner (*Bertie v. Walthamstow Overseers* (10)). In these cases it was held that there was beneficial occupation, but it has not been so held where the caretaker was merely a caretaker, as I find him to have been in this case.

B Nor is the presence till September, 1926, of the two cupboards and the mangle on the premises any evidence, in my opinion, of beneficial occupation. Leaving furniture in a house may render it rateable as stated by LUSH, J., in *R. v. St. Pancras Assessment Committee* (16) (2 Q.B.D. at p. 588):

C "The owner of a vacant house . . . is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year."

D The reason for this is not that it is simply a storehouse for the furniture, but that the owner is having such beneficial enjoyment of it as he desires. It is ready for him whenever he wants to reside in it. No doubt in such a case it might be also regarded as the subject of beneficial occupation as a storehouse for the furniture which must be stored and safeguarded somewhere. On these principles, in *Staley v. Castleton Overseers* (17), it was held in respect of a cotton mill, which, owing to bad trade, it did not pay to work:

E "Regarding the mill merely as a storehouse for valuable machinery which it is important to keep in a state fit for use, it is obviously property for which some persons would give a rent,"

and similarly in *Harter v. Salford Overseers* (18), a mill not being worked was held rateable as a warehouse for the machinery necessary for its working when required. These cases, in my opinion, afford no analogy to the present case where the chattels, as I find the facts, were kept on the premises simply because they were of no practical importance and, though they had to be removed before any valuable use could be had of the premises, were not worth the trouble of removing for their own sake. It seems to me to be fallacious to say that these buildings were beneficially occupied in any amount, merely because these unwieldy and obsolete articles were not taken away earlier.

F I ought in passing to notice counsel for the defendants' argument, not perhaps strenuously pressed, that there was some beneficial occupation because the premises were repaired from time to time and because the architects and surveyors of the plaintiffs visited them. The former is, I think, merely a matter of the preservation of the premises for the plaintiffs as owners and not any act of beneficial occupation. The latter is of the same character, and in any case has no reference to actual beneficial occupation, but only to future or prospective valuable user.

G In my judgment, for the above reasons, the plaintiffs were not beneficial occupiers and were not rateable in the year in question, but that still leaves the further question whether they can succeed in this action. The action being an action of replevin, they have to show that the distress was unlawful, which involves that the warrant issued by the justices was issued without jurisdiction. Such actions have been maintained where rates have been levied on premises which a person did not occupy, or which were outside the period, as in *Milward v. Caffin* (19), and *Bristol Poor Governors v. Wait* (20), or where the rate was bad on its face. A more modern instance where a claim in replevin succeeded on the ground that the plaintiffs were not occupiers but licensees, is *Rochdale Canal Co. v. Brewster* (21). The reason is that in such a case both the allowance of the rate by the justices and its confirmation by quarter sessions on appeal, if appeal be taken, and the proceedings before the justices who grant the distress warrant are proceedings coram non iudice and are void of legal effect.

Counsel for the plaintiffs has, however, contended that the basis of the justices' jurisdiction depends not on occupation, that is actual occupation, but on beneficial occupation, and hence that a distress warrant against an occupier who is not a beneficial occupier is without jurisdiction because the proceedings are *coram non judice*, and hence, the warrant being without jurisdiction and bad, the action in replevin will lie. He admits that no authority in terms justifies this contention and that there are decisions and dicta to the contrary effect, but he prays in support of his argument *Jones v. Mersey Docks; Mersey Docks and Harbour Board v. Cameron* (11), where, in an action for replevin, the House of Lords heard and determined the question whether the occupiers were beneficial occupiers, and he argues that as jurisdiction cannot be given by consent, the House of Lords must have assumed that this issue of beneficial occupation was a relevant issue to be determined where the validity of a distress warrant was in question. I do not think that the latter contention is sound. What happened in that case was that the point was waived by the overseers in order to obtain the decision of the House of Lords on so vital a question of principle as that case raised. Their Lordships do not mention the question, but it is thus stated in the opinion of the majority of the judges, read by BLACKBURN, J.:

"The question whether replevin lies has been waived, and therefore it is not necessary further to consider whether in such a case the more proper expression would be that the person in possession of the property was not an occupier at all within the meaning of the statute of Elizabeth, so that the overseer had no jurisdiction to make the rate, and consequently that the levying of it might be resisted in replevin or trespass; or whether, as seems to have been the opinion of the court of Queen's Bench in *Birmingham Churchwardens v. Shaw* (12), and *R. v. Bradshaw* (13), he is an occupier, whom, as such, the overseers have jurisdiction to tax, though on appeal the rate must be reduced to nothing. Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the Bar) it is clear that a beneficial occupation is essential as the foundation of the rate."

I confess I feel some doubt how BLACKBURN, J., would have answered the question he so propounds. But in the Court of Common Pleas judgment was given by the majority of the court (ERLE, C.J., WILLIAMS, J., and KEATING, J.; WILLES, J., doubting) against the plaintiffs, not on the merits of the case, but simply on the ground that replevin did not lie, where the only question was whether the occupation was or was not beneficial. They held themselves bound by the principles enunciated in the earlier decisions of *Birmingham Churchwardens v. Shaw* (12), and *R. v. Bradshaw* (13), deferring to them as a matter of duty, and leaving all further consideration for the Court of Error.

The principle of these cases (which were cases of mandamus, not of replevin) was thus stated in *R. v. Bradshaw* (13), (29 L.J.M.C. at p. 177):

"*Birmingham Churchwardens v. Shaw* (12) adopts and confirms *Marshall v. Pitman* (22), which establishes the principle, that where there is visible occupation of property within the rating parish, and the party rated objects that although he is in visible occupation of the premises, his occupation is altogether devoid of benefit to himself—that is matter for which he must seek his remedy by appeal to the quarter sessions."

I think that, as a judge of first instance, I am bound by this decision. Counsel for the plaintiffs, however, contends that, though there has been no case of an action of replevin where, there being occupation, there was no beneficial occupation, yet I ought not to follow *Mersey Docks v. Cameron* (11) in the Court of Common Pleas, because by subsequent cases the jurisdiction of magistrates, in considering questions on proceedings for distress warrants, has been enlarged.

A In *R. v. Bradshaw* (13), it was held that the duties of magistrates were ministerial, and that when called upon to enforce a rate good on the face of it they had no jurisdiction to go into the question of beneficial occupation. It is clear that that view is no longer accepted or acted upon. It was held in the case of *Fourth City Mutual Building Society v. East Ham Churchwardens and Overseers* (23), that justices in proceedings for a distress warrant were authorised to inquire into objections and state a case for the opinion of the High Court, so that their duties were not simply ministerial. The power to state a Case depended on the Summary Jurisdiction Act, 1884. Cases have accordingly been thereafter from time to time stated by justices, and their jurisdiction was thus defined by ATKIN, J. (giving the judgment of himself and BRAY, J.), in *Whenman v. Clark* (24), ([1915] 1 K.B. at p. 559):

C "In *R. v. Hannam* (25), LORD ESHER, M.R., and COTTON, L.J., laid down a rule that where there can be an appeal to quarter sessions the justices have only to enforce the rate, and are bound to assume the rate to be good if the property is within the district. This was in the year 1886, and if this rule had been uniformly acted on since, we should have been bound to follow it, but the cases which I have mentioned show that this is not so, and that other exceptions have been made, and it is open to this court to lay down a general rule which will embrace these exceptions; and we think the rule to be laid down is that the justices have jurisdiction if the question is whether the defendant ought to have been rated at all, or if at all, for the full rateable value."

E That was on the hearing of an application for a distress warrant for non-payment of rate. In the same case, in the Court of Appeal, that rule was adopted by SWINFEN EADY, L.J., and PICKFORD, L.J., with the qualification "where the material facts are not really in dispute." I gather that in such cases as the present there is seldom any real dispute on the material facts. Notwithstanding some doubts expressed obiter in *Shillito v. Hinchliffe* (26), the rule thus expressed is acted upon, as, for instance, in *Hackney Borough Council v. Metropolitan Asylums Board* (14), to which I have already referred, where the Case was stated by the justices on the question of beneficial occupation.

F But though the practice, or, as I think, the law as to the scope of the justices' jurisdiction in such cases has been thus extended since *R. v. Bradshaw* (13), I do not think that this extension affects the law established by the authorities cited as to the foundation or origin of their jurisdiction, which I feel bound to hold still depends simply on occupation within the parish, and not on beneficial occupation. What gives jurisdiction is a different matter from the scope of jurisdiction once it is given. As I am deciding the matter simply on the basis of authority, I do not consider it necessary or desirable to consider it further, or to discuss further the difficult question of precisely defining the principles necessary to ascertain, in the case of inferior tribunals, what goes to absence of jurisdiction on the one hand and erroneous exercise of jurisdiction on the other, or to discuss the balance of expediency in procedure having regard to the complicated inter-relationship between justices, quarter sessions on appeal, and the High Court on mandamus and similar proceedings and Case Stated. It is enough that the defendants rely on the point which I have been considering and in my opinion it is covered by authority binding on me. I therefore hold that the claim in replevin is not maintainable.

I There must be judgment for the defendants. I shall give them judgment with costs, subject to the condition that they will pay to the plaintiffs the costs of the issue which has been tried before me and on which the defendants have failed so far as I am concerned—namely, the issue of beneficial occupation.

Judgment for the defendants.

Solicitors: *P. Bullivant; R. H. R. Tee.*

[Reported by R. A. YULE, Esq., Barrister-at-Law.]

Re HÓWDEN AND HYSLOP'S CONTRACT

[CHANCERY DIVISION (Astbury, J.), April 26, 1928]

[Reported [1928] Ch. 479; 97 L.J.Ch. 313; 139 L.T. 309;
72 Sol. Jo. 400]

Probate—Grant—Confirmation—Scottish confirmation—Re-sealing—Power of executors to sell real estate in England without separate grant—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 168.

Scottish executors whose confirmation has been re-sealed in England can, under s. 168 of the Supreme Court of Judicature (Consolidation) Act, 1925, make a good title to their testator's real estate in England without the necessity of a separate grant of probate in respect thereof.

Notes. As to re-sealing grants, see 16 HALSBURY'S LAWS (3rd Edn.) 256 et seq.; and for cases see 23 DIGEST (Repl.) 261 et seq. For Supreme Court of Judicature (Consolidation) Act, 1925, s. 168, see 9 HALSBURY'S STATUTES (2nd Edn.) 782.

Case referred to:

(1) *Hood v. Lord Barrington* (1868), L.R. 6 Eq. 218; 23 Digest (Repl.) 264, 3224.

Adjourned Summons.

By an agreement dated Jan. 9, 1928, William Hay Howden, Henry Jackson Butchart, and William Aristides Verel agreed to sell to Brigadier-General Hyslop for £4,000 a freehold house, Glenview, and other freehold houses and land in the parishes of Drayton and Taversham in the county of Norfolk. The vendors purported to sell as the personal representatives of John Bisset Verel. From the abstract of title it appeared that John Bisset Verel was a domiciled Scotsman, and that on Nov. 21, 1920, he made a trust disposition and settlement in Scottish form, appointing William Hay Howden, Henry Jackson Butchart, and two other persons, his executors. By a codicil, dated Nov. 14, 1922, the testator revoked the nomination of the two other persons and appointed William Aristides Verel to be an executor. The testator died in 1926, possessed of property in Scotland, and of real and personal estate in England. On Dec. 29, 1926, confirmation of the vendors as executors was granted in Scottish form by the Commissariate of the county of Edinburgh. On Jan. 7, 1928, the confirmation was re-sealed in the Principal Probate Registry of the High Court. The solicitors for the purchaser delivered a requisition on title in the following terms:

"The re-sealing of the confirmation does not give the vendors any power to deal with real estate. A separate grant must be taken out to deal with the realty. This must be done, and the grant produced before completion. The grant, if applicable only to the property sold, should be handed over; if not, a memorandum of the sale to the purchaser should be endorsed thereon."

The vendors refused to take out probate in England, and contended that the re-sealing of the confirmation was sufficient to enable them to deal with the real estate. The purchaser issued this summons to decide the matter.

Vanneck for the purchaser.

W. J. Whitaker for the executors.

By the Supreme Court of Judicature (Consolidation) Act, 1925:

"Section 168: If a confirmation of the executors of a person who died domiciled in Scotland, which includes besides the estate situate in Scotland also personal estate situate in England, is produced to the High Court, and a copy thereof deposited in the Principal Probate Registry, the confirmation shall, if there is inserted therein or noted thereon a statement signed by the sheriff clerk to the effect that the deceased died domiciled in Scotland, be sealed with the seal of the Principal Probate Registry, and returned to the person pro-

A ducing it, and shall on being so sealed have the like effect in England as if it were a grant made by the High Court. . . . Section 175: 'Grant' means a grant of probate or administration."

B **ASTBURY, J.**, after stating the facts: The purchaser contends that according to the practice in the Probate Registry the re-sealing of the Scottish confirmation only enables the executors to make title to the English personal estate, including chattels real, and that for English real estate a separate grant is required. The Confirmation of Executors (Scotland) Act, 1858, repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, provided by s. 12 that a confirmation of the executors of a person who died domiciled in Scotland, "which includes besides the personal estate situate in Scotland, also personal estate situate in England," shall
C on being sealed with the seal of the Principal Court of Probate in England, "have the like force and effect in England as if a probate . . . had been granted by the said Court of Probate." At that date an English will could only deal, so far as executors were concerned, with personal estate, including chattels real. In *Hood v. Lord Barrington* (1) it was held that a Scottish executor with a confirmation re-sealed under this section had all the powers of an English executor, and could
D sell and dispose of English leaseholds, although specifically bequeathed and although by Scottish law an executor could not deal with Scottish leaseholds. **LORD ROMILLY, M.R.**, said:

E "The consequence of this [s. 12] is that the person who has obtained the confirmation duly sealed is in exactly the same situation as the person who has obtained probate, and until it is recalled he has the title of an executor. He alone can sue or be sued in this country; with it his title cannot be disputed, and without it, it cannot be maintained."

The Land Transfer Act, 1897, which came into operation on Jan. 1, 1898 (repealed by Law of Property (Amendment) Act, 1924, and Land Registration Act, 1925), provided by s. 1 (1) that where real estate was vested in any person without a
F right in any other person to take by survivorship, it should, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives from time to time as if it were a chattel real vesting in them. Section 2 (2) provided that all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and the powers, rights, duties and liabilities of personal representatives in respect of
G personal estate, should apply to real estate, so far as the same were applicable, "as if that real estate were a chattel real vesting in them."

These provisions are substantially reproduced by the Administration of Estates Act, 1925, ss. 1, 2, under which the testator's executors sold. The purchaser contends that notwithstanding these provisions, the vendors cannot make a title to the English real estate under the re-sealed confirmation alone, but must obtain an
H English grant. He relies upon **TRISTRAM AND COOTE'S PROBATE PRACTICE** (16th Edn. 1926), pp. 302, 303, where the practice is stated as follows:

I "As the scope of a confirmation, when re-sealed, only extends to personal estate, a confirmation cannot be re-sealed, if the only property in England consists of realty. In such a case it is necessary, in order to deal with the English real estate, to take out a separate grant in England. . . . Where a confirmation has been re-sealed and there is real estate in England, a grant of realty only is made to the executors. Reference to the re-sealing is made in the grant, showing that the executors were thereby constituted the legal personal representatives of the deceased as regards his personal estate only in England."

No doubt, that has been the practice in the Probate Registry up to the end of 1925. On the other hand, the note in **KEY AND ELPHINSTONE'S PRECEDENTS** (12th Edn. 1926), vol. 1, part 1, p. 459, says that

"executors under a Scottish will can, after the confirmation has been sealed by the Probate Division, make a good title to English leaseholds (*Hood v. Lord Barrington* (1), and consequently also to English freeholds."

The last six words first appeared in the 10th Edn. (1914), vol. 1, p. 471.

The vendors strongly rely on s. 168 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that a confirmation of the executor of a person who died domiciled in Scotland, "which includes besides the estate situate in Scotland also personal estate situate in England," shall on being sealed with the seal of the Principal Probate Registry, "have the like effect in England as if it were a grant made by the High Court," meaning (s. 175) "a grant of probate or of administration." This section substantially reproduces s. 12 of the 1858 Act, omitting the word "personal" before "estate situate in Scotland." Here the testator had personal as well as real estate in England, and the Scottish confirmation was re-sealed. It is impossible to get out of the plain words of s. 168, providing that the confirmation so re-sealed has the like effect as a grant of probate. The Scottish executors, therefore, became the testator's personal representatives in England, and under the law since Jan. 1, 1898, they can make a title to English real estate. The purchaser contends that the retention of the words requiring "personal estate situate in England" as a condition of re-sealing a Scottish confirmation shows an intention to confirm the previous practice under the 1858 Act, and limits the re-sealed confirmation to English personal estate, including chattels real. I do not take that view. Section 168 expressly says that a re-sealed confirmation is equivalent to an English probate. It is not really necessary to discuss why the words "personal estate situate in England" were retained in s. 168. Possibly the vendors' explanation is correct. If the testator has only real estate and no personal estate in England, the Scottish courts cannot affect that real estate, there is no re-sealing, and a separate grant is necessary, but, if he has personal estate in England, the executors can get their Scottish confirmation re-sealed, as in the present case. In that case there is no reason for disregarding the plain words of the section making the re-sealed confirmation equivalent to an English probate. The purchaser's objection fails, and the summons will be dismissed with costs.

Solicitors: *Vivard, Oldham, Crowder & Cash*, for *Mills & Reeve*, Norwich; *Neish, Howell & Haldane*.

[Reported by E. K. CORRIE, Esq., Barrister-at-Law.]

A

AUCHTERONI & CO. v. MIDLAND BANK, LTD.

[KING'S BENCH DIVISION (Wright, J.), March 30, April 2, 1928]

[Reported [1928] 2 K.B. 294; 97 L.J.K.B. 625; 139 L.T. 344;
44 T.L.R. 441; 72 Sol. Jo. 337; 33 Com. Cas. 345]

B

Bank—Bill of exchange—Duty to pay—Bill for £876 presented and paid over the counter—Endorsement in blank—Circumstances of suspicion—Negligence—Money had and received—Conversion—Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 2, s. 8 (3), s. 34 (1), ss. 47, 53, and 59.

C

The plaintiffs, by way of payment for goods supplied by them to a company, drew a bill for £876 payable to themselves in three months, which the company accepted. The company gave its bankers, the defendants, instructions to pay the bill at maturity, and, although the company's account was at the time overdrawn, the defendants accepted those instructions, as they had an arrangement with the company for a running overdraft. When the bill became due, the plaintiffs endorsed it in blank and handed it to their cashier with instructions to take it to their own bank for collection. The cashier, in fraud of the plaintiffs, presented the bill at the defendant bank, obtained payment over the counter, and thus fraudulently converted and stole the proceeds of the bill. In an action by the plaintiffs against the defendant bank for the amount of the bill,

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Held: (i) there being no privity of contract between the plaintiffs and the defendant bank, there was no duty binding the bank to exercise care on behalf of the plaintiffs, breach of which duty would give the plaintiffs a cause of action for negligence; (ii) the drawing of a bill did not amount to an assignment in favour of the payee of funds belonging to the acceptor in the hands of the acceptor's bank at which the bill had been accepted payable, and, in the present case, even if after the bill had been paid the acceptors provided sufficient funds to reimburse the defendant bank, the plaintiffs could not claim that those funds were provided for their benefit so that they could claim them from the defendant bank as money had and received on their account; (iii) the defendant bank converted the bill since they exercised dominion over it adverse to the plaintiffs, who had not intended to part with it except against payment, but they had their customer's mandate to pay the bill; the bill was duly presented for payment in manner authorised by the law merchant, and there were no special circumstances of suspicion except that payment was required in cash over the counter; and, therefore, the plaintiffs could not recover for the conversion of the bill.

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Notes. As to payment of bills accepted payable at a bank, see 2 HALSBURY'S LAWS (3rd Edn.) 203, 204; and for cases see 3 DIGEST 225 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

I

- (1) *Scholfield v. Earl of Londesborough*, [1896] A.C. 514; 65 L.J.Q.B. 593; 75 L.T. 254; 12 T.L.R. 604; 45 W.R. 124, H.L.
- (2) *London Joint Stock Bank v. Macmillan and Arthur*, [1918] A.C. 777; 119 L.T. 387; 34 T.L.R. 509; 62 Sol. Jo. 650, H.L.; 3 Digest 230, 629.
- (3) *Hill v. Royds* (1869), L.R. 8 Eq. 290; 38 L.J.Ch. 538; 20 L.T. 842; 3 Digest 248, 728.
- (4) *A. L. Underwood, Ltd. v. Bank of Liverpool and Martins, Same v. Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 40 T.L.R. 302; 68 Sol. Jo. 716; 29 Com. Cas. 182, C.A.; Digest Supp.
- (5) *Taxation Comrs. v. English, Scottish and Australian Bank*, [1920] A.C. 683; 89 L.J.P.C. 181; 123 L.T. 34; 36 T.L.R. 305, P.C.; Digest Supp.

- (6) *London Joint Stock Bank v. Simmons*, [1892] A.C. 201; 61 L.J.Ch. 732; 66 L.T. 625; 56 J.P. 644; 41 W.R. 108; 8 T.L.R. 478; 36 Sol. Jo. 394, H.L.; 3 Digest 271, 844.
- (7) *Bank of England v. Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 39 W.R. 657; 7 T.L.R. 333, H.L.; 3 Digest 170, 281.

Action tried before WRIGHT, J., without a jury.

The plaintiffs, Auchteroni & Co., a partnership firm carrying on business as merchants in Liverpool, claimed to recover the sum of £876 9s. from the defendant bank.

Singleton, K.C., and *N. J. Laski* for the plaintiffs.

A. R. Kennedy, K.C., and *A. J. Hodgson* for the defendants.

Cur. adv. vult.

April 2. **WRIGHT, J.**, read the following judgment.—In this case the plaintiffs, a partnership firm carrying on business in Liverpool, claim from the defendant bank the sum of £876 9s. The facts out of which the claim arises are comparatively simple. The plaintiffs in the ordinary course of their business sold certain goods to a company called Nigerian Products, Ltd., also in Liverpool, and in payment for the goods so supplied they drew upon the company a bill dated Dec. 18, 1923, payable three months after date. Nigerian Products, Ltd., accepted the bill payable at the defendant bank where they kept their account, and in due course they notified the defendant bank that they had accepted the bill drawn by the plaintiffs. The notice, which was dated Mar. 18, 1924, three days before the bill fell due, asked the defendant bank to order "payment of the above and charge to the account of Nigerian Products, Ltd." In fact, as the evidence shows, the company was overdrawn at that time at the defendant bank, but the defendant bank were willing to act upon this advice and to pay the bill because they had an arrangement for a running overdraft with the company, whose credit was good, and payment of the bill would have left the matter within the agreed limits of the overdraft. On March 21, 1924, the bill then being due, a man named Woodward, who was the plaintiff's cashier or manager, brought the bill to one of the partners of the plaintiff firm and asked to have it endorsed, and the partner endorsed it in the usual way. It was then the duty of Woodward to take the bill to the plaintiff's bank, which was the Bank of Liverpool and Martin's, Ltd., and that bank in the usual course would collect the amount of the bill through the Clearing House and credit the plaintiff's account accordingly. In fact, however, Woodward entirely departed from his duty; instead of doing that which his duty required him to do, he took the bill, endorsed as it was in blank, presented it himself in person over the counter to the defendant bank, and took the money in bank notes, that is to say, one of £500, two of £100, five of £20, and the balance in smaller notes or change. Having so received the money, he fraudulently converted and stole it. That was not the only case in which he committed such a fraud. In the case of two other bills, one accepted payable at the Bank of West Africa and in the case of several open cheques, he adopted a similar procedure; he got the endorsement of the plaintiff firm in the usual way and then obtained payment to himself of the money at the appropriate bank over the counter. It was not until towards the end of 1927 that the plaintiffs became aware of the frauds which had been committed by Woodward. He was tried and convicted and sentenced to a term of imprisonment or penal servitude, which he is still serving, and he came and gave evidence in this case. The only other evidence to which I need refer is this. Evidence was given that a number of acceptances of which the plaintiffs were holders had been dealt with by the defendant bank. There were twenty-six in number between September, 1906, and March, 1924; that is to say, twenty-six in about eighteen years. Each one of those acceptances had been paid by the defendant bank to the plaintiff's bankers. It was not clear in every case, however, whether the plaintiffs had directly collected these bills through their bankers or whether some of the bills had not been discounted by them and collected on

- A behalf of third parties who were in fact holders of the bills. A certain amount of evidence was given about the course of business in the collection of bills now prevalent in Liverpool. At Liverpool there is a Clearing House, and the evidence was that in the case of trade bills, especially trade bills for so large an amount as the bill in question, practically the universal custom was that these bills should be presented to the bank at which they were accepted as being payable through
- B the Clearing House. One witness gave evidence that in his twenty years' experience as a bank cashier and manager he had never known a bill such as that in question presented for payment over the counter and in cash, and he frankly admitted that he did not quite know what he would have done in such a case, which to him was hypothetical. He said that he might ask some questions, but how far he could pursue those questions would depend upon the humour in which
- C he was. Bank officials called by the defendants also agreed that the presentation of a bill such as that in question over the counter was most unusual. One witness said that in the eight years in which he had acted as cashier, he had known six instances of that being done, but the banking witnesses called for the defendants, while admitting that the practice of presenting a bill for payment in this way was unusual, took the view that it was the duty of the bank to pay, and that they had
- D no right to make inquiries before paying, unless, indeed, there was something very striking about the appearance of the individual who presented the bill—for instance, if he were a postman, or, I suppose, a tramp or an office boy, the cashier would want to be satisfied that he was a responsible person likely to be in a position to receive payment in cash on behalf either of himself or of someone else. One witness said that he regarded such a presentation as unusual, but not
- E irregular. Some witnesses seem to have considered that a cashier, faced by a bill of this sort presented over the counter, ought to have referred the matter to the manager, but why he should do so or what would be the result of his so referring it was left somewhat obscure.

These being the facts, I have to consider what is the legal position. The claim is somewhat peculiar, and, indeed, it appears to be without any precise precedent.

- F It is not brought against the acceptors, because it is not suggested, nor do I think it could be suggested, that the bill, which was paid on behalf of the acceptors by the acceptors' bank at which it was drawn payable, was not paid on the payees' genuine endorsement and was not discharged by such payment within the meaning of s. 36 of the Bills of Exchange Act, 1882. The present claim is brought against the acceptors' bank, which is not the payees' bank, and it is based on three grounds.
- G The claim is brought first as for negligence, secondly as for money had and received, and thirdly as on a conversion of the bill. In regard to the first head of claim, I think it is ill-founded. A claim for negligence must be based on the ground of some duty binding the defendants to exercise care on behalf of the plaintiffs, which in a case such as this case can only arise from privity of contract. I need not multiply authorities for this principle. It is enough to contrast
- H *Schofield v. Earl of Londesborough* (1), where it was held that the acceptor of a bill of exchange owed to the actual holder no duty to be careful that the bill should not be drawn so as to enable it to be fraudulently altered, because there was no privity of contract between them, with *London Joint Stock Bank, Ltd. v. Macmillan and Arthur* (2), where such a duty was held to exist between the drawer of a cheque and the drawee bank, on the ground that privity of contract existed
- I between those parties, that is, as between banker and customer. LORD SHAW thus expresses the principle referring to the latter case. He says ([1918] A.C. at p. 823):

"In the first place, not only is [*Macmillan's Case* (2)] not a case between the drawer and the acceptor of a bill or between the acceptor and a holder of the bill in due course, but it is not the analogue of such a case. The reason that I state this in the forefront of my opinion is that it disposes at once of a considerable body of authority which was cited as relevant to the consideration of the present suit. My Lords, the distinction between a case of the latter sort

and of the present was very clearly brought out in *Scholfield v. Earl of Londesborough* (1) by LORD WATSON and by LORD DAVEY. In the words of the former, which are directly applicable to the present case, 'the duty of the customer arises directly out of the contractual relation existing between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future endorsees of a bill of exchange.' A

In the present case no privity of contract existed between the defendant bank and the plaintiffs. The defendant bank owed a duty to the acceptors to honour the bill on due presentation, but no duty at all to the plaintiffs, and this head of claim must fail. B

The second head of claim is, in my opinion, equally baseless. It is for money had and received, but by s. 53 of the Bills of Exchange Act the drawing of a bill does not in England amount to an assignment in favour of the payee of funds in the hands of the drawee, still less of funds belonging to the acceptor in the hands of the acceptors' bank at which the bill is accepted payable. In the present case the acceptors had no such funds available at the due date, but the defendant bank were willing to lend sufficient funds to meet the bill because the amount fell within the authorised limit of their overdraft. Even if I assume, what was not proved, that in due course after the bill was paid the acceptors provided sufficient funds, I cannot see how the plaintiffs can claim that such funds were provided for their benefit so that they can claim them as money had and received on their account. The defendant bank at no time notified the plaintiffs that they held or had received any money from the acceptors on the plaintiffs' account. In truth, if such funds were provided for the defendant bank by the acceptors they were provided to repay the loan which the defendant bank had granted to the acceptors by paying a bill of exchange on their behalf and by granting an overdraft alone for that purpose. I can see no justification in law for this head of claim. Apart from s. 53 of the Act I may refer to *Hill v. Royds* (3), the principle of which applies *à fortiori* as between the plaintiffs as drawers and payees and the defendant bank as the acceptors' bank. The advice to pay the acceptance sent by the acceptors to their bank is an order solely between the defendant bank and the acceptors as their customers and gives no right to the plaintiffs as against the defendant bank. C D E F

The third head of the claim is that which was most strenuously pressed by counsel for the plaintiffs and is based on conversion. Woodward, the fraudulent servant of the plaintiffs, beyond question converted the plaintiffs' bill to his own use because he used it to collect the proceeds to his own use in fraud of his employers. The defendant bank, however innocently, also converted the plaintiffs' bill as a chattel, because they exercised a dominion over it adverse to the plaintiffs. The plaintiffs did not intend to part with the bill of exchange except upon receipt of payment. The defendant bank having paid the proceeds to Woodward, took the bill and held it subject to their lien as against their customers, the acceptors, for the amount they had lent upon it. If they had paid the bill out of funds of the acceptors in their hands, it may be that they would have held the bill of exchange simply on behalf of their customers, who would be entitled to hold it as against the payees as a bill discharged by payment, that is, as a voucher and a proof of payment. In fact the defendant bank held the discharged instrument in their own right as against their customers, and in virtue of their lien for the money advanced in order to pay it. In any case they exercised a dominion over it adverse to the plaintiffs, and that would be a conversion as against the plaintiffs on principles analogous to those stated by SCRUTTON, L.J., in *A. L. Underwood, Ltd. v. Bank of Liverpool and Martin's* (4) ([1924] 1 K.B. at p. 790). The defendant bank say that, however true this might be, if it were a case of an ordinary chattel, it is not true in the present case, because the bill was a negotiable instrument, and they dealt with it in good faith and for value and in accordance with the law merchant, and are not liable for conversion. They rely upon s. 59 of the Bills of Exchange Act, 1882. As the bill was, in fact, discharged by payment by the defendant bank, who paid simply as agents for the acceptors, and being so discharged ceased to be G H I

A negotiable under s. 36 of the Act, I do not think that the defendant bank became holders for value of the bill under s. 27 (3) of the Act, but in any case, even if the statutory words do not apply to protect them, they are entitled, subject to what I discuss below, to the protection of the general principles applicable to negotiable instruments. The bill bore the genuine endorsement of the payees; that endorsement was in blank, and the bill became a bill payable to bearer under s. 8 (3) and s. 34 (1) of the Bills of Exchange Act. But by s. 2 "bearer" means the person in possession of such a bill, and that was, in fact, Woodward, to whom the defendant bank paid the bill, and, indeed, as I have said, it was not contended that the bill was not duly discharged. The plaintiffs, however, contend that the defendant bank are not entitled to rely upon this answer to the claim for conversion, because they say that the defendant bank was so put on inquiry that they cannot rely on the defence that they paid the bill in good faith and without notice of any defect in title. The plaintiffs rely on the contention that the presentation of such a bill over the counter was so unusual as to put the defendant bank on inquiry and to prevent them saying that they paid in good faith. Counsel for the plaintiffs relied on dicta cited in the opinion of the Privy Council in *Taxation Comrs. v. English, Scottish, and Australian Bank* (5) ([1920] A.C. at p. 688), where the question is considered

"whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make inquiry,"

and further on the discussion in *Underwood's Case* (4), already referred to, where it was held that the defendant bank, which was in that case the collecting bank, should have made further inquiries before collecting the cheques. But in these cases the question was not whether the bank acted in good faith and without notice, but whether they acted without negligence, namely, in breach of the statutory duty established in the case of banks collecting crossed cheques for a customer. It is, in my judgment, necessary most carefully to distinguish such a case, where the question is one of negligence, from a case like the present, where there is no duty to exercise reasonable care in favour of the plaintiffs. Section 90 of the Act is as follows:

"A thing is deemed to be done in good faith within the meaning of this Act where it is in fact done honestly, whether it is done negligently or not."

G The question, therefore, is whether the bank had notice of such facts as would debar them from saying that they acted in good faith and without notice of any defect in title. Counsel contended that there was such a departure from the usual banking practice involved in the presentation of a commercial bill such as that in question for payment over the counter, especially having regard to the amount, that the defendant bank could not be heard to say they were not put on inquiry, and that they could not pay without wilfully closing their eyes to the realities of the position. The guiding principle has often been stated. I may refer in particular to the words of LORD HERSCHELL in *London Joint Stock Bank v. Simmons* (6). He says ([1892] A.C. at p. 221):

I "In any other case the tribunal must investigate the facts for itself and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value. One word I would say upon the question of notice, and being put on inquiry. I should be sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instruments is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicion aside without further inquiry."

In the present case the evidence shows, as I find the facts, that the payment of a bill such as this, and for this amount, over the counter instead of through the Clearing House, or at least through the holder's banker, is very infrequent and is very unusual, but such cases do occur. I do not attach any importance to what is relied on as the course of business with regard to other bills held by the plaintiffs and accepted payable at the defendant bank, and, in fact, paid through the Clearing House. Such cases were spread over a long period of years, and were, I find, too infrequent to create any definite course of business apart from the fact that there was nothing to show whether the plaintiffs were the actual holders. But the crucial consideration here is that the defendant bank had presented to them for payment a bill of exchange complete and regular on its face and endorsed in blank by what the cashier knew to be the plaintiffs' genuine endorsement. The holder of such a bill was entitled *prima facie* to payment there and then across the counter just as if it were an open cheque. Section 47 of the Bills of Exchange Act provides that a "bill is dishonoured by non-payment when it is duly presented for payment, and payment is refused or cannot be obtained."

The question of what a bank should do when a bill is presented for payment in cash over the counter was discussed in *Bank of England v. Vagliano Bros.* (7). In particular, I desire to apply to the facts of this case as I find them the language of LORD SELBORNE, where he said this ([1891] A.C. at p. 127):

"But it was insisted that in paying these bills as they did the bank deviated from the proper course of business and ought to be held affected with notice that the endorsements were fraudulent. The first point relied upon for that purpose was, that the bills, drawn as they were for large sums, were all presented and paid across the counter and not through any bankers. This was admitted to be 'unusual' in the evidence for the bank; but it was not, as I read the evidence, either admitted or otherwise proved that it was irregular or sufficient in itself to excite a suspicion that there was something wrong, although it was unusual in the sense of not often happening. No authority was produced to show that it was irregular according to the law merchant; and if not, and if the payments were *bonâ fide* made, without any actual suspicion on the part of the officers of the bank, I cannot think it enough to defeat their right to charge the plaintiffs with those payments that they did not take a precaution not required by the law merchant, and on which they could not have insisted without the risk of the bills being treated by *bonâ fide* holders as dishonoured."

I may also refer to the language of LORD MACNAGHTEN in the same case where he says ([1891] A.C. at p. 157):

"Bankers who undertake the duty of paying their customers' acceptances cannot do otherwise than pay off-hand, and, as a matter of course, bills presented for payment which are duly accepted and regular and complete upon the face of them."

In truth, if the plaintiffs' contentions are accepted on this point, no bank could ever without risk pay any open cheque for any considerable sum over the counter, or any bill of exchange, without making inquiries. If I thought a bank could not pay without making inquiries, I should not be influenced by considering whether the inquiries made would be likely to elicit any hopeful result, but I do not think a bank can properly be held bound to make, in such a case, any inquiries merely because cash is asked for over the counter. It may be that the practice of presenting bills through the Clearing House or through bankers has become more general since the date of *Vagliano's Case* (7), although, indeed, the Clearing House in London at least had been established half a century or more before then. But the law merchant has always recognised such presentation as due presentation sufficient to require the bankers, in the absence of very special circumstances of suspicion, such as presentation by a tramp or a postman or an office boy, to pay. To lay down any different principle would be, I think, to make an inroad on the

A established rules of the law merchant without any sufficient ground. The bankers' evidence given in this case is not very illuminating, but, in any event, supports this general conclusion. The defendant bank, on the facts of this case, had their customers' mandate to pay the bill. The bill was duly presented for payment in manner authorised by the law merchant. There were no special circumstances of suspicion except that payment was required in cash over the counter, and I think

B the defendant bank could not have refused to pay, or even have deferred making payment, without risking a breach of duty to their customers, the acceptors, because the dishonouring of the bill might have amounted to injuring their customers' credit and exposed them to an action for damages. In my judgment, the principles laid down in the House of Lords in *Vagliano's Case* (7) as quoted above are as true to-day as in 1891. The real trouble had arisen here because the plaintiffs were

C unfortunate enough to have entrusted the indicia of title of the bill to their fraudulent clerk, and they ought not to be heard to complain that the bank in good faith have acted on those indicia and have fulfilled their duty in accordance with the rule of the law merchant. I think, therefore, that on all grounds the plaintiffs' claim fails, and there must be judgment for the defendants with costs.

Judgment for defendants.

D Solicitors: *Hall, Hawkins, Pimblott, Brydon & Chapman; Gregory, Rowcliffe & Co., for Hill, Dickinson & Co., Liverpool.*

[Reported by T. R. FITZWALTER BUTLER, Esq., Barrister-at-Law.]

E

Re DEBTOR (No. 737 of 1928)

F [COURT OF APPEAL (Lord Hanworth, M.R., Greer and Russell, L.J.J.), November 9, 1928]

[Reported [1929] 1 Ch. 362; 98 L.J.Ch. 38; 140 L.T. 266;

[1928] B. & C.R. 130]

G *Bankruptcy—Act of bankruptcy—Suspension of payment of debts—Notice—Need for evidence of intention to suspend—Effect of statement on recipient—Relevance of circumstances in which made—Statement made to agent of creditors—Receiving order—Jurisdiction to make while bankruptcy proceedings pending in foreign country—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 1 (1) (h), s. 3.*

H The debtor made a statement to the managing clerk of solicitors who were acting for the petitioning creditors under a power of attorney to the effect that he had called a meeting of his creditors in Switzerland to whom he intended to offer a sum of £1,000 in settlement of a sum of £26,000 owing by him to them upon condition that they should instruct their English agents to release to him certain goods held by such agents in England which were of such a value that he would be able to make up the £1,000. Beyond that sum he stated that he had not a penny. If the Swiss creditors accepted that proposed composition, he said, he would then offer to pay his English creditors 5s. in the pound spread over a period of years, but in the event of the Swiss creditors refusing to accept that arrangement he would have no objection to any English creditor filing a petition in bankruptcy and would give every assistance to such a proceeding.

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Held: (i) the statement, being made to an agent of the petitioning creditors, was equivalent to a statement made to the creditors themselves; to bring the matter within s. 1 (1) (h) of the Bankruptcy Act, 1914, the court had to find,

beyond a simple declaration of inability to pay, evidence of an intention on the part of the debtor to suspend payment of his debts; in doing so they must estimate what the person receiving the statement of the debtor, in the circumstances on which it was made—to which they were entitled to have regard—had a right to assume to be the debtor's meaning; applying that test, the statement by the debtor in the present case constituted a notice that he had suspended payment within s. 1 (1) (h), and, therefore, he had committed an act of bankruptcy; (ii) the fact that proceedings relating to the debtor's financial affairs were pending in Switzerland did not render it undesirable that, as a matter of discretion, a receiving order should be made against him in this country.

Notes. As to acts of bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 259 et seq.; and as to receiving orders, see *ibid.* 313 et seq. For cases see 4 DIGEST 48 et seq., 153 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

- (1) *Re Robinson, Ex parte Robinson* (1883), 22 Ch.D. 816; 48 L.T. 501; 31 W.R. 553, C.A.; 4 Digest 46, 389.
- (2) *Re Artola Hermanos, Ex parte André Châle* (1890), 24 Q.B.D. 640; 59 L.J.Q.B. 254; 62 L.T. 781, C.A.; 4 Digest 46, 390.
- (3) *Re Reis, Ex parte Clough*, [1904] 2 K.B. 769; 73 L.J.K.B. 929; 91 L.T. 592; 53 W.R. 122; 20 T.L.R. 547; 11 Mans. 229, C.A.; affirmed sub nom. *Clough v. Samuel*, [1905] A.C. 442; 74 L.J.K.B. 918; 93 L.T. 491; 54 W.R. 114; 21 T.L.R. 702; 12 Mans. 347, H.L.; 4 Digest 108, 971.
- (4) *Re Wolstenholme, Ex parte Wolstenholme* (1885), 2 Morr. 213, D.C.; 4 Digest 106, 954.
- (5) *Re Crook, Ex parte Crook* (1890), 24 Q.B.D. 320; 7 Morr. 11, C.A.; affirmed sub nom. *Crook v. Morley*, [1891] A.C. 316; 61 L.J.Q.B. 97; 65 L.T. 389; 8 Morr. 227; sub nom. *Re Crook, Crook v. Morley*, 7 T.L.R. 650, H.L.; 4 Digest 108, 971.
- (6) *Re Friedlander, Ex parte Oastler* (1884), 13 Q.B.D. 471; 54 L.J.Q.B. 23; 51 L.T. 309; 33 W.R. 126; 1 Morr. 207, C.A.; 4 Digest 106, 953.

Appeal by the debtor from a receiving order made by a registrar in bankruptcy. The facts appear in the judgment of the Master of the Rolls.

By s. 1 (1) of the Bankruptcy Act, 1914:

"A debtor commits an act of bankruptcy in each of the following cases . . .

(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

Clayton, K.C., and *Oscar Kean (Tindale Davis with him)*, for the debtor, cited, besides the cases dealt with in the judgments, *Re Robinson, Ex parte Robinson* (1) and *Re Artola Hermanos, Ex parte André Châle* (2).

W. N. Stable, for the petitioning creditors, was not called upon.

LORD HANWORTH, M.R.—This is an appeal by the debtor, who, it is not disputed, is within the jurisdiction of the Bankruptcy Act, 1914, and is trading in this country. He holds a small appointment in a London company, but apparently he engages in trading transactions, buying goods from friends with whom he is in communication in Switzerland, and paying for them by bills drawn upon him by the traders in Switzerland.

There is no question that there is a debt due from the debtor. The debt is a considerable one; it is a sum of £5,916. There has been no judgment in respect of it. The petition for a receiving order was lodged by a Swiss firm of creditors who had appointed under a power of attorney a London firm of solicitors to act for them. Notice was given disputing the act of bankruptcy. The act of bankruptcy which is relied upon is that the debtor had, within the terms and meaning of sub-s. (1) (h) of s. 1 of the Bankruptcy Act, 1914, given notice to his creditors that he had suspended or was about to suspend payment of his debts. The facts

A which were relied upon as bringing the debtor within para. (h) were these. It appears that on May 22, 1928, a managing clerk to the solicitors who held this power of attorney called upon the debtor and had a conversation with him. The call was avowedly made for the purpose of discussing with the debtor his prospects of liquidating the debt admittedly due to the petitioning creditors. I need not trouble further with what happened on that day, except to say that it was then

B arranged that there should be a second interview on the following day. The second interview was for the purpose of giving to the managing clerk all information that was required by him. When that interview took place on May 23 the debtor made certain statements. He gave the information that he had heavy liabilities in Switzerland, where he had apparently what is known to the Swiss courts as a trading domicile. He informed the managing clerk that he had in Switzerland

C Swiss liabilities amounting approximately to £26,000, and that a meeting of his Swiss creditors was to take place on June 4. He also gave the information that in addition to the Swiss liabilities he had English creditors for sums amounting to something between £1,500 and £1,600. He then stated that he intended to offer the Swiss creditors the sum of £1,000 in cash in settlement of all his liabilities to them upon the condition that they, the Swiss creditors, should instruct their

D English agents to release certain goods held by such agents in England which were of the approximate value of £800, which goods he would then realise. The debtor would thereby get certain goods of the value of £800 released, from the realisation of which it would be possible for him to be placed in funds to the extent of a total of £1,000, with which £1,000 he would deal with his Swiss creditors. The debtor also said "that his sole assets both in England and in Switzerland, including the said goods, amounted to approximately the said sum of £1,000, and that beyond that sum he had not a single penny." Then the following passage occurs in the affidavit of the managing clerk, on which counsel for the debtor has rightly spent some time in criticising: "The debtor informed me that it was his intention, in the event of the Swiss creditors adopting the composition above referred to, to get into touch with his English creditors and offer them a composition of 5s. in the

E pound spread over a period of years." That, of course, is a conditional offer, an offer that, if he has satisfied his Swiss creditors and they have accepted a composition, then and in that event he would be able to offer his English creditors 5s. in the pound, a sum to be paid over a period of years. Supposing that condition or hypothesis is not fulfilled, then he goes on: "and that in the event of the Swiss creditors not accepting the composition hereinbefore referred to he, the debtor,

G stated that he would not have the slightest objection to any one of the English creditors filing a petition in bankruptcy and would give all assistance to such proceedings." The debtor further added that he had no hope or the slightest prospect of making any larger offer than that to which I have already referred, as he was merely an employee of a London company.

H It is said that, taken in its proper setting, that information, to use a colourless word, given by the debtor, does not amount to the giving of notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts. It appears to me that the requirements of s. 1 (1) (h) are fulfilled. The debtor had before him at the interview the representative of one of his creditors. I do not think that the position of the managing clerk to the firm of solicitors who held a power of attorney from the creditors prevents him from being the representative

I of one of the creditors in question, and in that sense being the person who is referred to as the person to whom a notice has to be given. But it is said that the information that is given is in a sense a mere discussion of the debtor's affairs, a discussion, I will not say of a confidential nature, but of a somewhat intimate character, when the debtor made a clean breast of it and stated quite frankly what his actual position was. But even though at first I was inclined to take that somewhat benevolent view, I find it impossible, looking at all that passed at that interview, to say that the debtor did not mean to convey, and did not in fact convey, to the managing clerk that he had no intention of paying anyone, and in

that sense that he had suspended payment of his debts. It appears to me to be a plain indication that he had no money at that time with which to defray his debts, that his only chance of having any money in England for the purpose of paying a composition to his creditors was a chance based on the hypothesis that the Swiss creditors would sanction a release of goods to the value of £800, and, in the alternative of their not doing so, it was made plain by him that bankruptcy proceedings must immediately follow, proceedings which he would facilitate. Those statements when they are summed up make it, to my mind, quite plain that he did give notice to one of his creditors that he had suspended payment of his debts.

Counsel has called our attention to a number of cases bearing upon this question. In *Clough v. Samuel* (3) LORD MACNAGHTEN tell the story of how s. 4 (1) (h) of the Bankruptcy Act, 1883, which corresponds with s. 1 (1) (h) of the Bankruptcy Act, 1914, came to be inserted in the Bankruptcy Acts. He says this ([1905] A.C. at p. 445):

"Why was this provision introduced? Certainly not in order to afford the debtor an opportunity of communicating to his creditors the fact of his insolvency so that they might, if they should think proper, take proceedings to make him bankrupt. A declaration by a debtor of inability to pay his debts filed in the prescribed manner was an act of bankruptcy already. The object of the new departure is stated, and stated I think correctly, in the case of *Re Wolstenholme* (4), by one of the counsel in the course of his argument. 'Before the year 1883,' Mr. Yate Lee is reported to have said, 'it was common practice for a trader to send out notices saying he was about to suspend payment. Afterwards, however, dealings often took place between the debtor and his creditors. That was felt to be unfair, and the object of the new Act was to meet the evil by making the notice of suspension a new act of bankruptcy in order to prevent these unfair dealings.' "

So that the intention of the section, and as drawn it appears to convey it, was that a notice of having suspended payment should be an act of bankruptcy.

What interpretation then is to be placed upon these words? Although it has been useful and helpful to us to be referred to them, I do not think I need go through the judgments again, but I should like to call attention to the words which are used by STIRLING, L.J., in *Re Reis, Ex parte Clough* (3) ([1904] 2 K.B. at p. 779), sub nom. in the House of Lords, *Clough v. Samuel* (3).

"The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts."

As some criticism may be directed to the statement made by LORD MACNAGHTEN in *Clough v. Samuel* (3), a statement, with which I respectfully agree, as to the interpretation of para. (h) and what is necessary under it, I prefer in this case to refer to the words of STIRLING, L.J., because I think they are sufficient to arrive at a right conclusion, namely:

"We have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts."

It appears to me that the words to which I have referred show, without either hesitation or any doubt, clear evidence of an intention on the part of the debtor to suspend, and that he has suspended, payment. I will also add that in the earlier case of *Re Crook* (5), to which our attention was called—and I think it was confirmed on this point in the House of Lords, sub nom. *Crook v. Morley* (5), LORD ESHER, M.R., said (24 Q.B.D. at p. 321):

"It is necessary in each case to estimate the reasonable construction which those persons who receive such statement of the debtor would, under the circumstances of the debtor's case have a right to assume to be his meaning as to what he intends to do with respect to paying or suspending payment."

- A It appears to me that no man of sense, no business man, no managing clerk to solicitors accustomed to deal with business affairs, could fail to appreciate that the effect of the statement made to him was that the debtor had suspended payment of his debts, and, indeed, that he had no hope, or at most but a hypothetical hope, of being able to make payment at all. I will only add that the view that I venture to express as to the difference in meaning between s. 1 (1) (h) and s. 1 (1) (f) of the
- B Act of 1914 appears to be the view which LORD SELBORNE held in *Crook v. Morley* (5), to which we have been referred. It seems to me, therefore, construing this clause as the cases have laid down that it ought to be construed, there is here abundant evidence to show that an act of bankruptcy has been committed.

- C On the second point—that there are already proceedings in bankruptcy pending in Switzerland, and, therefore, that as a matter of discretion the receiving order ought not to be made—I am unable to accept that view. No doubt is thrown upon the jurisdiction of the registrar to make the order, but it is said that in his discretion he ought to have had regard to the fact that the larger debts are in Switzerland, that an order which is equivalent to a bankruptcy order has been made in Switzerland, and that he should have held, therefore, that there is no necessity to make an order over here. It appears to me that inasmuch as there are debts over
- D here, the debtor is over here, and jurisdiction is not disputed, the registrar was well within his rights of discretion in making the order. More than that, I think the order was rightly made. If difficulties arise hereafter in the carrying out of the bankruptcy proceedings in this country as well as in Switzerland, they will be matters to be dealt with in the course of the proceedings, but, upon the plain statement by the debtor, it seems to me that this is a case which is rightly brought
- E in bankruptcy, and that the appeal must be dismissed with the usual order as to costs.

GREER, L.J.—I agree. The registrar has made a receiving order against the debtor on the ground that he committed an act of bankruptcy within the description given in s. 1 (1) (h) of the Bankruptcy Act, 1914, which is in these terms :

- F “If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.”

It is said there is no evidence upon which the registrar could hold that the debtor had given notice either that he had suspended or that he was about to suspend payment of his debts. The greater part of the lucid argument put before us by

G counsel was addressed to the second alternative, that there was no evidence that he gave notice that he was about to suspend payment of his debts. If that had been the only question involved in this appeal I should have liked to consider the matter a little more fully than I have yet done, because I appreciate the strength of the argument that commended itself to the court in *Re Friedlander, Ex parte Oastler* (6) that it is impossible to hold that a mere statement that a debtor is in

H difficulties and cannot pay his debts is an act of bankruptcy under s. 1 (1) (h), because s. 1 (1) (f) makes it necessary, in order that a statement of inability to pay debts should be an act of bankruptcy, that it should be in writing and should be filed. That argument, I think, is a very forcible one; it commends itself to me, notwithstanding that it received some criticism in *Crook v. Morley* (5) from LORD SELBORNE. But LORD SELBORNE's speech and the words that have been cited to us,

I merely mean that one is not confined to the literal meaning of the words used in order to ascertain whether they do amount to a notice that a debtor is about to suspend payment; a statement by a debtor that he cannot pay his debts may in one set of circumstances be merely a statement that he cannot pay, but in another set of circumstances, to which one is entitled to look for the purpose of interpreting words that are not words of art, it may clearly mean to any ordinary human being listening to it, that he is stating that he has not the intention of paying his debts when they become due. That is, I think, the whole meaning of what LORD SELBORNE says in his judgment of *Crook v. Morley* (5).

Here we are not merely concerned with the question whether the statements which were made at the two interviews amounted to notice of intention to suspend payment of debts, because, in my judgment, they clearly amounted to a notice that the debtor had suspended payment of his debts. He made them to a representative of a creditor. It is just the same as if he had made them to the creditor himself. What an agent of one person says to another is, of course, binding upon the principal and the receipt by an agent of the statement, the agent being the representative of the creditor, is just as good for this purpose as if the statement had been made directly to the creditor himself. I cannot escape from the conclusion that when in answer to questions as to what he was going to do about payment of this debt, the debtor told the creditor's agent that he had been made a bankrupt in Switzerland, he was telling the creditor in so many words: "My property has ceased to be my property; my debts are not going to be paid by me; they are going to be paid and must necessarily be paid by the trustee of my estate; I have hopes of arranging a composition in Switzerland, and I may arrange a composition here; but payment of my debts has most clearly been suspended by what has taken place in Switzerland." I cannot escape the conclusion that that is a statement that he has suspended payment of his debts. **A**

Is it a notice? There is very little help to be found in the authorities as to what is the meaning of the word "notice." LORD HALSBURY in one case says, at any rate, it must be a notice, whatever that may mean. That does not help us very much. It seems to me that it must be something like a statement which is intended to give the creditor to understand that the debtor has in fact suspended payment. One need not use the word "notice." If the debtor had said to this gentleman: "Take notice, I give notice to you, acting for the creditors whom you represent, of all these facts"—it can hardly be suggested that that would not have been a notice that he had suspended payment of his debts. He did not use the words "I give you notice," but what he did say he said in answer to a question what he was going to do about the debt. I think the reasonable interpretation of that is that he did in substance say: "Take notice, observe, that I am a bankrupt, and, therefore, that I have suspended payment of my debts by becoming a bankrupt in Switzerland, and your only hope is for some kind of composition." In those circumstances I think the registrar was quite right in the view that he took. **B**

I wish to add nothing to what my Lord has said on the other point with reference to the question whether the order ought to have been made having regard to the proceedings in Switzerland. I see no reason to interfere with the exercise of a discretion which undoubtedly the registrar has. **C**

RUSSELL, L.J.—I am of the same opinion. As I read the conversation which took place between the representative of the creditor and the debtor on May 23, the debtor made not only a statement of inability to pay his debts, which would be sufficient within para. (h), but also a statement that he had suspended payment of his debts. I take that view because he held out to the representative of the creditors the fact that he was going to offer his Swiss creditors a composition of so much in the pound. He held out to the representative of the creditors also the fact that he might in the future offer the English creditors a composition. That statement, in my opinion, can only have been made by the debtor upon the footing that in the meanwhile he would not pay his debts in the ordinary course as they became due. The circumstances of this case appear to me to bring them within the language used by LORD SELBORNE in *Crook v. Morley* (5), where he said ([1891] A.C. at p. 321): **D**

"I cannot help thinking that every creditor receiving that circular must have understood that he would not do or attempt to do that which he said he was unable to do, he would not attempt to meet any of his engagements as they fell due. The very object of so writing to all the creditors is, in substance, to request them to act upon the footing that he is not going on to make payments." **E**

A It is said that the authority of that case is in some way impaired by the subsequent case in the House of Lords of *Clough v. Samuel* (3). As I read the speeches in that case there was no divergence of opinion as to the proper construction of para. (h); the only point upon which the majority and the minority there differed was as to what was the true result of the words used by the solicitor, Mr. Spyer, to the creditors in that case. **LORD HALSBURY** and **LORD ROBERTSON** held that upon **B** the true construction of what passed, there was no such notice as was required by para. (h). **LORD MACNAGHTEN**, on the other hand, held that upon the true construction of what passed, there was such a notice. **LORD MACNAGHTEN** in his speech states what in his opinion fulfils the requirements of para. (h), and he uses this language ([1905] A.C. at p. 446):

C "The notice need not be in writing. It is enough if notice is given to any one of the creditors. No particular form is required. There is nothing said in the Act about the debtor's intention. The question is what effect would the communication have upon the minds of the persons to whom it is addressed. That is the test as laid down in this House. It is only a matter of common sense, as **A. L. SMITH, L.J.**, observed. All that is required is that a communication **D** proceeding from the debtor, made seriously, should give the creditors or any of the creditors to understand from the state of circumstances as disclosed at the time that the debtor has suspended or that he is about to suspend payment."

In the present case the communication was one which proceeded from the debtor. It was not a haphazard or casual communication. It was a communication **E** seriously made and made upon an appointment arranged for the purpose of discussing the debtor's position. Further, as I have already said, it was, in my opinion, a statement from which the creditor to whose representative it was made would necessarily understand that the debtor had in fact suspended payment of his debts as they became due in the ordinary course. For these reasons, as far as concerns the first point of the argument before us, I agree that this appeal fails. **F** As regards the second point, it does not occur to me to add anything to what my Lord has already said.

Appeal dismissed.

Solicitors: *Denton, Hall & Burgin; Herbert Oppenheimer, Nathan & Vandyk.*

[*Reported by G. P. LANGWORTHY, Esq., Barrister-at-Law.*]

Re WALTER. SLOCOCK v. OFFICIAL RECEIVER

[CHANCERY DIVISION (Tomlin, J.), June 14, 1928]

[Reported [1929] 1 Ch. 647; 98 L.J.Ch. 403; 141 L.T. 319;
[1929] B. & C.R. 63]

Bankruptcy—Property available for distribution—Money accumulated by bankrupt after adjudication—Death of bankrupt—Debts for necessities incurred by bankrupt after adjudication—Funeral expenses—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 38, 130 (6).

An undischarged bankrupt died testate, possessed of over £600 saved by him out of his earnings since his adjudication and indebted to creditors for about £300 in respect of goods and services supplied to him in the ordinary course of living between his adjudication and his death. The bankrupt's executor paid £80 2s. 6d. (which amount was agreed to be reasonable) funeral expenses of the bankrupt.

Held: (i) debts incurred by the bankrupt between his adjudication and his death for necessities supplied to the bankrupt, his wife and children and remaining unpaid at his death should be paid in full out of the bankrupt's savings, as the bankrupt's death made no difference to the rights of creditors for such debts: *Re Roberts* (1), [1900] 1 Q.B. 122, applied; (ii) the executor was entitled to retain in full out of the savings the funeral expenses he had paid, either by analogy with the provision [Bankruptcy Act, 1914, s. 130 (6)] that such expenses were a preferential debt, or because common justice demanded that he be indemnified out of the assets for performing the public duty of burying the bankrupt.

Per **Curiam**: The official receiver, as trustee in bankruptcy, is entitled to an inquiry, if he desires it, as to what is a reasonable sum to allow the executor in respect of the funeral expenses.

Notes. As to a bankrupt's personal earnings between his bankruptcy and discharge, see 2 HALSBURY'S LAWS (3rd Edn.) 432-434. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 373.

Cases referred to:

- (1) *Re Roberts*, [1900] 1 Q.B. 122; 69 L.J.Q.B. 19; 81 L.T. 467; 48 W.R. 132; 16 T.L.R. 29; 44 Sol. Jo. 44; 7 Mans. 5, C.A.; 5 Digest 728, 6315.
- (2) *Sharp v. Lush* (1879), 10 Ch.D. 468; 48 L.J.Ch. 231; 27 W.R. 528; 43 Digest 587, 4106.
- (3) *Re Thellusson, Ex parte Abdy*, [1919] 2 K.B. 735; 88 L.J.K.B. 1210; 35 T.L.R. 732; 63 Sol. Jo. 788, C.A.; 4 Digest 205, 1893.
- (4) *Chippendall v. Tomlinson* (1785), 4 Doug. K.B. 318; 1 Cooke's Bankrupt Laws (8th Edn.), p. 428; 99 E.R. 900; 5 Digest 726, 6298.
- (5) *Williams v. Chambers* (1847), 10 Q.B. 337; 16 L.J.Q.B. 230; 11 Jur. 798; 116 E.R. 130; 5 Digest 982, 8035.
- (6) *Wadling v. Oliphant* (1875), 1 Q.B.D. 145; 45 L.J.Q.B. 173; 33 L.T. 837; 24 W.R. 246; 5 Digest 727, 6305.
- (7) *Affleck v. Hammond*, [1912] 3 K.B. 162; 81 L.J.K.B. 565; 106 L.T. 8; 19 Mans. 111, C.A.; 5 Digest 727, 6310.

Originating Summons.

Francis H. Walter (hereinafter called the testator) died on June 15, 1927, having by his will, dated Nov. 8, 1926, appointed the plaintiff and one other person (who predeceased the testator) executors and trustees thereof, and thereby bequeathed all his estate upon trust to sell and convert the same, and, after payment out of the proceeds of such sale and conversion of his funeral and testamentary expenses and debts, upon trust as in the said will declared. The testator had been adjudicated bankrupt on Mar. 16, 1925, and at the date of his death was still undischarged.

- A In October, 1926, he had obtained employment, and by the date of his death had saved £656 14s. 0d. out of the proceeds of such employment, but the claims still outstanding against him in his bankruptcy exceeded this sum. Between his adjudication and his death the testator had been supplied with goods and services on credit by various persons, some of whom were unaware of his bankruptcy. During this time his wife had brought divorce proceedings against him, and had
- B been awarded a decree nisi with costs. At the testator's death he owed £66 4s. 1d. in respect of these costs, and £306 18s. 8d. in respect of goods and services supplied since his bankruptcy. In order to secure the burial of the testator without delay, the plaintiff had paid £80 2s. 6d. funeral expenses shortly after the testator's death. Probate of the testator's will was granted to the plaintiff on Oct. 7, 1927. This summons was now taken out, by agreement between the plaintiff and the
- C Official Receiver, as trustee in bankruptcy of the testator, to determine, inter alia, (i) Whether the whole or any of the bankrupt's estate acquired by him subsequent to his adjudication as a bankrupt was payable to the Official Receiver as his trustee in bankruptcy; (ii) Whether the funeral expenses of the bankrupt were payable out of his estate acquired by him subsequent to his adjudication as a bankrupt. The defendants to the summons were the Official Receiver, the creditors for goods
- D and services supplied between adjudication and death, and the wife in respect of her divorce costs.

The Bankruptcy Act, 1914, provides as follows :

- E "Section 38: The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars: (1) Property held by the bankrupt on trust for any other person; (2) The tools, if any, of his trade, and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole. But it shall comprise the following particulars: (a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and
- F (b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and (c) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business,
- G by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

- H Section 130 (6). In the administration of the property of a deceased debtor under an order of administration, the official receiver or trustee shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate, and such claims shall be deemed a preferential debt under the order, and shall, notwithstanding anything to the contrary in the provisions of this Act relating to the priority of other debts, be payable in full, out of the debtor's estate, in priority to all other debts."

- I J. J. Llewellyn, for the plaintiff, referred to *Sharp v. Lush* (2) and *Re Thellusson* (3).

F. D. Morton, for the Official Receiver, referred to *Re Roberts* (1).

Gilbert Beyfus, for the creditors, referred to *Chippendall v. Tomlinson* (4), *Williams v. Chambers* (5), and *Wadling v. Oliphant* (6).

F. D. Morton, in reply, referred to *Affleck v. Hammond* (7).

TOMLIN, J.—This is a summons taken out by the personal representative of a deceased bankrupt against the official receiver (the trustee in bankruptcy) and

certain persons who claim to be creditors of the deceased in respect of debts incurred by the deceased between the date of the adjudication and the date of his death. The questions which I have to determine are these: The assets of the estate in the hands of the executor consist exclusively of unexpended personal earnings of the bankrupt; that is to say, they are the surplus of his salary over what he actually spent, he having been occupied in some commercial situation, and I am asked by the plaintiff, and by the defendants other than the official receiver, to say that there are properly payable out of the estate, before the official receiver as the trustee in the bankruptcy takes anything, the funeral expenses of the deceased (which funeral expenses have actually been paid by the executor), and the debts in question. The actual fund is some £655, the amount of the debts about £300, and the funeral expenses are £80 or thereabouts. The adjudication was on Mar. 16, 1925, and the bankrupt was undischarged at the date of his death.

It is said on behalf of the official receiver that the Bankruptcy Act, 1914, s. 38, under which the property of the bankrupt divisible among his creditors is described, includes after acquired property, such as salaries earned after the adjudication, and that, although it is true—and I think that this is admitted by the official receiver—that as regards personal earnings he would be permitted to spend what was necessary to keep himself and his wife and children alive and reasonably clothed and maintained, that is in the nature of a personal privilege. If it happens that he dies before those who have supplied the necessary commodities have been paid, that is an advantage to the creditors in the bankruptcy, because those suppliers of goods, not having been paid, could not possibly be paid, the debtor being no longer present to exercise that personal privilege of buying necessities; and therefore the fund out of which they would have been paid goes intact to the trustee in bankruptcy, and the creditors who supplied the necessary goods go unpaid. On the other hand, it is said that the principle is that the courts have always recognised that there is some limitation on the vesting provision in the Bankruptcy Act, 1914, and it is this, that in regard to personal earnings there vests in the trustee only the surplus over and above what is required for the maintenance, and that, so far from the paying for commodities which are necessary for maintenance being a personal privilege of the debtor, it is a right which the debtor has; and if by chance the creditor who supplied the commodities is unpaid at the date of the death, he ought to be paid out of the fund from which the debtor in his lifetime would have been entitled to pay him.

I think it is reasonably plain that there is a limitation on the vesting under the Act; I need do no more than read a passage from LINDLEY, M.R.'s judgment in *Re Roberts* (1), where he says ([1900] 1 Q.B. at p. 128):

"The present Act [that is the Act of 1883] like previous Bankruptcy Acts, must be construed so as to enable him to do so [that is, live to use his tools, and so on] and the language of s. 44 [that is the section corresponding in the Act of 1883 to s. 38 of the Act of 1914] clear and express as it is must not therefore be taken so literally as to deprive the bankrupt of these fruits of his personal exertions which are necessary to enable him to live; in other words, it is only the surplus over and above that which vests in the trustee."

That being so, it seems to me that the trustee, if the bankrupt was alive, could not claim anything more than that which was over after the bankrupt had provided for what was reasonably necessary having regard to his occupation and station. The question is whether it makes any difference that before he has paid the bills, he dies. For my part I am wholly unable to see on what principle, either of logic or of honesty, it can make any difference. It is to be observed that, so far as the creditors in the bankruptcy are concerned, and also the trustee in the bankruptcy, they profit by the exertions of the bankrupt, inasmuch as the surplus of the personal earnings passes to them, and it is in part by means of the expenditure on necessities that that surplus is capable of being earned. It seems to me to be not in accordance with either logic or sound principle to say that if the debtor happens

A to die before the bills for these commodities are paid, the trustee, who is still getting the profit which results from the bankrupt's exertions, is free from the obligation of seeing that, so to speak, the fuel by which the fire has been stoked is paid for. In fact, whether the bankrupt lives or dies, if the things were proper for him to buy, they are, in my opinion, things which ought to be paid for before the trustee takes anything. In those circumstances, so far as these debts are concerned, it appears to me to depend on whether they are in fact necessities within the meaning of the rule. I have not the material before me to enable me to express an opinion about that, and all I can do is to make a declaration to the effect that debts representing necessities unpaid for are proper to be paid out of the fund, and direct an inquiry as to what debts there are of that character.

That leaves the other point, as to the funeral expenses. It is said that the **C** funeral expenses may be distinguished from the necessities in two ways; first, that a man's funeral is no part of that necessary equipment which enables him to live; and secondly, that it is not part of that expenditure that results in the earning of the profits which come to the benefit of the trustee; and that therefore they ought not to be paid. That is true, but I am not sure that they do not come under a somewhat different principle, under the head of things that ought to be paid.

D The legislature itself has recognised at any rate that funeral expenses are an expense that ought to be provided for in full before the debts are paid, because I find in s. 130, the section under which, after the death of a debtor, a bankruptcy petition may be presented, and an order for administration of the estate of the deceased debtor made in bankruptcy, this sub-s. 6. [His Lordship read the subsection and continued:] It seems to be a little curious if there is this distinction that where

E the bankruptcy adjudication is made before a man dies, his funeral expenses are not to be paid out of his estate, but if it is made after he dies, they are to be paid out of his estate. It is true that there is no provision which deals with the particular state of facts which obtains in this case, but it appears, and has been said, that it is the duty of the executor to bury his testator, and that he is liable to pay for his funeral whether he has assets or not. That is to say, the executor has

F thrust upon him, if that be true, something in the nature of a public duty of an onerous kind, and it would be a course which I should not take unless I were driven to it, to hold that an executor who has duly buried his testator and paid for the funeral is not entitled to be paid in full for the proper costs of the funeral out of the assets before handing the balance over to the trustee in bankruptcy. I think that, whether it be by analogy to what is recognised in s. 130, or whether it

G be on the general principle that the position of the executor is such that common justice demands that he should be indemnified out of the assets for doing his public duty, it is proper to hold that these expenses are payable out of the estate before the balance is handed to the official receiver. Of course in a matter of that kind there must be a question of amount. It is not enough to say that the executor is

H entitled to be paid the expenses of the funeral. Obviously they must be expenses which are reasonable, having regard to the position of the deceased; and the official receiver is entitled to an inquiry, if he desires it, as to what is a reasonable sum to allow the executor in respect of the item. I understand, however, that the official receiver will not contest the amount expended by the executor, and, therefore, there will be a declaration that the executor is entitled to retain that amount out of the assets, and to pay any debts of the bankrupt representing amounts **I** incurred for necessities for himself, his wife, and his children, remaining unpaid at his death.

Solicitors: *Herbert Reeves & Co.; Tarry, Sherlock & King.*

[*Reported by K. R. A. HART, Esq., Barrister-at-Law.*]

MALLET v. STAVELEY COAL AND IRON CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Sargant and Lawrence, L.J.J.),
March 26, 27, 1928]

[Reported [1928] 2 K.B. 405; 97 L.J.K.B. 475; 139 L.T. 241;
18 Tax Cas. 772]

*Income Tax—Deduction in computing profits—Colliery company—Sum paid for
surrender of mining lease.*

A company carried on the business of mining and selling coal. By a lease dated Nov. 10, 1882, W.A. demised to the company, for a term expiring in 1945, veins and beds of workable coal, the lease providing for a minimum rent and royalties on the amount of coal raised and imposing a duty on the company to raise the largest quantity of coal possible. On Mar. 3, 1928, by an indenture the company surrendered all the seams of coal under specified lands to the intent that the residue of the term of years granted in respect of those seams by the lease of 1882 might merge in the reversion and be extinguished. In consideration of his acceptance of the surrender, the company paid £8,500 to W.A. The question arose whether that expenditure was a permissible deduction in arriving at the company's net profits for the purposes of taxation.

Held: the expenditure incurred was not a sum wholly and exclusively laid out for the purposes of the company's trade, viz., the winning and selling of coal, but was a sum expended in respect of the company's fixed capital, and, therefore, was not deductible for income tax purposes.

Principle stated by VISCOUNT SUMNER in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1), [1915] A.C. at p. 468, applied.

Decision of ROWLATT, J. (1927), 138 L.T. 201, affirmed.

Notes. Followed: *Coucher v. Mills* (1927), 13 Tax Cas. 216. Distinguished: *Anglo-Persian Oil Co., Ltd. v. Dale*, [1931] All E.R.Rep. 725; *Greyhound Racing Association (Liverpool), Ltd. v. Cooper*, [1936] 2 All E.R. 742. Considered: *Collins v. Adamson & Co.*, [1938] 1 K.B. 477; *Southern v. Borax Consolidated, Ltd.*, [1940] 4 All E.R. 412; *Mann, Crossman and Paulin, Ltd. v. I.R.Comrs.*, [1947] 1 All E.R. 742; *West African Drug Co. v. Lilley* (1947), 28 Tax Cas. 140. Referred to: *I.R.Comrs. v. Northfleet Coal and Ballast Co.* (1927), 12 Tax Cas. 1102; *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] All E.R.Rep. 402; *Van Den Berghs, Ltd. v. Clark*, [1935] All E.R.Rep. 874; *Union Cold Storage Co. v. Ellerker*, [1938] 4 All E.R. 692; *Bean v. Doncaster Amalgamated Collieries, Ltd.*, [1944] 2 All E.R. 279.

As to items ranking as capital expenditure, see 20 HALSBURY'S LAWS (3rd Edn.) 162 et seq.; and for cases see 28 DIGEST 47 et seq.

Cases referred to:

- (1) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 31 T.L.R. 104; 6 Tax Cas. 399, H.L.; 28 Digest 56, 287.
- (2) *John Smith & Son v. Moore*, [1921] 2 A.C. 13; 90 L.J.P.C. 149; 125 L.T. 481; 37 T.L.R. 613; 65 Sol. Jo. 492; 12 Tax Cas. 266, H.L.; Digest Supp.
- (3) *City of London Contract Corp., Ltd. v. Styles* (1887), 4 T.L.R. 51; 2 Tax Cas. 239, C.A.; 28 Digest 47, 239.
- (4) *British Insulated and Helsby Cables, Ltd. v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 42 T.L.R. 187, H.L.; 28 Digest 52, 264.
- (5) *Hancock v. General Reversionary and Investment Co., Ltd.*, [1919] 1 K.B. 25; 88 L.J.K.B. 248; 119 L.T. 737; 35 T.L.R. 11; 7 Tax Cas. 358; 28 Digest 51, 260.
- (6) *Smith v. Incorporated Council of Law Reporting for England and Wales*, [1914] 3 K.B. 674; 83 L.J.K.B. 1721; 111 L.T. 848; 30 T.L.R. 588; 6 Tax Cas. 477; 28 Digest 52, 262.

- A** **Appeal** by the Staveley Coal and Iron Co., Ltd., from a decision of ROWLATT, J., holding that payments made by the company for the surrender of mining leases which had become an onerous asset to the company were capital expenditure and were not allowable deductions within the meaning of r. 3 (a) or (f) of the Rules applicable to Cases I and II of Sched. D of the Income Tax Act, 1918, in computing the company's profits for income tax, thereby reversing a decision of the
- B** commissioners that such payments were allowable deductions. The facts are stated in the judgment of LORD HANWORTH, M.R.

A. M. Latter, K.C., and H. V. Rabagliati for the company.

The Solicitor-General (Sir Thomas Inskip, K.C.) and R. P. Hills for the Crown.

- C** **LORD HANWORTH, M.R.**—This case is at first sight a difficult case, because the facts are not easy to measure. It is not easy, too, because the commissioners have taken one view and ROWLATT, J., has set aside their decision without hesitation, finding it quite a plain case, on the other side of the line.

- The Staveley Coal and Iron Co. claim to deduct two items amounting to £6,500 in arriving at their net income for tax purposes as being sums which they ought to be allowed as a deduction from their profits. The company carry on business in
- D** the winning and getting of coal and they fall to be taxed in respect of their profits or gains under a particular rule of Sched. A, which introduces in a certain measure the standard of a Case of Sched. D. Under r. 3 of the Rules applicable to Cases I and II of Sched. D, it is declared that

- “in computing the amount of the profits or gains to be charged, no sum shall
- E** be deducted in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation . . . (f) any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment, or vocation. . . .”

- It is now accepted that the declaration in the speech of LORD SUMNER in *Usher's*
- F** *Wiltshire Brewery, Ltd. v. Bruce* (1) is the true reading of that rule. He said ([1915] A.C. at p. 468):

- “The effect of this structure, I think, is this, that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if
- G** there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it.”

- There have been a number of cases which have been decided on this question what
- H** is a proper deduction, and we have been referred to a number of them which give useful and helpful illustrations on one side of the line and on the other. It has been said that the proper test to apply is to ask the question: Do you acquire an asset by the expenditure you have made? If you acquire an asset, then it is something which is expended out of capital. If you do not acquire an asset, then it may be something which is a debit in the profit and loss account. It has been
- I** said that one may look to see whether or not one is dealing with a recurrent item, an item which would appear year by year in the profit and loss account, and if one is dealing with that sort of item, then even though one is making an out-and-out expenditure to redeem it, one is dealing with something which belongs to the profit and loss account. For my part, I do not believe that those tests, although they may be of some help in some cases, are fundamental, exact, or accurate. I think that one has to keep clear in one's mind that in dealing with any business there are two sorts of capital, one the fixed capital which is laid out in the fixed plant, whereby the opportunity of making profits or gains is secured, and the other

the circulating capital, which is turned over and over in the course of the business which is carried on. **A**

The basis of what I have said may be found in the words of LORD HALDANE in *John Smith & Son v. Moore* (2). In that case a man had succeeded to a business which had valuable coal contracts—contracts under which coal was to be supplied at a very advantageous price, and what I may call the capital value of those contracts was £30,000. The case was decided in reference to excess profits duty, and therefore somewhat different considerations applied from those applicable in the present case. But the observations which are made by LORD HALDANE are germane to the present case. He said ([1921] 2 A.C. at p. 20): **B**

“In the case before us the appellant, of course, made profit with circulating capital by buying coal under the contracts he had acquired from his father’s estate at the stipulated price of 14s. and re-selling it for more, but he was able to do this simply because he had acquired, among other assets of his business, including the goodwill, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting with them to other masters, but by retaining them, that he was able to employ his circulating capital in buying under them.” **C**

If, again, one wants another illustration of the difference between the fixed capital and the circulating capital—the difference between the items that fall to be dealt with as capital in the balance sheet and the items which fall into the profit and loss account—one may go back to the old case of *City of London Contract Corp’n., Ltd. v. Styles* (3). There it was attempted to deduct £180,000, which was part of the price of the business which was carried on. The business had been purchased, and it was in the nature of a wasting asset, and LORD ESHER said (2 Tax Cas. at p. 243): **D**

“Now nothing can be more plain, if that be so, than that £180,000 was the capital which they embarked in that business, the money they paid for it. If that was the capital which they embarked in that business, they then proceeded to carry on the business. How can you carry on a business after you have embarked your capital in the purchase of it? You must find new money in order to pay the expenses year by year, but then you do find money to pay the expenses year by year, and you get the receipts year by year, and the difference between the expenses necessary to earn the receipts of the year, and the receipts of the year are the profits of the business for the purpose of the income tax.” **E**

FRY, L.J., said (*ibid.* at p. 245): **G**

“It appears to me that this £180,000 was a sum ‘employed or intended to be employed’ as capital in the trade of the company, therefore it is a sum from which no deduction can be made under the Income Tax Acts.”

Those are the two illustrations which I think keep quite clearly before one the fact that one must separate the sum employed in the purchase of the business from the sum employed in the carrying on of the business, or otherwise the circulating capital. In *British Insulated and Helsby Cables, Ltd. v. Atherton* (4), LORD CAVE goes into these cases. He accepts the rule laid down by LORD SUMNER as to what are proper deductions, and he adds that one has to consider the matter from the point of view of commercial expediency. Reliance is placed on the passage where LORD CAVE said ([1926] A.C. at p. 213): **H**

“But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital . . .” **I**

He gives illustrations of that sort which are derived from a number of cases which had been decided.

A I come, therefore to the facts of the present case. Be it remembered that the Staveley Coal and Iron Co. are concerned in deriving their profits from the sale of coal. Their business is not one of handling properties or buying and selling or dealing with properties or concessions. We have known such companies, not in this country, but abroad, which have been concerned in the handling of concessions and the buying and selling of property with advantage to the company. But here

B we have the case of a company which are engaged in mining. How do they acquire the mine in which they are to seek their profits? They have either to buy properties or they have to obtain leases of them, and those leases may impose on them either the burden of an immediate payment or, if no immediate payment, it may impose on them the burden of winning and getting the coal, the maintenance of the mine, the keeping of it free from water, the duty of ventilating it, and the like, all of which may enure to the benefit of the landlord or the owner of the mine,

C while the company themselves acquire the coal and are able to sell that in the market. But throughout one has to remember that the business of this company was the business of winning and then the selling of the coal which they had got in the places and from the places where they had a right to work, under the leases which they held. Like many other companies, they had a number of leases, and they had had, contiguous to the areas comprised in the leases, some actual freehold property of their own. In other words, they had rights to work in these mines under varying systems of holdings. One lease dated Nov. 10, 1882, was a lease whereby William Arkwright demised to the company certain veins and beds of workable coal. There was to be a minimum rent paid, mining royalties were reserved, and the company were to work the mine so as to raise the largest possible

E quantity of coal without causing any damage or injury to the demised seams of coal. This lease did not empower the company to surrender any part or parts of the demised mines as distinguished from the entirety of the hereditaments demised. That lease was to expire in 1945. They also had to pay a dead rent under that lease. On Mar. 3, 1923, they entered into an indenture by the terms of which the company surrendered all the seams of coal under certain specified lands containing

F 384 acres, to the intent that the residue of the term of years created by the lease of 1882 and all the other estate, interest and rights of the company thereunder might, as to the surrendered hereditaments, merge and be extinguished in the reversion, and for that right so to give up all responsibility in respect of the 384 acres they paid to Mr. Arkwright £3,500. I pause there for a moment. Was that sum incurred in respect of the coal that was got or being got or was it in relation to a

G capital item which would appear in the balance sheet, viz., this lease, and did it relieve the company from a continuing liability in respect of the capital item, viz., their right to acquire the coal as distinguished from actual coal gotten, which was the business which they carried on?

In the next case there was a mining lease dated June 24, 1919, which will expire in 1940. In 1923, it appears that the company were minded to be released entirely from their liability under that lease. Whether the coal had proved unprofitable, whether it had been worked out or not, I do not know. But the result of the indenture of Mar. 3, 1923, was that the company were freed entirely from any responsibility in respect of the lease of the coal which had been granted by the mining lease of June 24, 1919, for the sum of £3,000. Again, was that £3,000 paid in relation to the coal gotten or to be gotten or was it in relation to the right to get

I coal which was given to them under the original lease of 1919? Those are the two sums which have been paid, and one asks oneself: Can it be said that those two sums have been paid in respect of the earnings of profits or gains? Can it be said that they were sums paid in respect of the circulating capital, or were they items which were paid in respect of the original capital outlay, or what may be called the fixed capital, which was employed, and by which the right to win coal was secured to the company? It appears to me that the answer to that is that the company disposed of a liability. They have been able to get rid—in the second case, perhaps even more strongly than in the first—of a liability which would have

hung round their necks. By this payment out-and-out they have freed themselves from what was a capital liability. A

It could be said on behalf of the company that if the two indentures of Mar. 3, 1923, had not been entered into, and if the company had year by year gone on pumping or keeping up the timbering and so on under the 384 acres in the first case, and if they had gone on pumping and keeping the ventilation going in the area granted to them under the mining lease of June 24, 1919, that might have been legitimately charged by them against their profit and loss account as one of the items which belonged to, and was rightly treated as, an annual recurrent expense. That is quite true. But I do not think the recurrence enables one to test what is the true nature of the outlay when the sum is paid for relief from that recurrent expense. It appears to me that one must apply the original test that I applied and see whether or not it is an outlay in respect of the fixed capital or an outlay in respect of the circulating capital which is employed in the mine. B C

ROWLATT, J., has employed that test quite correctly in the latter part of his judgment, where he says:

"But that only applies, of course, where the annual business expense, which is obviated by the single payment, is an annual business expense chargeable against revenue. Here that entirely breaks down. It is not the case at all. The company do not make these payments to get rid of any annual charge against revenue in the future. They make these payments to get rid of the loss in the business or apprehended loss in the business—an entirely different matter—after the income and the expenditure have been put together. They are paying this money, in other words, in order pro tanto to get out of the business." D E

Two cases on which counsel for the company can legitimately rely most strongly are *Hancock v. General Reversionary and Investment Co., Ltd.* (5) and *Smith v. Incorporated Council of Law Reporting for England and Wales* (6). Those are two cases in which the item that was dealt with was a matter of revenue, a matter of ordinary working, entirely. There could not have been a capital outlay in respect of the pension to the pensioner in the first case or in respect of the reporter in the second case. Both of these matters were incidental to the carrying on of the business. Here, to my mind, it is quite different, and I think the principle which was laid down in *Atherton's Case* (4) shows that the distinction to be drawn between the activities of the circulating capital and the purpose of the fixed capital must always be borne in mind, and it appears to me on the facts that these two sums have been laid out in relation to, and as relevant to, the opportunity for the company to go on, or the duty of the company to go on, working the mine as distinct from and opposed to the actual coal which they would have got if they had continued to use that opportunity. F G

One difficulty, no doubt, is presented by this, that the commissioners have found that these sums were deductible. The commissioners who heard the appeal said that this £6,500 should be allowed as an admissible deduction for income tax purposes in computing the company's profits. It does not appear to me to be simply a question of fact. It appears to me to be a question of at least mixed law and fact—but, I am inclined to think, of law only—whether or not these sums could be properly attributable to the fixed or to the circulating capital. The case is undoubtedly a difficult one. It appears to me that the commissioners have come to this conclusion wrongly, because there was no evidence on which they could come to this conclusion. It was not a question as to accountancy; it was a matter on which, when the true nature of the payment was ascertained, they ought to have found that it was a payment in respect of a capital item and not in respect of the profit and loss account. I feel, therefore, able to say that ROWLATT, J., was entitled to set aside the decision of the commissioners, and that the grounds on which he set it aside seem to me right, and therefore that this appeal must be dismissed with costs. H I

A SARGANT, L.J.—I am of the same opinion. In the first case, which is the case of the payment of £3,500, the facts appear to me to be that the company had in existence and as part of their capital assets this large mining lease, which, at the time in question had a period of twenty-two years unexpired, and they entered into an arrangement which had the effect, in my judgment, of modifying in important respects the conditions of that lease. By that modification the area subject to the lease was diminished, though the payments to be made in respect of rent were kept at the same figure. Generally speaking the deed of surrender contracted the area leased to the company and operated by way of modification of the capital asset with which they were conducting their business.

C In the second case, the case of the payment of £3,000, the position was that the company obviously considered that the lease was onerous, and accordingly they made a payment for the purpose of getting rid of and extinguishing an asset which undoubtedly formed a part of their permanent capital in their business, and they paid a lump sum for the purpose of ridding themselves of that, which, instead of being an advantage as they had hoped, has turned out to be a disadvantage. It is accepted on both sides that the principle to be applied is that stated by LORD SUMNER in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1) ([1915] A.C. at p. 468),
D and we have to consider whether the payment was, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of the profits of it. Counsel for the company, while accepting that as the proper test, rather urged that it had, in some way, been limited by the observations of the Lord Chancellor in *British Insulated and Helsby Cables, Ltd. v. Atherton* (4) ([1926] A.C. at p. 213) in that passage which my Lord has read, and
E which contains the phrase

“when an expenditure is made not only once and for all but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade.”

F Counsel suggested that that had the effect of limiting the general principle enunciated by LORD SUMNER to the case where there was a payment in respect of the positive acquisition of an asset, and that it did not apply to a case where the payment was made for the purpose of getting rid of an onerous asset. It seems to me that that phrase, “bringing into existence an asset or an advantage for the enduring benefit of a trade,” was one which was applicable to the facts of the case before the Lord Chancellor, but in no way implied that LORD SUMNER's principle was to be limited to such a case, and I have already said, in language corresponding with that used by the Lord Chancellor, what appears to me to be the case with regard to these two items. In the case of the item of £3,000, the payment was being made for the purpose of putting an end to the existence of a disadvantage or onerous asset for the enduring benefit of the trade. To my mind such a transaction is entirely within the principle of the words of the Lord Chancellor as used with regard to the acquisition of a positive asset. The case of the £3,500 seems to me possibly clearer than the other case. It is a payment made for the purpose of modifying the conditions of an existing asset so as to cause the result to be more advantageous for the enduring benefit of the trade. In that case it seems to me that the words of the Lord Chancellor, in themselves applicable to the acquisition of a positive asset or possible advantage, are equally applicable to the case where the payment is made for the purpose of getting rid of a permanent disadvantage or liability arising with regard to the lease, which was a permanent asset of the business. In my judgment the decision of the learned judge was correct and should be affirmed.

I **LAWRENCE, L.J.**—I agree. The question in this case is whether two sums of money, amounting together to £6,500, paid by the company to its lessors in consideration of the latter accepting a surrender of certain seams of coal comprised in the two leases of 1882 and 1919, are admissible deductions for income tax purposes in computing the company's profits for the year ending April 5, 1925. In my

judgment the true test to be applied in determining this question is that laid down by LORD SUMNER in *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1) ([1915] A.C. at p. 468) and approved by LORD CAVE, L.C., in *British Insulated and Helsby Cables, Ltd. v. Atherton* (4), viz., is this sum of £6,500 a proper debit item to be charged against incomings from the trade of the company when computing the balance of the profits of such trade? In applying that test, it is essential, in the first place, to see what the trade of the company really is, and secondly, whether the payment was money wholly and exclusively expended for the purposes of that trade, or was it otherwise a proper debit item to be charged against the incomings of that trade? A B

As regards the nature of the trade carried on by the company there is really no dispute. It must be borne in mind that that trade does not consist of acquiring mining leases and selling those mining leases. The company's business is that of colliery proprietors, and its trade consists of the winning and the selling of coal. For the purpose of carrying on that trade it has acquired numerous leases, including the two leases in question in this case. Those two leases, to my mind, clearly constitute a part of the fixed capital assets of the company, and none the less so because they were acquired without any cash premium having been paid on those leases being granted. It is only necessary to substitute the words "mining leases" for the word "contracts" in the passage in LORD SUMNER's speech in *John Smith & Son v. Moore* (2) ([1921] 2 A.C. at p. 38), to make that passage directly applicable to the facts of the present case. He there says: C D

"The business carried on was not that of buying and selling contracts, but of buying and selling coals, and the contracts, which enable the seller of the coals to acquire the coals, were no more the subject of his trading as a stock in trade for sale than a lease of a brickfield would be the subject of a sale of bricks." E

Now if I have rightly appreciated the nature of the trade carried on by the company, the second question, namely, whether the sum of £6,500 is a proper debit item against the incomings of that trade, presents no difficulties, to my mind.

The company, for sufficient reasons, decided to get rid of certain seams of coal constituting part of its fixed capital assets. The only practical way of disposing of those seams was to procure the lessor to accept a surrender of the leases under which they were held, and in order to effect such surrender the company had to pay the £6,500 in question. In those circumstances it cannot, in my opinion, reasonably be said that the consideration paid for the acceptance of the surrender was a sum wholly and exclusively expended for the purpose of winning and selling the coal in which the company traded. In substance and in fact it was a sum paid for the purpose of disposing of a capital asset of the company which had become burdensome to the company. In principle, such a payment seems to me to stand on precisely the same footing as any loss or profit sustained or made by a trading company on the disposal of part of its fixed capital. Perhaps it is not very material in this case to define the precise nature of the payment, whether it can be said to be a payment made in order to improve the rest of the company's fixed capital assets, or whether it can be truly described as a loss of capital. Whatever may be the direct object of the payment, it seems to me that it is a payment made in respect of the company's fixed capital and not a payment made for the purpose of its trade of winning and selling coal so as to form a proper debit item against the incomings of that trade. F G H

Counsel for the company have strongly relied on *Hancock v. General Reversionary and Investment Co., Ltd.* (5). It appears to me that the facts of that case are essentially different from the facts of the present case. In that case it would not reasonably have been suggested that the payment made to the actuary was one made in respect of any fixed capital asset. It was in the nature of a commutation of the liability which the company had entered into to make a payment to one of its late employees, and, in my opinion, it stands on an entirely different footing from the case which we have before us here. The mere fact that I

A the disposal of these seams by surrender to the landlord has operated to avoid certain expenses which the company would have had to incur and which could properly have been charged against the incomings of this trade, does not, in my judgment, make the payment itself a payment which can be properly admitted as a deduction from the incomings of the company's trade.

B For these reasons I agree that the decision of ROWLATT, J., was right, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Johnson, Weatherall, Sturt & Hardy*, for *Parker, Rhodes, Cockburn & Co.*, Rotherham; *Solicitor of Inland Revenue*.

[*Reported by GEOFFREY P. LANGWORTHY, ESQ., Barrister-at-Law.*]

C

D

Re SANDWELL PARK COLLIERY CO. FIELD AND OTHERS v. THE COMPANY

[CHANCERY DIVISION (Maugham, J.), November 1, 2, 14, 1928]

[Reported [1929] 1 Ch. 277; 98 L.J.Ch. 229; 140 L.T. 612]

E

Company—Debenture holders' action—Sale of property—Approval by court—Time for obtaining—Need to state in contract—Reasonable time where no date fixed.

F

A contract for the sale of property in a debenture holders' action entered into by a receiver should generally contain a clause stating the date by which the approval of the court must be obtained. In such a case time will be of the essence of the condition, and there will in general be no difficulty in obtaining the approval of the judge to a sale before the fixed date. Sometimes the receiver takes steps to obtain from the purchasers an extension of the time for obtaining the approval of the court, but if such extension of time is refused there is no difficulty in dealing with the matter under R.S.C., Ord. 51, r. 1 (b), which gives the court power to make an order for sale in a debenture holders' action at any time. In a case where the contract for sale provides for the sale being subject to the approval of the court, but states no time within which such approval is to be obtained, the approval must be obtained within a reasonable time.

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In the circumstances of the present case,

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Held: a reasonable time could not be later than the date fixed for completion.

Notes. Distinguished: *Finkielkraut v. Monohan*, [1949] 2 All E.R. 234.

As to sale of property charged by debentures, see 6 HALSBURY'S LAWS (3rd Edn.) 519; and for cases see 10 DIGEST (Repl.) 836-888.

Cases referred to:

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- (1) *Smith v. Butler*, [1900] 1 Q.B. 694; 69 L.J.Q.B. 521; 82 L.T. 281; 48 W.R. 583; 16 T.L.R. 208, C.A.; 40 Digest (Repl.) 266, 2232.
- (2) *Forrer v. Nash* (1865), 35 Beav. 167; 6 New Rep. 361; 11 Jur.N.S. 789; 14 W.R. 8; 55 E.R. 858; 40 Digest (Repl.) 269, 2247.
- (3) *Re Head's Trustees and Macdonald* (1890), 45 Ch.D. 310; 59 L.J.Ch. 604; 63 L.T. 21; 38 W.R. 657, C.A.; 40 Digest (Repl.) 253, 2122.
- (4) *Bellamy v. Debenham*, [1891] 1 Ch. 412; 60 L.J.Ch. 166; 64 L.T. 478; 39 W.R. 257; 7 T.L.R. 199, C.A.; 40 Digest (Repl.) 266, 2230.
- (5) *Halkett v. Earl of Dudley*, [1907] 1 Ch. 590; 76 L.J.Ch. 330; 96 L.T. 539; 51 Sol. Jo. 290; 40 Digest (Repl.) 206, 1685.

(6) *Stickney v. Keeble*, [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664, H.L.; 40 Digest (Repl.) 254, 2134. A

Summons in a debenture holders' action.

The vendor, under a conditional contract of Oct. 31, 1927, sought an order that that contract, which was made between him as the receiver and manager of the Sandwell Park Colliery Co., Ltd., of the one part, and the purchasers, of the other part, for the sale of land and cottages subject to the debentures for £23,075 might be confirmed. The writ was issued on Aug. 24, 1927, and on Aug. 31 a receiver and manager was appointed on behalf of the debenture holders on motion treated as a motion for judgment by consent, and the usual accounts and inquiries were ordered. On the making of the contract a deposit of 10 per cent. had been paid. By cl. 6 thereof the purchase was to be completed on or before Dec. 31, 1927. By cl. 8 the vendor was stated to be selling as receiver. Objections and requisitions were to be sent in in seven days after delivery of the abstract, to be replied to within three days after delivery thereof. By cl. 14 the contract was to be subject to approval by, and sanction of, the court. If not so approved and sanctioned, the contract was to become void with no liability to either party, the purchasers to be entitled to return of their deposit without interest. Application for confirmation was made on Nov. 21 and was adjourned to the judge. Subject to another contract, which was confirmed, the summons was ordered to stand over. The title was accepted by the purchasers' solicitors on Dec. 20, they stating that they hoped the sanction of the court would be expedited. The draft conveyance was sent by them on Dec. 23 and acknowledged on Dec. 29 by the vendors' solicitors, who stated that it could not be approved until sanction of the court had been obtained. The purchasers' solicitors wrote on Jan. 10, 1928, that the deposit had been provided by one Alderson who held an agreement which earmarked it as his money. They referred to the terms of the contract and pointed out that the necessary consent of the court had still not been obtained. They demanded repayment of the deposit, and stated that as Alderson could not now proceed with the scheme he had of forming a company to acquire the land for a greyhound racing track, the delay being fatal thereto, the purchasers were not able to complete. On Jan. 17 there was another request for return of the deposit. The court was now asked for the first time to confirm the contract. B
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Gover, K.C., and *Errington*, for the purchasers, referred to *Smith v. Butler* (1); *Forrer v. Nash* (2); *Re Head's Trustees and Macdonald* (3); *Bellamy v. Debenham* (4); *Halkett v. Dudley* (5); *Stickney v. Keeble* (6). G

Spens, K.C., and *Evershed*, for the vendor, referred to *Stickney v. Keeble* (6).

Cur. adv. vult.

Nov. 14. **MAUGHAM, J.**, read the following judgment.—The questions which arise upon the present application are questions of considerable importance in relation to sales, with the approbation of the judge, in debenture holders' actions, and as such sales are now very common it may be useful to consider the position in regard to them. H

A contract for sale of property in a debenture holders' action entered into by a receiver should, I think, generally contain a clause stating the date by which the approval of the court must be obtained, and in my experience that is the usual practice. In such a case time will be of the essence of the condition, and there will in general be no difficulty in obtaining the approval of the judge to a sale before the fixed date. Sometimes in such a case the receiver takes steps to obtain from the purchasers an extension of the time for obtaining the approval of the court; but if such extension of time is refused there is no difficulty in dealing with the matter under Ord. 51, r. 1 (b), before the certificate has been obtained, and, therefore, before all the persons interested are ascertained. In the present case the contract provides for the sale being subject to the approval of the court, but states no time within which such approval is to be obtained. Clearly, therefore, the approval must be obtained within a reasonable time; and, for reasons which will appear, I

A I have come to the conclusion that in the circumstances of such a case as the present a reasonable time cannot be later than the date fixed for completion, namely, in this case Dec. 31, 1927. This is not based upon the view that the date for completion was in equity of the essence of the contract, a matter with regard to which I do not think it necessary to express an opinion, although it seems to be clear that the intention of the purchasers was to acquire the property for purposes
B which might be thought to involve expedition. The contract, however, was entered into by the receiver, not as agent for the owners, but as an officer of the court, and, therefore, by a person who had himself no title to the property whatever. Clause 14 of the contract must be regarded as a condition precedent which had to be satisfied before the contract would be binding as a contract for sale. Courts of equity, in dealing with actions for specific performance relating to land, have been accustomed
C to give effect to the real intention, rather than to the precise words, fixing the date for completion. The effect is that a clause fixing a date for completion is equivalent to a clause stating that completion shall be on that date or within a reasonable time thereafter. But there is no ground for a similar construction in the case of a condition upon which the validity of the contract as one for sale depends. The distinction is obvious. In the first case, both parties are bound, and a moderate delay
D in completion is thought not to injure either. In the latter, the very existence of the mutual obligations is dependent on the performance of the condition. The purchasers do not know in the first instance if their purchase money will ever be required. In general, and in the present case, there is no promise or undertaking by the vendor that the condition will be fulfilled. Equity has, I think, never applied its liberal views as to time to such a condition. If a date is mentioned,
E the condition must be exactly complied with. If a date is not mentioned, the condition must be fulfilled within a reasonable time; there is no difference between the views of law and equity in considering what is a reasonable time, and the uncertain position of the purchasers must be borne in mind.

The situation in the present case is not very unlike that which was considered by the Court of Appeal in *Smith v. Butler* (1). There was an agreement in that
F case to purchase from the defendant the lease of a public-house on which there was a subsisting mortgage, on condition that the consent of the mortgagee should be obtained to the same amount of money remaining due on the mortgage as was then due. There was no express statement as to the date by which such consent of the mortgagee must be obtained, but there was a difficulty in obtaining it, and the plaintiff unwisely treated the contract as at an end, and repudiated it before
G the date fixed for completion. The Court of Appeal held that the defendant had until the date fixed for completion in which to perform the condition of obtaining the consent of the mortgagee. ROMER, L.J., says this ([1900] 1 Q.B. at p. 699):

“To my mind it is reasonably clear that the vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time,
H in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor.”

I think, taking the judgments as a whole, it is reasonably apparent that the court took the view that the date fixed for completion was the time by which the condition had to be performed, and considered that if that time had passed the purchaser might have recovered the deposit. *Re Head's Trustees and Macdonald*
I (3) and *Bellamy v. Debenham* (4), though not so closely in point, seem to me to support the view that a condition precedent to the validity of a contract for sale of land must, *prima facie*, in the absence of express provision, be fulfilled before the date fixed for completion.

I should add that I do not think the purchasers in such a case as the present are in any way directly affected by what takes place in chambers in the debenture holders' action, or that any such proceedings can throw light upon the question what is a reasonable time within which a receiver for debenture holders must obtain the sanction of the court to a contract for sale. It is, of course, true that the

purchasers enter into the contract upon the express stipulation that the sanction of the court will have to be obtained; but it does not follow that they must be taken to know that this circumstance is likely to occasion any considerable delay. Since the year 1893 there has been a rule (Ord. 51, r. 1 (b)), under which the judge in person may direct a sale before judgment and also after judgment before all the persons interested are ascertained and accordingly before the certificate of the master is made. In these days there is no need for delay, if the parties concerned are expeditious, and bring satisfactory evidence before the court. In an urgent case counsel can apply for an early hearing of the matter, and I have known more than one case in which the sanction of the court to a sale in a debenture holders' action has been obtained within a few days after the issue of the writ. There is, therefore, no ground in the present case for drawing the conclusion that the parties to the contract must have anticipated any difficulty in obtaining the approval of the court before the date fixed for completion. It is, I think, of great importance that purchasers negotiating with receivers should be able to negotiate on the terms that they will know at an early date whether or not their contracts are binding.

There is, however, another point which is, I think, decisive on the question whether the purchasers are entitled to recover the deposit of £2,307 10s. The position of a purchaser in regard to a deposit in a case where there has been delay in completion for which the purchaser has not been responsible has been clearly explained in *Stickney v. Keeble* (6). From LORD PARKER's opinion in that case it is apparent that in a contract for the sale and purchase of real estate the time fixed for completion has at law always been regarded as essential, with the result that after the day fixed for completion is past the purchaser can treat the contract as at an end, and recover his deposit. He points out, however, that equity did not look upon the stipulation as to time in the same light, and constantly decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and restrained proceedings at law based on such failure. He deals with the effect of s. 25 (7) of the Supreme Court of Judicature Act, 1873, as follows ([1915] A.C. at p. 417):

"My Lords, I cannot give to the section in question the interpretation for which the respondents contend. It means, in my opinion, that where equity would, prior to the Act, have, for the purposes of decreeing its own remedies, disregarded a stipulation as to time and restrained an action at law based on the breach thereof, the courts constituted by the Act are for the purpose of giving common law relief to disregard it in like manner. In considering whether it would give relief by restraining proceedings at law the Court of Chancery took cognisance of everything which had happened up to the date of the decree, and in applying s. 25 (7) of the Act, everything up to the date of judgment ought, in my opinion, to be similarly taken into account. The section cannot, in my opinion, mean that the rules as to time laid down by courts of equity in certain cases for certain purposes, and in certain circumstances only, shall be applied generally and without inquiry whether the particular case, purpose or circumstances are such that equity would have applied the rules. If since the Judicature Acts the court is asked to disregard a stipulation as to time in an action for common law relief, and it is established that equity would not under the then existing circumstances have, prior to the Act, granted specific performance or restrained the action, the section can, in my opinion, have no application; otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity."

I have, therefore, to consider here the question whether the applicant is entitled to the equitable relief of specific performance at the present date, and whether the court ought to approve the contract with that end in view, and would before the Judicature Act have restrained an action at common law by the purchasers. In considering these questions, I have to consider the facts as they exist at the present

A time; for, as LORD PARKER points out, the vendor's conduct, even in cases when the time fixed for completion is not in equity of the essence of the contract, may disentitle him to equitable relief, and in order to ascertain whether he is so disentitled, his conduct both before and after the date fixed for completion must be considered. In the present case, I think it is quite impossible to hold that the purchasers who entered into the conditional contract in question on Oct 31, 1927, B ought to be told to-day, after more than a year has elapsed, that the court approves and sanctions the contract, notwithstanding the facts to which I have above referred. The delay in obtaining the approval of the court, apart from the definite repudiation of the purchasers in January last, has, I think, entitled the purchasers to object to specific performance of such a contract as is here in question. The consequence is that the purchasers have their legal rights as regards the deposit, and these are, C to treat the contract as at an end, and to recover the deposit paid, together with all interest earned by such deposit since it was paid to the vendor.

Solicitors: Collyer-Bristow & Co., for Forsyth, Bettinson & Co., Birmingham; Peacock & Goddard, for Shakespeare & Vernon, Birmingham.

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

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E

J. ARON & CO. v. MIAL AND OTHERS

[COURT OF APPEAL (Scrutton, Greer and Sankey, L.JJ.), June 22, 25, 26, 1928]

[Reported 98 L.J.K.B. 204; 139 L.T. 562; 34 Com. Cas. 18;
17 Asp.M.L.C. 529]

F

Insurance—Marine insurance—Assignment of policy—Endorsement in blank by brokers and agent of assured—Right of assignee to sue for loss suffered before assignment—Application of policy money between assignee and assignor.

G

Where brokers who have effected a marine insurance policy and the agent of the assured have endorsed the policy in blank all claims on the policy are assigned to the holders of the policy who thus acquire the right to sue any claim which the assignor had on the policy, irrespective of the fact that at the time of the loss or damage the assignees were not interested in the subject-matter lost or damaged.

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Per GREER, L.J.: In dealing with a claim on a policy it is no concern of the court to say whether or not the policy moneys, when obtained by the assignee, are to be held for the assignee entirely or partly for the assignee and partly for some other person. The question whether or not part of the policy money is held by the assignee for the benefit of the assignor must be left to be determined between the assignor and the assignee.

I

Notes. As to assignment of marine policies, see 22 HALSBURY'S LAWS (3rd Edn.) 108, 109; and for cases see 29 DIGEST 90-92.

Cases referred to:

- (1) *Lloyd v. Fleming, Lloyd v. Spence* (1872), L.R. 7 Q.B. 299; 41 L.J.Q.B. 93; 20 W.R. 296; sub nom. *Lloyd v. Fleming, Lloyd v. Spence*, 25 L.T. 824; 1 Asp.M.L.C. 192; 29 Digest 91, 488.
- (2) *Swan and Cleland's Graving Dock and Slipway Co. v. Maritime Insurance Co. and Croshaw*, [1907] 1 K.B. 116; 76 L.J.K.B. 160; 96 L.T. 839; 23 T.L.R. 101; 12 Com. Cas. 73; 10 Asp.M.L.C. 450; 29 Digest 92, 497.

(3) *Yangtze Insurance Association, Ltd. v. Lukmanjee*, [1918] A.C. 585; 87 A.L.J.P.C. 111; 118 L.T. 736; 34 T.L.R. 320; 14 Asp.M.L.C. 296, P.C.; 29 Digest 88, 463.

Appeal from an order of ROCHE, J.

The plaintiff firm, who were interested in a cargo of cocoa beans, claimed to recover from the defendants, underwriters, for loss or damage to the cargo under a policy of insurance which contained a warehouse-to-warehouse clause. The plaintiffs had purchased under a c.i.f. contract some 3,000 bags of cocoa beans, which had been shipped from the west coast of Africa. On delivery the beans were found to be damaged. The judge held that the damage was caused by rain and surf, aggravated by sweating before shipment. He held further that the plaintiffs had an interest in the goods covered by the policy of insurance and could sue for the damage which had occurred before shipment. The defendants appealed.

Pritt, K.C., and *James Dickinson* for the defendants.

Norman Raeburn, K.C., and *David Davies*, for the respondents, were not called on to argue.

SCRUTTON, L.J.—I am satisfied that we cannot interfere with the judgment of the learned judge below. The claim is by a person interested in cocoa beans coming from the west coast of Africa against underwriters. Some damage undoubtedly happened to the beans. The underwriters take three points in opposition to a judgment in favour of the plaintiffs given by ROCHE, J., giving the plaintiffs an award of certain sums of money. The underwriters say three things. They say, first of all, that the plaintiffs cannot sue for this damage, because a very substantial portion, if not all of it, occurred at a time when they were not interested in cocoa beans. Secondly, they say, as I understand, that if the plaintiffs had a claim on them they had forfeited it by the way in which they had dealt with an arbitration against the sellers which had destroyed their (the underwriters') right of subrogation. Thirdly, they say that the learned judge has given much too much; he has made a mistake in the figure. The second and third questions appear to me to turn entirely on matters of fact. The first may raise important questions of law.

The facts are these. A firm on the west coast of Africa, Bartholomew & Co., acting through a gentleman in London named Thompson, sold to purchasers certain cocoa beans f.o.b., of a certain quality, "fair fermented," with certain allowances, and with a term as to insurance which was this:

"Insurance against marine and war risk to be effected from the port of shipment to destination by sellers for buyers' account, sellers allowing 2s. per cent. on f.o.b. value which covers their risk from beach to steamer."

It is pretty clear, therefore, under that contract, that the person who would then effect the insurance would be effecting it on account of buyers from shipment and on account of sellers from beach to steamer. Those goods so sold were re-sold by the original purchasers to the plaintiffs under a contract expressed to be c.i.f. which would require the original purchasers to pass on to the plaintiffs the usual policy in the trade covering against the usual risks. When one looks at the policy that the original sellers effected, it is a policy

"from a port to ports, place or places, on the west coast of Africa to Boston, the risk to commence from the time of leaving the factory or warehouse in interior until delivered to warehouse as above, including all country damage"

—country damage being a phrase which usually covers damage sustained in the land transit from the warehouse in the interior to shipment. If the question simply arose on this policy and the damage claimed was country damage or damage happening before shipment I think there would be no doubt that the original purchasers would not be interested under the policy. The goods were not at their risk from warehouse to steamer. However, it is not necessary for me to decide that.

I have not heard counsel for the plaintiffs on the subject, and Heaven forbid

A that anybody should suggest that c.i.f. contracts have yet arrived at translucent clearness; but a thing has happened in this case which appears to me to render it unnecessary to decide whether the plaintiffs could sue on the policy as persons for whose benefit it was intended to be effected, for one finds on the policy an assignment of the policy in the ordinary form in which policies are assigned in England, that is to say, the brokers who effected the policy have signed their names and the B agent of the original purchasers has signed his name. That endorsement in blank, according to my experience and according to the custom of marine insurance in England, assigns all claims on the policy to the holder of the policy, and it is made more precise in this case by the plaintiffs, the holders of the policy, endorsing on it a request that the claim shall be paid to them.

In my view, the effect of effecting the assignment of the policy in that way, in C the ordinary manner in which policies are assigned in England, assigns to the person holding the policy the right to sue any claim which the assignor had on the policy, irrespective of the fact that the assignee was not at the time of loss or damage interested in the subject-matter lost or damaged. That appears to me to have been clearly pointed out by BLACKBURN, J., in the judgment in *Lloyd v. Fleming* (1), in which he discussed whether it is necessary when there is an assignment D after loss that the assignee should have been interested in the goods at the time of the loss, and decides (giving the judgment of the Court of King's Bench) that it is not necessary, but that the assignment is merely the assignment at common law of a chose in action, the chose in action being the claim which the assignor has against the underwriters on the original policy. That statement was again followed and adopted in *Swan and Cleland's Graving Dock and Slipway Co. v. Maritime Insurance Co. and Croshaw* (2) by CHANNELL, J. ([1907] 1 K.B. at p. 123), and it is again stated (to be discarded, because there was in that case no assignment) in the very elaborate judgment in the Privy Council delivered by LORD SUMNER in *Yangtze Insurance Association, Ltd. v. Lukmanjee* (3). LORD SUMNER pointed out what would be the position if there was an assignment, or if the documents in that case against which cash had to be paid, had by custom included an insurance F policy. It was pointed out that in that particular case there was no assignment and no evidence that the cash was against documents—that the documents included an insurance policy. The first point, therefore, put before me by counsel for the defendant, in my view, fails, because it is open to the plaintiffs to sue here as assignees of the original sellers' rights under the policy though they were not, at the time when the loss for which those sellers would claim, interested in the subject-matter G which sustained the loss or damage.

The other two points are points, as I have said, of fact. [His Lordship dealt with the evidence and concluded:] For these reasons I think the appeal should be dismissed with costs.

GREER, L.J.—I agree. Counsel for the defendants has made three points, and H has expressed them with his usual facility and vigour, but I agree with my Lord that he fails in establishing any of those points. The first point, as I understand it, is this. Counsel says that the plaintiffs never acquired the right to sue upon the policy in question in respect of the damage that happened before the goods were delivered at the ports of shipment over the ship's rail, because he says they bought on a c.i.f. contract and they were entitled to have goods delivered over the ship's I rail which were of the quality contracted for and in the condition contracted for. Therefore, he says that they had no interest whatever in the damage which happened during the delivery to the ship—in any damage called country damage which happened before the goods had got to the port of shipment. The answer to that point depends, in my judgment, on whether the plaintiffs became the assignees of the policy, with contractual rights under it, and it is no concern of the court, in dealing with a claim upon the policy, in my opinion, to say whether or not the policy moneys, when obtained by the person who has the right to sue for them, are to be held for that person entirely or partly for that person and partly for some

other person. If the contractual rights have in fact passed to the assignee, then the assignee is entitled to sue for anything that may be due upon the policy, and the question must be left to be determined between the assignor and the assignee whether part of the proceeds is or is not held for the benefit of the assignor. A

Before the Policies of Marine Assurance Act, 1868, policies could not be assigned at law. The right to sue could not be passed from the person who took out the policy to any assignee. The rights of the assignee were only recognised in equity as the assignee then had the right to sue in the name of the assignor; if this Act had not passed, this action would have been brought in the name of the assignor and everything that could be recovered in the name of the assignor would have been recovered by the assignee operating in the name of the assignor; then it would have had to be determined, between assignor and assignee, which part of the policy moneys went to the one and which part of the policy moneys went to the other. I am not suggesting in this case there ought to be any doubt as to where the policy moneys are to go; all I am suggesting is that it is unnecessary for us to decide that question. I am inclined to think from the document that the beneficial right in all the policy moneys was intended to pass and did pass to the assignees, the plaintiffs in this case, but it seems to be unnecessary to determine that question. B C

I think that the result of the statute to which I have referred, and s. 50 of the Marine Insurance Act, 1906, is that where there is an assignment of the policy, the contractual rights go to the assignee, and the sole question is whether there was an assignment of the claims under this policy. I am unable to draw any other conclusion from the fact of the endorsement than that it was intended and did operate as an assignment of all the claims under the policy. If it was not so intended it was not necessary to endorse the policy at all, because the assignees, the plaintiffs, could have sued as persons for whose benefit the policy was taken out. They did not need an endorsement for that purpose. The only purpose for which an endorsement was required was to pass to them something that they would not have had if that endorsement had not in fact been made. They had a beneficial interest in the policy because there was something at risk; they had some risk, namely, the risk of damage which might happen, and the deterioration which might take place in the course of the voyage after the goods were handed over the rail of the ship. That I think disposes of the first question which we have to determine. D E

The other questions are questions of fact, and with regard to them I agree with what my Lord has said, and do not desire to add anything. F

SANKEY, L.J.—I agree. I only desire to add a few words upon the first point. The remaining points appear to me to be questions of fact upon which the learned judge came to a right conclusion. The plaintiffs were purchasers under a c.i.f. contract of certain parcels of cargo, and the question which falls for determination is: Are they entitled to claim for the damage that those goods sustained before they were put on board ship? In my view, the plaintiffs were assignees of the policy in question. The assured had a right to make a claim in respect of this damage. It was a claim which was assignable, and it was in fact assigned, as appears by the documents themselves, to the plaintiffs. *Lloyd v. Fleming* (1) has been referred to as an authority in favour of the contention, and it provided, by s. 50 of the Marine Insurance Act, 1906, that a marine policy is assignable unless it contains terms expressly prohibiting the assignment, and it may be assigned either before or after loss. This policy was assigned, and the plaintiffs were entitled to sue. I think the first point fails. G H I

Appeal dismissed.

Solicitors: *Ballantyne, Clifford & Co.; Ince, Colt, Ince & Roscoe.*

[Reported by T. W. MORGAN, Esq., Barrister-at-Law.]

BURTON v. BOARD AND ANOTHER

[COURT OF APPEAL (Scrutton, Lawrence and Sankey, L.JJ.), November 5, 1928]

[Reported [1929] 1 K.B. 301; 98 L.J.K.B. 165; 140 L.T. 289]

B *Libel—Fair comment—Particulars of facts on which comment based—No justification—Right of defendant to give particulars.*

In an action for libel the defendant did not plead justification, but pleaded: "The said words are fair comments made in good faith and without malice upon a matter of public interest." He then proceeded to give particulars of the facts upon which he had commented. Upon an application by the plaintiff to strike out a number of these particulars upon the ground, *inter alia*, that they were unnecessary, and tended to prejudice, embarrass, or delay the fair trial of the action,

Held: the defendant was entitled to give particulars of the facts on which he had made his comments although he did not plead justification regarding those facts.

D **Notes.** Considered: *Kemsley v. Foot*, [1951] 1 All E.R. 331.

As to particulars of the defence of fair comment, see 24 HALSBURY'S LAWS (3rd Edn.) 95, 96; and for cases see 32 DIGEST 152, 153.

Case referred to:

(1) *Sutherland v. Stopes*, [1925] A.C. 47; 94 L.J.K.B. 166; 132 L.T. 550; 41 T.L.R. 106; 69 Sol. Jo. 188, H.L.; 32 Digest 142, 1739.

E **Appeal** from an order of HORRIDGE, J., made at chambers.

The plaintiff, at all material times chairman of the Isle of Wight Waterworks Co., claimed damages for libel from the defendant, Board, who was at all material times the chairman of the Sandown Urban District Council and a member of the water committee of that council. The defendant Bindon was the proprietor, printer, and publisher of a newspaper published weekly, known as the "Isle of Wight Chronicle." The Isle of Wight Waterworks Co. was a company incorporated by the Isle of Wight Waterworks Act, 1861, for the purpose of supplying with water the inhabitants, buildings, lands, and premises within the limits of the Act, which included Sandown. By s. 71 of the Isle of Wight Water Act, 1927, it was provided that if the Sandown Urban District Council should introduce in the then next session of Parliament a Bill for an Act to empower them to purchase the undertaking of the company, the company would not oppose such Bill except in so far as they might deem necessary in order to secure the insertion therein of provisions in accordance with the section to protect their interests with respect to the sale and purchase provided for by the section. In his statement of claim the plaintiff alleged that the defendant Board was at all material times desirous that the council should promote the necessary Bill to obtain the powers to purchase the undertaking, and that he (Board) falsely and maliciously caused to be printed and published of the plaintiff in the "Isle of Wight Chronicle" certain letters which the plaintiff alleged meant and were intended to mean and were understood to mean that the plaintiff in opposing the wishes of the defendant Board, and/or of the water committee of the council was actuated by dishonest and selfish motives; that he put his own private gain before the public weal and to achieve his purpose made and was prepared to make deliberate mis-statements and scurrilous attacks on the reputations of honourable men whose opinions did not correspond with his own; that he was endeavouring to hoodwink the inhabitants of Sandown and the district, and in particular the district council electors by making promises which he knew to be worthless, and which he did not intend to keep; that he was a man whose statements ought not to be believed; and that he was corrupt, unscrupulous, and dishonourable. The defendant, Board, admitted that he wrote, and caused to be published, the words complained of. He did not plead justification, but said

that they did not mean and were not understood to mean what was alleged by the plaintiff in his statement of claim. The defendant further pleaded that the publication of the words was made *bonâ fide* and without malice and upon privileged occasions, and that "the said words are fair comments made in good faith, and without malice upon a matter of public interest." The defendant then gave particulars in which he said that the plaintiff had written several letters to the same newspaper, and that in them the plaintiff had made statements which the defendant considered to be misleading in suggesting that the council had not much experience of municipal trading, and that if they purchased the waterworks they would be compelled by the Ministry of Health to purchase outright a large part of the area which formed what was known as the Wyers and Apse Heath supply. The latter statement the defendant considered misleading in view of the fact that neither under the company's Act nor under the council's Bill was any such power given to the Ministry of Health, and that, further, to the knowledge of the company, the Ministry of Health had applied for the insertion of such a clause in the company's Bill and had been refused. The defendant further complained that the plaintiff had incorrectly stated the additional cost of pumping the water: that the plaintiff had in the course of his letters made personal attacks upon those who differed from him, that is to say, upon members of the council and others. The plaintiff thereupon applied to have struck out certain particulars upon the ground that they were unnecessary, and/or scandalous, and/or an abuse of the process of the court, and/or tending to prejudice, embarrass, or delay the fair trial of the action. HORRIDGE, J., having made the order asked for, the defendant appealed.

du Parcq, K.C., and *Blake Odgers* for the defendant.

Rayner Goddard, K.C., and *Wilfrid Lewis* for the plaintiff.

SCRUTTON, L.J.—Of all the cases, which, in my experience, have involved the question of fair comment, this is one of the most troublesome. It is a case in which I propose to say as little as possible about the facts, because they will be investigated by a jury, under the direction of a judge, who will know much more about them than I know from these pleadings, and I might easily say something which would have undue effect upon the trial of the facts. I understand the position to be this. There was a question which excited a considerable amount of public interest at Sandown in the Isle of Wight—namely, whether the local authority should buy the waterworks of a private company, which supplied water to the locality—and the matter appears, judging by extracts from the letters, which are set out in great profusion in the pleadings, to have excited angry passions, leading to comments in which each of the parties expressed his opinion of the other in very uncomplimentary fashion. One of them has, in my opinion, been ill-advised enough to go to law about it, and I suspect, although this is a prophecy which may be all wrong, that by the time this case is finished both of them will be truly sorry to find that only one class of people will have benefited by it.

The plaintiff, who has written a number of letters reflecting upon the defendant, Board, brings an action for libel against the defendant for writing that which he, the plaintiff, says strongly affected him in his reputation and credit. The defendant does not justify in the sense of saying: "The statements I have made are true and any inferences that people would draw from them are correct," but he says: "The said words are fair comments made in good faith and without malice upon a matter of public interest." It is the law that you have a defence in a libel action, if you show that there is a matter of public interest, and that your comments, so far as they are based upon facts, are based upon real, true, and existing facts, are fair, not in the sense that they are inferences that must be drawn, but comments which a fair man may reasonably make, although another fair man may easily make the opposite comment. Having pleaded that, the pleader then goes on to give the particulars of the facts upon which this defendant has commented, and he sets out a number of matters which are facts, dated letters

A by the plaintiff to the papers, and the particular statements made, or alleged to have been made by the plaintiff in his letters. There are about three pages of them, and they are set out as being the facts upon which he bases the comments he made, which he says are fair. What the plaintiff does in answer to that is this. He applies to strike out a very large number of those particulars, on the ground that the defendant cannot include them in his pleadings unless he justifies them—

B unless he says they are true. There are two senses in which he may justify them and say that they are true. He may justify the words by saying that the imputations, which would ordinarily be drawn from them, are correct—that the words are true. That is the ordinary plea of justification. Then there is a more limited sense in which he may justify. He may say: "These facts are facts and the inferences to be drawn from them and the comments I have made on them are

C opinion, and I say that the inferences and the comments are fair, in the sense that they were made without malice and are inferences which may reasonably be made from those facts."

The question is: Can the defendant put forward the latter defence without putting in a plea of justification in the ordinary sense of the word. In my opinion, he can. The latest authority, that of the highest tribunal, on this question of

D justification and fair comment is the well-known case of *Sutherland v. Stopes* (1), and I find that in that case, in the statements of the learned Lords, the distinctions which I have stated are frequently drawn. For instance, LORD FINLAY, speaking about the plea commonly known as the "rolled up plea," because it was originally supposed that there was rolled up the plea of justification and the plea of fair comment, says ([1925] A.C. at p. 62):

E "There has been a good deal of misconception as to the nature of this plea. It has been sometimes treated as containing two separate defences rolled into one, but it in fact raises only one defence, that being the defence of fair comment on matters of public interest. The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This averment is quite different from a plea of justification of

F a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated, but also that any comments upon them are correct."

Again he says ([1925] A.C. at p. 65):

G "I read the summing-up as a direction to the jury that in considering the justification they were to find whether the statements of fact in the libel were true, while as to any portion consisting of comment, they were to say whether it was fair comment. The jury found that the facts were correctly stated, but as regards the comment they found that it was not fair. It is, therefore, in my judgment, impossible to deal with the case as if there had been a finding for the defendants upon the plea of justification in the ordinary way. The

H finding was merely that the facts had been proved."

There is a similar passage in LORD CARSON's judgment.

If that is so, what has the defendant in the present case alleged? He has alleged that the words are fair comment on a matter of public interest. He has then gone on to say: "The facts in that matter of public interest, on which I make the comments which I say are fair are," and then follow four pages, which

I allege a number of facts. Counsel for the plaintiff says he must not do anything with these facts unless he adds a plea of justification. In my view, what the defendant is doing is to allege facts on which he relies. He is saying: "There are facts which I shall prove," not "I shall justify," but "I shall prove these facts, and then I shall ask the jury to say the comments I have made on those facts are true." From that point of view I think these particulars should stay where they are. Some of them strike me as rather odd, but they appear to me to be simply an allegation of fact, which counsel says he proposes to prove, not an allegation that the facts and the inferences, which would necessarily be drawn from them,

are true. In these circumstances, without going further in detail into each of the matters which have been struck out, as to which, in the absence of full knowledge I might easily make comments which would be very unfortunate if they were to prejudice the parties at the trial, I think that this appeal must be allowed and the matters struck out reinstated.

LAWRENCE, L.J.—I agree.

SANKEY, L.J.—I agree. The plea set forth by the defendant is that, "the said words are fair comments made in good faith and without malice upon a matter of public interest." Under a plea of that character it appears to me that the defendant is entitled to, and, indeed, must, show, first, what the facts were upon which he commented, and, secondly, that they are true. Facts which are untrue are not facts. Then he must show that the matter is one of public interest. Thirdly, he must show that the comments are fair; and, fourthly, that he made them in good faith and without malice. That, I think, appears from the decision in *Sutherland v. Stopes* (1), especially in the passage which has been already referred to by my Lord in *VISCOUNT FINLAY*'s judgment. For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.; Lawrance, Messer & Co.*

[Reported by E. J. M. CHAPLIN, Esq., Barrister-at-Law.]

Re **JOHNS. WORRELL v. JOHNS**

[CHANCERY DIVISION (Tomlin, J.), May 17, 1928]

[Reported [1928] 1 Ch. 737; 97 L.J.Ch. 346; 139 L.T. 333;
72 Sol. Jo. 486; [1928] B. & C.R. 50]

Bankruptcy—Property available for distribution—Mortgage—Provision benefiting mortgagee if mortgagor bankrupt.

A provision in a mortgage the effect of which is that, if the mortgagor is made a bankrupt, a larger sum shall be paid to the mortgagee than would have been paid had the mortgagor not been made a bankrupt, is void, as being in contravention of the bankruptcy laws, and the security held by the mortgagee will, notwithstanding such provision, be a security for the amount actually advanced and no more.

Notes. Referred to: *Re Apex Supply Co., Ltd.*, [1941] 3 All E.R. 473.

As to property available for distribution in bankruptcy generally, see 2 HALSBURY'S LAWS (3rd Edn.) 409 et seq.; and for cases see 5 DIGEST 630 et seq.

Cases referred to:

- (1) *Mainland v. Upjohn* (1889), 41 Ch.D. 126; 58 L.J.Ch. 361; 60 L.T. 614; 37 W.R. 411; 35 Digest 355, 976.
- (2) *Re Jeavons, Ex parte Mackay, Ex parte Brown* (1873), 8 Ch. App. 643; 42 L.J.Bey. 68; 28 L.T. 828; 21 W.R. 664, L.J.J.; 5 Digest 659, 5370.
- (3) *Re Thompson, Ex parte Williams* (1877), 7 Ch.D. 138; 47 L.J.Bcy. 26; 37 L.T. 764; 26 W.R. 274, C.A.; 5 Digest 962, 7878.

Adjourned Summons, whereby the trustees of the will of C. F. Johns, who died in 1892, asked the court how they were to deal with the one one-ninth share of a son of the testator.

- A The testator's widow had been tenant for life of his estate. She had died on Nov. 10, 1927, and thus the share became distributable. During her lifetime she had made various advances to the son, and had secured these by three mortgage deeds, the date of which were Nov. 25, 1907, June 5, 1911, and Jan. 11, 1913. In the earliest, it was recited that she had agreed to lend the son £1,650. The terms of this agreement were that, as soon as the deed had been executed, he should pay her the sum of £1,000 as a bonus; that she should pay him the sum of £1,010, keeping out of it the sum of £1,000 to meet the bonus; and that he should be paid the remaining £640 by instalments, in accordance with provisions to that effect contained in the deed. The deed provided that if, so long as the mother was alive, the son should neither be adjudicated bankrupt nor charge the property, all obligations which he had incurred by the loan would be satisfied merely by his paying
- B back the £640, but, in the event of his being adjudicated bankrupt or creating a charge upon the property, the mother was to be entitled, as against his trustee in bankruptcy, to have repaid to her the £1,000 which had already been deducted to meet the bonus, the £10 which had originally brought that sum to £1,010, and the remaining £640, plus interest at 5 per cent. In substance, the second and third mortgage deeds differed in effect from the first only in that the second did not make
- C a bonus part of the transaction. Apart from that, the same preferential advantage was secured to the mortgagee in all three cases. The son was adjudicated bankrupt in 1924, and, in the present summons, a legal personal representative of the widow put forward certain claims based on the terms of the mortgages, while the trustee in bankruptcy of the son resisted those claims.

A. P. Vanneck for the trustees of the will.

- E F. Whinney, for the first defendant, Alice Regan Johns, a personal representative of the widow, referred to *Mainland v. Upjohn* (1).

Henry Johnston, for the trustee in bankruptcy of the son, referred to *Ex parte Mackay* (2) and *Ex parte Williams* (3).

- TOMLIN, J.—In this case the trustees of a will seek directions as to dealing
- F with the one one-ninth share of a son which is become distributable by reason of the death of the testator's widow. [His Lordship stated the facts and continued:] It is to be observed that the bargain as to the bonus seems to have the elements which suggest, not the affectionate relation of mother and son, but rather the relation of moneylender and borrower. The effect of the transaction is that the mortgagor is to have at any rate a theoretical advance of £1,650. He is to repay
- G that with interest, and he is also to repay a bonus of £1,000 at once. If he does not before the death of his mother charge the property or go bankrupt, upon her death he discharges the obligation by simply paying back the £650. But if he goes bankrupt in her lifetime, she, as mortgagee, can claim, as against the trustee in bankruptcy, the sum of £1,000, the £10, and also any other advance made, with interest at 5 per cent.

- H It is said on behalf of the trustee that this arrangement is an obvious device to defeat the bankruptcy laws, and is, therefore, bad. My attention has been called to two cases. The first is *Ex parte Mackay* (2), the other is *Ex parte Williams* (3). What I have to do in the present case is to consider the provisions of the mortgage and apply, as far as necessary, the principles laid down in these two cases. In the former case, MELISH, L.J., in the course of his judgment, said:

- I “As I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws.”

This passage was quoted by JAMES, L.J., in his judgment in the later case. It seems to me plain, on examination of this document, that, taking into consideration both the usurious terms of the advance, and the fact that the amount which the mother receives in cash, on the first advance, is equal to the whole of what the son is to receive, the result of the whole transaction is that, if the son goes bankrupt in

her lifetime, she gets not only a substantial sum by way of corpus, but also a large amount by way of interest. It seems to me reasonably plain that the scheme of the document is to secure that something more shall come to her if he becomes bankrupt than will come to her if he does not, and that this scheme falls exactly within the words of MELLISH, L.J., which I have read. The true inference to be drawn from a perusal of this document is that there is here a deliberate device to secure that more money shall come to the mother if the son goes bankrupt than will come to her if he does not; and, that being so, the device is bad. As to the second and third mortgages, the only substantial difference between them and the first is that the second does not stipulate for a bonus; but the same considerations apply to them as to the earlier deed. That being so, all that the mortgagee is entitled to do is to hold the shares as security for the money advanced. The whole bargain between the parties in regard to the advances is bad, as being in violation of the bankruptcy laws, and, therefore, the mortgagee is entitled to be repaid only the moneys actually advanced, with interest at the rate of 5 per cent.

Solicitors : *Worrell & Fordyce; William Easton & Sons.*

[Reported by K. R. A. HART, Esq., Barrister-at-Law.]

Re GREENE. Re WHITWORTH. Re E. A. Re FRASER.
Re WOOD

[COURT OF APPEAL (Lord Hanworth, M.R., Sargant and Lawrence, L.JJ.),
February 17, 20, 28, March 23, 1928]

[Reported [1928] Ch. 528; 97 L.J.Ch. 378; 139 L.T. 152;
44 T.L.R. 449]

*Person of Unsound Mind—Settlement of property—Grounds on which settlement
may be ordered—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 171 (1).*

RE GREENE

R. and W., the only surviving children of H.D.G. and Mrs. G., were certified as of unsound mind in 1902 and 1910 respectively and neither was likely to recover. Under the marriage settlement made in 1879 of H.D.G. and Mrs. G., Mrs. G. was the life-tenant of both the husband's fund and the wife's fund after the death of H.D.G. (which occurred in 1915). Mrs. G. had a power of appointment among issue over both funds, and subject thereto the funds were directed to be held on trust for R. and W. (neither of whom had married) in equal shares. Under the will of J.J., which was proved in 1885, Mrs. G. was entitled to the whole income of the residuary estate during her life and she had a power to appoint to her issue and subject thereto the residuary estate was directed to be held on trust for R. and W. absolutely. In addition R. and W. would succeed to property on the death of their aunt, C.G., who was also of unsound mind. The only relatives of R. and W. nearer than second cousins were Mrs. G. and C.G. The property subject to the marriage settlement was of the value of £49,000 and that subject to the will of J.J. £395,700. The expectation of R. and W. on the death of C.G. was about £18,000. Neither R. nor W. had made a will or would ever be capable of doing so. Mrs. G. wished to have a power of appointment over the property settled by the marriage settlement (of which she had provided the major part) and by the will of J.J., subject to proper provision being made for R. and W., in order that she might make provision for various persons, friends of hers and

A of H.D.G., servants and charities, but limited her application to personal property. The Crown did not oppose the application in regard to the marriage settlement, it being argued on behalf of Mrs. G. that if R. and W. had been of sound capacity they would have undertaken the responsibilities which Mrs. G. desired to meet.

B **Held:** no injustice would be suffered (within the meaning of the Law of Property Act, 1925, s. 171 (1) (c)) if the property subject to the settlement and to the will of J.J. was allowed to devolve as undisposed of on the death intestate of R. and W., because none of the persons or objects for whose benefit a settlement was desired had any spes successionis; nor was there any ground based on hardship or expediency on which a settlement might be ordered under s. 171 (1) (b) of the Act of 1925; but, although without the assent of the Crown the court would have felt much difficulty, a settlement would be ordered of the marriage settlement funds enabling Mrs. G. to dispose of them on her death.

RE WHITWORTH

D The applicant was a first cousin of the mother of the patient, who was found to be of unsound mind in 1906. The applicant was born in 1847 and applied for a settlement to be made of the property of the patient under which she and other second cousins of the patient would benefit. No special services had been rendered to the patient by the applicant, and there was no proof of close association with or special case for the patient.

Held: the application had no merits within the purview of s. 171 of the Act of 1925, and would be dismissed.

E

RE E.A.

F The patient, who was born in 1848, was the founder of a brewery and held a large number of shares in the capital of a limited company which ran it. In 1924, his only surviving son was appointed receiver of his estate. His property was worth not less than £450,000. The patient lived at home. His last will was made in 1887, when his family consisted of his wife, who died in 1918, a son born in 1880, a daughter born in 1883, the son (his receiver and the present applicant) born in 1885, and a daughter born in 1891. In 1920 the elder son died, leaving a widow and four children. The daughters were both married and each had children. The applicant was married with one child. By his said will the patient divided his estate equally between his wife and children as a class, the wife's and daughters' shares being settled. In 1922 the patient talked of making a new will. The applicant said that if the patient had not been incapacitated he would have divided his property equally among his children, and if one had died in his lifetime leaving issue, that issue would have taken equally the share of their father or mother. It was also said that he would have had due regard for the future of the family brewery company, and have made provisions avoiding a forced sale of his shares. The application for a settlement was supported by all persons who would take under the subsisting will.

H

Held: it was clear that if no fresh dispositions were made of the patient's property injustice would be caused to the children of the deceased elder son and serious inconvenience might be caused to the company, and a settlement under s. 171 would be ordered.

I

RE FRASER

The patient had for many years resided with Mrs. H., who was his first cousin. The patient was entitled to considerable property derived from his maternal grandfather, through a settlement made by his mother, and under the latter's will and as her heir-at-law. The patient's mother had been deserted by the patient's father prior to 1875 and in 1877 on the mother's petition the marriage was dissolved. The patient's mother died in 1896, and the patient's only sister died a spinster and intestate in 1903; he had no

brother. Mrs. H. and the children of a deceased sister of Mrs. H. were the only relatives of the patient on the mother's side. Nothing was known about the whereabouts of the patient's father, and so far as was known there were no relatives of the patient on the father's side. In 1927, Mrs. H. and her husband were appointed committees of the person and estate of the patient.

Held: an order would be made under s. 171 (1) (b) that a settlement be made securing to those relatives on the mother's side who would take, if there were a complete failure of relatives on the father's side and living at his death, the property of which he was possessed.

RE WOOD

In 1912 the patient was married, but there were no children of the marriage, and he made a will dated Mar. 12, 1922, which was witnessed by P.A.H. and Mrs. H. P.A.H. and Mrs. H. were able to give evidence of the terms of the will, which had been lost. In 1925, the wife of the patient was appointed receiver.

Held: there were "special reasons" within s. 171 (1) (c) why a settlement of the patient's property should be executed to carry out the purposes of the lost will.

Notes. Applied: *Re C.W.M.*, [1951] 2 All E.R. 707.

For the Law of Property Act, 1925, s. 171, see 20 HALSBURY'S STATUTES (2nd Edn.) 780.

Cases referred to:

- (1) *Re Freeman*, [1927] 1 Ch. 479; 96 L.J.Ch. 225; 136 L.T. 657; 71 Sol. Jo. 272, C.A.; Digest Supp.
- (2) *Re Hinde, Ex parte Whitbread* (1816), 2 Mer. 99; 35 E.R. 878, L.C.; 33 Digest 195, 978.

Applications in lunacy.

These were five applications under s. 171 of the Law of Property Act, 1925, by persons interested in the property of lunatics seeking settlements of the property. Each case was argued separately and judgment reserved in which all the cases were dealt with separately. The facts in each case are shortly stated in the headnotes and will be found more fully set out in the judgment of LORD HANWORTH, M.R.

W. A. Greene, K.C., G. B. Hurst, K.C., and Wilfrid M. Hunt for the applicant in *Greene's Case*.—In effect, owing to the lunacy of the two patients, the marriage settlement of the applicant, their mother, had failed pro tanto, and in justice those who provided the money should have the benefit of a resulting trust, and in the events which have happened that would be a trust in favour of the applicant. *Re Freeman* (1) was referred to on the question what constituted "suffering an injustice" within the meaning of that phrase in s. 171 (1) (c), where the phrase was given a very wide meaning. The Crown is represented here as a sort of residuary legatee. Subsection (5) of s. 171 does not necessarily mean that in all circumstances every penny of the capital must remain intact. If ever there was a case of injustice owing to lunacy this case is one, the whole footing of the settlement and the will was that on the children of the marriage attaining twenty-one years they would be compos mentis. *Re Hinde, Ex parte Whitbread* (2) (2 Mer. 99 at p. 102), and other cases which were referred to recently in *Re Freeman* (1) were cited and commented on.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Stafford Crossman for the Crown.—It is only desired by the Crown to assist the court in arriving at some principle. The applicant in effect desires a settlement which will dispose of the personal property to be affected for benevolent purposes, but it was never intended that the rights given to the Crown should be defeated for any such purposes, and the court ought not to lay down any principle that under s. 171 it has power to dispose of the property of a lunatic benevolently, but must place some reasonable limit on its jurisdiction under s. 171. There can here be no sort of injustice.

- A** *W. G. Hart* for the applicant in *Whitworth's Case*.
E. M. Winterbotham for the receiver of the lunatic's estate, the Official Solicitor.
Cleveland Stevens for the applicant, the receiver of the estate in *E.A.'s Case*, heard in camera.
A. F. Topham, K.C., and *F. McMullan* for the applicant in *Fraser's Case*.
E. M. Winterbotham for the applicant in *Wood's Case*.
- B** *The Solicitor-General (Sir Thomas Inskip, K.C.)* and *Stafford Crossman* for the Crown.

Cur. adv. vult.

Mar. 23. The following judgments were read.

C **LORD HANWORTH, M.R.:**

RE GREENE

D These summonses were taken out by Mrs. Harriet Rowland Greene, a widow, residing at the Grove Craven Arms in the County of Salop, asking that under s. 171 of the Law of Property Act, 1925, settlements may be directed of all the estates and interests, present and future, of the above-named patients, respectively, under or by virtue of (a) the last will of John Jones (deceased) (the maternal grandfather of the patients) and (b) the settlement dated Oct. 16, 1879, made on the marriage of the parents of the patients, or of any appointment made or to be made in favour of the patients under any power of appointment conferred on the applicant by either of such documents, other than any property which would devolve on the death of the patients as real estate, together with further consequential or alternative relief.

E Mrs. Greene, the applicant, is the only child of her parents, John Jones, who died on May 19, 1885, and his wife, Mary Ann Jones, who died on May 26, 1885. Under the terms of her father's will Mrs. Greene became entitled to very considerable property. Mrs. Greene was married on Oct. 18, 1879, to Henry David Greene, who died on Oct. 11, 1915, and the settlement referred to in the summonses is that which was effected in contemplation of the marriage that was solemnised two days after it had been executed. There were three children of the marriage. The eldest, Hilda, was born in 1880 and died before being married or reaching the age of twenty-one. The second, Rowland, was born on Dec. 22, 1881, and the third, Winifred, was born on Dec. 30, 1883. By inquisitions in 1902 and 1910 they were respectively certified to be of unsound mind, and in each case the applicant was appointed committee of their persons and estates. These two persons are the patients referred to in the summonses. They have respectively reached the ages of forty-six and forty-four years, and there is no prospect of the recovery of either of them. These children of the marriage of Mr. H. D. and Mrs. Greene have no relations nearer than second cousins except their mother, the applicant, and their paternal aunt Catherine Greene, spinster, who is eighty-two years old and also certified as of unsound mind. Thus their mother is the only capable relative.

H By the marriage settlement of Oct. 16, 1879, Mrs. Greene settled certain investments specified in the first schedule, and provision was made for the settlement of after-acquired property during coverture. Her husband settled the investments specified in the second schedule. In the events which have happened, the value of the wife's settled funds is now about £38,700 and the husband's about £10,300, and the gross income of the total funds together is about £3,400 per annum. Mrs. Greene is entitled to the whole of this income during the rest of her life, and she has a power of appointment exercisable by deed, or will, among the issue of the marriage; and subject to her life interest and power of appointment, and a provision for hotchpot, the funds are settled in trust for the above two surviving children in equal shares. The ultimate trusts in default of issue were as to the husband's trust fund for Mr. H. D. Greene, and as to the wife's trust fund, in the events which happened, to Mrs. Greene. The joint power of appointment con-

ferred by the settlement on her and her husband was not exercised, and so far Mrs. Greene has not exercised her power of appointment as survivor. By his will, Mr. H. D. Greene left the whole of his estate to his wife absolutely. A

Probate of the will and codicil of Mrs. Greene's father, John Jones, was granted on July 15, 1885. In the events which have happened the beneficial trusts affecting his net residuary estate are that Mrs. Greene is entitled to the whole of the income for her life, and that she has a power of appointment exercisable by deed or will among her issue; and that, subject to such life interest and power of appointment and a hotchpot clause, the estate is settled in the following manner: (a) First, £15,000 is to be raised and paid to or for the benefit of each child except the eldest or only son. (b) As to the Grove Estate, in trust for the patient Rowland Greene, the son, in fee simple. (c) As to the estate in Hope in the County of Flint, which is known as Rhyddyn, and other lands mentioned, or the moneys or investments representing the same if sold in trust for the daughter in fee simple. (d) Subject as aforesaid, all in trust for the two patients equally. If no child had attained a vested interest in the said residuary estate, the said will conferred on Mrs. Greene a general power of appointment by will over the whole estate. B C

The Grove Estate comprises a mansion house and grounds covering about 30 acres and about 2,856 acres of farms and 482 acres of woodlands and the whole is of the gross value of about £155,300. The estate at Hope, and other lands mentioned in conjunction therewith, comprises about 90 acres and is of the gross value of about £5,400. The remainder of the residuary estate is of the value of about £235,000. Consequently the aggregate residuary estate is of the net value of about £284,900 after deducting death duties. D

On Mrs. Greene's death, estate duty will be payable in respect of the whole of the funds in her said marriage settlement and of John Jones's residuary estate (except and so far as she were to release her life interest more than three years before her death), and it is calculated that the rate of such duty will be 28 per cent., but, allowing for such duty, the two patients between them will ultimately succeed under such marriage settlement and will to about £321,600 net. In addition to the funds aforesaid, the two patients on the death of their said paternal aunt Catherine Greene will succeed to part of her property, which is considerable, and the portion thereof passing to the two patients will probably be about £18,000. So far as is known, it is believed this lady has not made any will, and there is no chance of her recovery. Neither of the patients has made any will, or is capable of making an effectual will, and the result is that each of them will die intestate. The probability is that both of them will survive their said aunt and Mrs. Greene; and in that event, on the death of the survivor of them, the whole property of both of them will pass to the Crown. The aunt Catherine Greene has no near relation other than the two patients, and her next nearest relations are not nearer than second cousins. Mrs. Greene resides at the mansion house on the Grove Estate and looks after and keeps up the estate, where the patients also stay occasionally, but they reside under the care of persons approved by the Master in Lunacy. Mrs. Greene's powers of appointment among issue under the said marriage settlement and her father's will are still exercisable, and by an exercise of such powers she can exclude one of the patients from taking any share. Except for the portion of the marriage settlement funds settled by her husband, the whole of the funds thereby settled were settled by Mrs. Greene. As to the residuary estate of her father, the whole was settled by her father, and when he made his will and codicil it was not known that the two patients were otherwise than normal as they were then only two and a half years and four months old, respectively. If he had known that they were not normal, it may be, and, indeed, it is probable that after providing ample income for their maintenance and benefit for life, he would have given Mrs. Greene a general power of appointment over the whole of the estate, just as he did in case she had no issue who should take vested interests. E F G H I

The applicant is anxious to have a power of appointment over the property

A settled by the marriage settlement, and will, subject to adequate provision being made for the two patients, in order that she may be able to make provision for various persons, friends of her own and of her husband, for the domestic servants and employees on the Grove estate, and for various charities. These applications have been, by amendment, limited to personal property, and Mrs. Greene by deed poll dated July 30, 1927, made a revocable appointment under the will of her father appointing all the real estate comprised therein on trust for sale, and directing the proceeds and the residuary personal estate to be held in trust for the two patients in equal shares. The applicant would thus if she survived the patients take as next-of-kin the whole of the property passing under the settlement and the will. If, however, as seems probable, the patients survive Mrs. Greene and the paternal aunt, then on the death of one patient, his or her property would pass to the other; and, on the death of the survivor, the whole would pass to the Crown.

C The jurisdiction that is entrusted to the court by s. 171 of the Law of Property Act, 1925, is a novel one. One of the particular cases in which a settlement may be directed by the court is: "where by reason of any change in the law of intestacy . . . any person might suffer an injustice": see s. 171 (1) (c). The change in the law of intestacy was effected by s. 46 of the Administration of Estates Act, 1925. Both these Acts received the Royal Assent on the same day. D It is plain that the intention of the legislature was to give power to the court to act under s. 171 where, in its discretion, it thinks it is wise or necessary to do so in the interest of those whose rights have been affected by the new law of intestacy. In other words, it cannot be claimed that the rights of the Crown under s. 46 ought not in proper cases to be modified or defeated, for it was recognised E that there might be considerations to be taken into account before the property should be allowed to pass to the Crown. Subsection (1) (vi) of s. 46 of the Administration of Estates Act, 1925, which gives power to the Crown to provide,

"in accordance with the existing practice for dependants . . . and other persons for whom the intestate might reasonably have been expected to make provision,"

F confirms this view. Next, it must be remembered that there is already under s. 117 of the Lunacy Act, 1890, power to deal with the property of a lunatic for the purposes therein defined, which includes

G "the payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit."

H Section 171, therefore, must not be construed narrowly as giving powers to be exercised only in the interest of the lunatic or as discharging his obligations; but also as including the interests of those for whom the intestate might reasonably have been expected to make provision, and those who might suffer an injustice in the sense given to those words in *Re Freeman* (1). I adhere to what I said there ([1927] 1 Ch. at p. 488) as to the unwisdom of attempting an exhaustive definition of s. 171. Its scope must be determined by the illustrations provided by the cases decided under it. I turn, therefore, to the facts of the present case.

I If the patients had not been afflicted, the property, which is the subject of the present application, would have passed away from any control by Mrs. Greene except as to the division of it between her two children. But it is argued that if they had died before reaching the age of twenty-one, and in the case of the daughter, so dying unmarried, the whole estate of her father would have returned to Mrs. Greene's control; and that the absence of any provision in John Jones's will in case of the lunacy of the grandchildren is sufficiently explained by their tender years at the date of his will, which was made only just over twelve months before his death. These considerations would appear to have the greatest weight if the duty imposed on the court had been to override the uncertainties of life, and to restore and make good the effect of misfortunes which might have been prevented by greater and longer foresight. That, however, is not the case. Under

para. (c) of s. 171 (1), the question is whether for any of the various reasons included in that paragraph an injustice might be suffered if the property were allowed to devolve as undisposed of on the death intestate of the lunatics. There seems no such injustice in the present case, for if all had gone as directed, the property would have passed away from Mrs. Greene, and none of the persons or objects for whose benefit these applications are made had any spes successionis. I find a great difficulty in acceding to any application as to the estate of John Jones, however deeply one's sympathy may be aroused on behalf of the applicant.

There remains the general power to make a settlement indicated under sub-s. (1) (b), "Where the property has been acquired under a settlement, a will, or an intestacy." There are no facts in the present case showing an actual present hardship to the applicant. She is in possession of, and will receive, during her life, all the provision that was intended for her by her father and her husband. I can find no grounds on which it ought to be deemed expedient to vary the terms of the will and settlement carefully drawn to meet the usual contingencies. There is no hardship or wrong to any other member of the family. It has been argued, however, that if the patients had been of sound capacity they would have undertaken some of the responsibilities towards the friends of the family and the residents and charities in the parish and district and county which Mrs. Greene has fulfilled and is anxious to provide for. So that in the light of existing circumstances the settlement might be looked at as if the resulting trust in favour of Mrs. Greene had taken effect. I have some difficulty in accepting this argument, but counsel for the Crown do not oppose it. It may be that in the course of looking for a sure foundation for action under the section, and for guidance as to the limits within which the discretion is to be exercised, there is a danger of giving too small an effect to s. 171, which is so drawn as to afford a large discretion to the court. While, therefore, I cannot regard this decision as a precedent, I am prepared to accede to the proposal that a settlement should be drawn up whereby both the funds brought into the settlement of Oct. 16, 1879, should be made subject to a power of disposal by Mrs. Greene upon her death.

I am not disposed to go further or to make any order in respect of the £21,000 provided for and made over to the account of the patients by Mrs. Greene. At the time when the sums comprising this total were so transferred, Mrs. Greene was well aware of the condition and prospects of the patients, and of her own position. The facts as to this total sum do not appear to make any ground for intervention under s. 171. Equally, I disregard any claim based on the expenditure involved in keeping up the Grove and the estate generally. Such an outlay would fall on the occupier in ordinary course and is part of the expense that the enjoyment of the property entails. It would not have been reimbursed to Mrs. Greene if her children had not been afflicted.

In coming to the conclusion stated as to these summonses I desire to say that Mrs. Greene is not to be taken to have abandoned or forfeited her right to apply under s. 117 of the Lunacy Act, 1890, if she is advised to do so. I express no opinion on such an application, except to point out that this judgment does not cover or interfere with any claim made under that section.

RE WHITWORTH

The summons in this case was taken out by Fanny Beaven, a widow, asking for a settlement to be made of the property of the patient, whose mother was a first cousin of the applicant. The patient is thus the first cousin once removed of the applicant. She was found to be of unsound mind by an inquisition on May 11, 1906. The applicant was born in 1847, so that her age is now eighty-one years, and she is prepared to allow her first cousin, Mary Mitjams, a spinster, who was also born in 1847, and Catherine Sarah Uriburu, born in 1850, to share with her in any order that might be made by the court. These cousins are now, and appear to have been always, resident in South America. The facts of the case are set out in an affidavit sworn by Mrs. Beaven; and from that, as explained by a pedigree

A and table of affinity put before the court, there appears to be no valid grounds for the application now made. There are no special services rendered to the patient by the applicant, whose husband appears to have paid some attention, incidentally, to the affairs of the patient in the course of his acting as a trustee of estates under which the patient has benefited: but there is no proof of close association with, or direct care for, the patient such as obtained in *Freeman's Case* (1). At the end of

B the affidavit of the applicant a submission is made that having regard to her own great age and that of her cousins in South America,

“any settlement which the court might be pleased to direct would not be of any material benefit to the patient's nearest of kin unless its scope were extended to include the children of any deceased first cousins of the patient's mother.”

C The application is, therefore, one to secure that the second cousins of the patient may receive a benefit under a settlement to be ordered by the court. By s. 46 of the Administration of Estates Act, 1925, the rights of second cousins are excluded. There is no ground for any interference with the effect of this section. There are no merits which the applicant can urge within s. 171 of the Law of Property Act, and this case affords a type of case in which, in my judgment, the court ought not

D to interfere. The application must be dismissed with costs.

RE E.A.

In this case the patient is the founder of a prosperous brewery, and the owner of a very large number of ordinary and preference shares in the limited company which has taken over the brewery. It is a public company, but the shares are

E largely held by the patient and his family. Unfortunately, after a successful business career, the patient's mental powers failed, and on Nov. 24, 1924, his only surviving son was appointed receiver of his estate. The latter is the applicant by the summons, now to be considered, the purpose of which is that a family arrangement may be ordered to be embodied in a settlement in order to overcome the difficulties resulting from the patient's condition. The patient still lives at his

F own home under the same circumstances as he did before November, 1924, and his condition is known to few persons. If it were known, some injury might be caused to the business, and quite unnecessary publicity would be given to purely family matters. Under these circumstances the court decided to hear the case in camera. The patient was born in 1848, so is now eighty years old. At the time when he made his last known will—in 1887—his family consisted of his wife, who

G died in 1918, a son, born Aug. 19, 1880, a daughter, born Sept. 13, 1883, and the applicant, born May 12, 1885. Another daughter was born July 19, 1891. By the terms of the will, he divided his residuary estate equally between his wife and children as a class; the wife's and daughters' shares being settled. There is evidence before the court that some two years before he became incapable of doing so, he talked of making a fresh will; and, indeed, in 1922 promised one of his

H relations that he would do so within a month or two, but he has failed to carry that intention into effect. His property is valued at not less than £450,000 and consists of a large holding in the preference and ordinary shares in, as well as of the debenture issued by, the brewery company. The patient, with his family and nephew, to whom he has made large presents of shares, hold one-half of the ordinary shares of the company. The elder son died on May 10, 1920, leaving a

I widow and four children. The elder daughter was married on Sept. 13, 1906, and there are four children of the marriage. The younger daughter was married on Mar. 14, 1917, and there are two children of the marriage. The applicant was married on Dec. 6, 1916, and there is one child of this marriage. In his affidavit, the applicant says that he is convinced that, if his father had been enjoying normal health, he would have divided his fortune equally amongst his children, and that if one of them had died in his lifetime, leaving issue, the issue would have taken between them the share of their father or mother, and also that he would have had due regard to the future of the company and his interests in it by giving his

trustees the usual provisions, whereby his interests might be retained for the benefit of his family and a forced sale avoided. The view thus presented appears to accord with the facts of the case. The patient had a warm affection for the members of his family. It is clear that if matters are left as they are without a fresh will having been made, "injustice" will be caused to the children of his deceased elder son, and serious inconvenience may be caused to the company. It seems to be a plain case for the intervention of the court—"by reason of the change in circumstances since the execution, &c., of a testamentary disposition." The application is concurred in by all the persons who would take under the will as it stands; and we, therefore, direct a settlement to be made of the patient's property on the lines and for the purposes indicated by the applicant. The details will be settled by the master. There will be an ample provision made for the patient to continue his life as at present, and the order will provide that the stamp duty on the settlement be paid out of the accumulations in the receiver's hands.

RE FRASER

This application is made by Hectoria Ricardo Nanny Mathews Hunter and her husband, James Harper Hunter, who are the committees of the person and estate of the patient, appointed by an order dated Sept. 6, 1927.

The patient has for many years resided with Mrs. Hunter, both when she was, as formerly, the wife of William Phayre Ryall, and he continues to reside with her, now that after the death of Mr. Ryall she has married again. The patient's mother, Caroline Eleanor Mathews, was married on July 14, 1866, to his father Charles Fraser, who was not possessed of any private means and had only his pay as a subaltern officer in the Army, and there were two children of the marriage—namely, the patient and a sister, Eleanor Caroline Mathews Fraser, who died a spinster and intestate on Dec. 2, 1903. Charles Fraser deserted his wife and family at a time previously to the year 1875, went to South Africa, and never returned here. In 1877, on the petition of the patient's mother, her marriage with Charles Fraser was dissolved, and nothing is known about him at the present time. The patient's mother died on Dec. 22, 1896. The applicant, Mrs. Hunter, is a first cousin of the patient. So far as is known she and her children and the children of her late sister, Mrs. Robinson (who died in 1927), are the only relatives of the patient on his mother's side; and also, so far as is known, there are no relatives of the patient on his father's side. The patient is entitled to considerable property derived from his maternal grandfather through a settlement made by his mother and also under the latter's will and as her heir-at-law. If no settlement were directed, difficulties might be experienced in administering the patient's estate on his death in view of the possible claim by some relative on his father's side. In view of the fact that his father disappeared over fifty years ago and has never taken any interest or care of the patient—was not a contributor to the property of the patient of which a settlement is sought—it seems right that the application should be treated as falling within the powers of the court under s. 171 (1) (b), and that a settlement should be made securing to those relatives on his mother's side, who would take if there were a complete failure of those on the father's side, and living at his decease, the property of which he is possessed. Accordingly, we direct that such a settlement be made in terms to be settled by the master, and the costs of it will be provided for as in ordinary course.

RE WOOD

In this case the court is asked to make good the loss of the will known to have been executed by the patient. The patient was married on Sept. 28, 1912, but there are no children of the marriage; and he made his will dated Mar. 12, 1922, which was witnessed by Percival Alfred Hulley, the deponent to an affidavit now before us, and Mrs. Hulley, his wife. These witnesses are also able to speak to the terms of the will which gave all his estate to the patient's wife absolutely, and it also provided that in the event of the death of himself and his wife together by

A accident, or if his wife survived him for a short time only and failed to make a will, the estate should be divided between his brothers. It was expressed in the simplest terms and appointed his wife and a solicitor the executrix and executor. This will was lodged with the firm of solicitors of which the executor, so appointed, was a member. He has since died—on Oct. 6, 1924. The will is not now forthcoming, and the evidence satisfies the court that it has been lost. On April 2, 1925, the wife of the patient was appointed receiver. It appears to the court that there are "special reasons" within s. 171 (1) (c) why a settlement of the patient's property should be executed to carry out the purposes of the lost will. We give directions accordingly, and the details of the settlement will be settled by the master.

C SARGANT, L.J.:

Re GREENE

These applications affect or involve the consideration of the interests of the two patients (brother and sister) in funds which may be shortly classified under three heads, viz., first, funds representing the real estate as converted into personalty and the residuary personal estate of the patients' maternal grandfather John Jones; **D** secondly, funds held under the trusts of the settlement effected on the marriage of the father and mother of the patients; and thirdly, funds (almost entirely in court) which have from time to time been transferred by the mother of the patients into the name and for the benefit of each of the patients separately. The first-mentioned funds may be roughly estimated as of a present value of £400,000, and each of the patients is entitled to a reversionary interest in a moiety of these funds **E** subject to the life interest of their mother, and subject to a power of revocation by her which she proposes to release. The secondly mentioned funds are of the value of about £50,000, of which some £40,000 was settled by the mother of the patients, and about £10,000 was settled by the father of the patients; each of the patients is entitled to a moiety of these settled funds subject to the life interest of their mother, and to any appointment by her. The thirdly mentioned funds are, as regards the patient Rowland H. B. Greene, of the value of some £12,600, and as **F** regards the patient Winifred H. B. Greene of the value of some £10,500; in each case these funds belong to the patient absolutely in possession. The patients are some forty-six and forty-four years of age respectively. Each has been of unsound mind for many years, and has no prospect of recovery. Neither has been married or has (so far as is known) made a will or has been ever capable of making a will. **G** Neither has any relative nearer than second cousins, except (i) the applicant, (ii) the other patient, and (iii) a paternal aunt, Catherine Greene, spinster, who is some eighty-two years of age, is herself certified as of unsound mind, and has no prospect of recovery. Accordingly, any settlement that might be directed by the court of the property of either patient on the application of their mother would not have any practical operation against the rights of anyone except the Crown. **H** And, this being so, the Crown is the only party on whom the applications have been served. The applications in terms purport to deal with the interests of the patients in the first and secondly mentioned funds only. But the thirdly mentioned funds have also to be taken into consideration, because of the suggestion hereinafter mentioned that the extent to which the first-mentioned funds should be settled in favour of the applicant should, in the case of each patient, be measured by the **I** amount of the fund which the applicant has herself provided for that patient.

The applications are not based on there having been any change in the law of intestacy under the first words of sub-s. 1 (c) of s. 171 of the Law of Property Act, 1925; for the applicant is, of course, not affected by that change. They are put forward on the ground of the interests of the patients in the will funds, and the settlement funds having been acquired under the will and the settlement respectively, and of the indications as to intention alleged to be desirable therefrom; and also on the ground that the applicant would suffer an injustice both as to the whole of the settlement funds, and also to some extent as to the will funds

were they allowed to pass as undisposed of on the deaths of the patients or at least on the death of the survivor of the patients. It is said that as to the funds settled by each parent of the patients neither parent would have wished in the circumstances to have made a provision for either patient beyond that patient's life; but this being so and the patient being amply provided for out of his or her share of the will funds the parent would suffer an injustice were such parent not allowed to dispose of the fund settled by him or her as on a resulting trust; and that the applicant having succeeded to her late husband's position as residuary legatee under his will she ought now to be placed, by a settlement under s. 171, in a position to deal by will with the share of each patient in the capital of the settlement funds and with the intermediate income of each share between her death and the death of each patient. It is further urged for the applicant that, having regard to the source from which the will funds come and the various indications in such will of the benevolent disposition of the testator to the applicant, the same sort of reasoning, though perhaps of a less urgent character, applies to the much larger will fund of £400,000, but the case in favour of the applicant is strengthened by her 'expenditure of money in improving or maintaining' the Grove Estate, and that she should now be given by a settlement under s. 171 large powers of disposition over the whole or a part of the will funds.

In the course of the opening of the case it was stated that terms had been provisionally arranged between the applicant and the Crown, subject to the approval of the court, under which the Crown would assent to the applicant having some such power of disposition by will as she sought over the whole of the settlement funds, and to her also having powers of disposition over the will funds to an extent not exceeding in the case of each patient the amount provided by the applicant for him or her out of her own property. But as to this last provision it was apparently not definitely agreed whether this power should or should not extend to the intermediate income of the amount in question between the death of the applicant and that of the patient, and minutes of the proposed order which have since been submitted show a divergence of view on this point. We have now to consider how far we can go in directing a settlement of the kind suggested.

As regards the proposed settlement of the marriage settlement funds I should apart from the acquiescence of the Crown have felt much difficulty. The primary object of the marriage settlement was undoubtedly to provide for the spouses during their successive lives and for their children and issue after their deaths. And there has been no failure of this primary object, though, through the misfortune of the death of the one normal child of the marriage under age, and of the imbecility of the two patients there cannot be any younger generation to provide for. No doubt had what has happened been foreseen a power would have been inserted in the settlement under which the parents or one of them could have disposed of the funds as they, he, or she might think fit. But whether looked at from this point of view or from that of resulting trust it is only in an extended use of the term that the applicant could be said to suffer "an injustice," or even suffer a "hardship" should she not be put in a position to deal with the funds as asked. And these considerations apply more strongly to the £10,000 or so originally settled by her husband than to the £40,000 or so settled by herself. Inasmuch, however, as the Crown, the sole party practically interested in opposing this settlement, acquiesces in general, though not in detail, in what is suggested, and would thereby be making sure of securing the whole of the £400,000 will funds, with the possible exception of amounts equivalent to those provided by the applicant for each of the patients, I think that the case is one in which we may give effect to this part of the suggested compromise and direct a settlement to be executed accordingly. As regards the will funds the proposal seems to me very different. I cannot find here anything even remotely of the nature of a resulting trust; nor is it clear to me what the testator would have done had he foreseen what has in fact happened. And as regards expenditure on the Grove Estate, there is not shown to have been anything beyond what a well-to-do and considerate owner would naturally expend

A in the course of the efficient maintenance of the property while residing there as tenant for life. Nor can I see what moral claim the provision by Mrs. Greene of the £12,600 and £10,500 respectively for the two patients can give her to have an equivalent power of disposition over the will funds. The provision was made with full knowledge of all the circumstances and leaves no room for re-consideration either as regards the funds so provided, or by way of charge or re-imbursement in respect of the will funds.

B This being so, the court ought not, in my opinion, to direct a settlement under which the applicant will have any power of disposition over the will funds. But though in this respect the court declines to direct any settlement under s. 171 of the Law of Property Act, 1925, this refusal is not intended to prejudice such right or claim as the applicant may have under s. 117 of the Lunacy Act to obtain recoupment out of the capital of the provided funds of

C £12,600 and £10,500 respectively of any past or future provision by her towards the maintenance of either patient beyond the income of the £12,600 or £10,500 as the case may be. And the order to be made on each of these applications should contain words reserving any such right or claim. In the minutes of order submitted to us an express provision was inserted for preserving the right of each patient to maintenance if necessary out of the income of his or her share of the

D marriage settlement funds in priority to the power of disposition over those funds to be given to the applicant. But this appears to be quite unnecessary and to introduce a needless complication into the proposed settlement. As matters stand, each patient will be entitled on the death of the applicant to one moiety in possession of the whole of the proceeds of the real and personal estate subject to the will of the testator John Jones, and it is obviously unnecessary to make or preserve

E any additional provision for either of them. The order will provide that as a condition of the execution of the settlement the applicant shall execute a release of the power of revocation and new appointment reserved by the deed poll of July 30, 1927.

Re WHITWORTH

F The patient here is a spinster and is sixty-two years of age. Her nearest of kin on her mother's side are three first cousins of her mother, namely, the applicant Fanny Beaven, a Mrs. Mitjams and a Mrs. Uribura. The applicant and Mrs. Mitjams are both over eighty years of age and Mrs. Uribura is over seventy-seven years of age. It is therefore most improbable that these three persons will survive the patient and hardly probable that any of them will do so. But there are

G numerous descendants in existence both of the applicant and of Mrs. Uribura and of deceased first cousins of the patient's mother. It is suggested that any relatives of the patient on the father's side are still more remote and the court is asked to deal with the matter on that footing, but saving their rights if any. The change in the law of intestacy effected by the Administration of Estates Act, 1925, has of course deprived the first cousins of the patient's mother and any descendants

H of such first cousins of any spes successionis in relation to the personal property of the patient. The applicant is asking that a settlement should be directed of the patient's personal property on such trusts as the court may deem expedient. And the trusts suggested by counsel were trusts under which the three surviving first cousins of the patient's mother or the children of all the first cousins of the patient's mother would benefit. It is unnecessary to consider what the exact provisions of any such trusts should be. For in my judgment the case is not one in which any settlement at all should be directed. There is obviously no sufficient

I reason under sub-s. (1) (b) of s. 171. And as regards sub-s. (1) (c) of the same section it is necessary, in order to justify the direction of a settlement, that the court should be satisfied that some person "might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate" of the patient. But, giving to the phrase "suffer an injustice" any of the extended meanings suggested in the judgments of this court in *Re Freeman* (1), I am nevertheless of opinion that the applicant has entirely failed to show that she or the two persons

in the same case as herself or the second cousins of the patient would "suffer an injustice." Such circumstances as were relied on in *Re Freeman* (1) are entirely or almost entirely lacking here. Nor are there any other sufficient circumstances. Indeed, if the present application were granted we should come very near to repealing, in the case of the personal property of every lunatic or defective existing on Jan. 1, 1926, the alternative in favour of the Crown effected by the Administration of Estates Act, 1925. The Crown has very naturally opposed the application, and this opposition must prevail, though it was not actually necessary to hear any argument on its behalf. The application must be refused. A B

RE E.A.

In this case, the application for a settlement is based on the change in circumstances since the patient in 1887 executed his existing will. I agree with my Lord that there has been such a change as to make a clear case for the exercise by the court of the jurisdiction conferred by s. 171 of the Law of Property Act, 1925, and that the main lines of the proposed settlement are proper and should be adopted. The matter is much facilitated by the fact that the immediate family of the patient are united and harmonious; and that the three surviving children of the patient, who would share his property in thirds should the existing will come into immediate operation, desire that the family of the deceased son should take the fourth share which the patient intended for him. On the other hand, each of these surviving children and their children will be safeguarded as regards their fourth shares in the estate by the gifts to him or her being saved from the danger of failure in the event of his or her death during the remainder of the life of the patient. The case is not one in which the Crown is in any way interested. C D E

RE FRASER

I agree that this is a clear case for directing a settlement of the patient's property as asked, namely, so that it may pass on his death as if there were then a complete failure of any relatives on his father's side. F

RE WOOD

The evidence as to the making of the patient's will and as to the contents of it appears to be conclusive. In the circumstances I agree that a settlement should be directed for the purpose of giving effect to the will; and the settlement proposed by the application would appear to be a proper one in its main lines. In this as in other cases the precise terms of the settlement will be dealt with by the master. G

LAWRENCE, L.J.:

RE GREENE

In this case the Crown does not object to the court, if it thinks fit, directing a settlement under s. 171 of the Law of Property Act, 1925, conferring on the applicant a general testamentary power of appointment over (a) the whole of the marriage settlement funds; (b) a sum of £22,140 to be raised out of the Jones's estate, but the Crown does not assent to such testamentary power operating immediately on the death of the applicant so as to prevent the settled property from being available in case of need for the maintenance or otherwise for the benefit of the patients during the remainder of their lives. As regards the marriage settlement funds I have come to the conclusion that in the special circumstances and particularly in view of the attitude taken up by the Crown the court can properly exercise its jurisdiction under the section so as to give effect to the wishes of the applicant. The case is near the line, but it comes within the letter of para. (b) of sub-s. (1), and there is something to be said for the contention that when the marriage settlement was executed the parents could not have foreseen that their only surviving children would be mentally afflicted and incapable of assuming any effectual control or of having any disposing power over their shares in the settled fund and that it is not unreasonable to suppose that had the events which subse- H I

A quently happened been anticipated the settlors would have framed the settlement in such a way as not to give the patients a vested interest in the capital of the trust funds and so as to make the ultimate trust in favour of the settlors take effect as regards any part of the trust funds as might not be required for the maintenance or benefit of the patients. Moreover, the applicant has under the after-acquired property clause been compelled to bring into settlement from time to time all the property which she acquired during the coverture, although in view of the large fortune to which the patients became entitled under their grandfather's will this property is not reasonably required for their maintenance and will not in fact enure for their benefit. On the whole though not without some hesitation, I am of opinion that the court may properly hold that the applicant might suffer an injustice (in the extended sense in which that expression has been construed by this court in *Re Freeman* (1)) if the settlement funds were allowed to devolve as on an intestacy.

Having arrived at this conclusion, I agree with the other members of this court that as the patients are amply provided for otherwise there is no need to make any provision in the proposed settlement for the maintenance of the patients out of the settlement funds, and that the power of appointment proposed to be conferred on the applicant can properly be made to operate both on the capital and on the income of the settled funds immediately on the death of the applicant. I further agree that in the circumstances there is no need to make any reservation in the settlement as regards any present or future disposition by the patients or as to the possible right of the patients' paternal Aunt Catherine Greene. On the other hand, I think that it should be made a condition of the order for a settlement that the applicant should undertake (a) to release her power of revocation reserved by the deed poll of July 30, 1927, (b) properly to maintain the patients as heretofore, and (c) not to make any further application for a settlement of any property of the patients.

As regards the proposed settlement of the sum of £22,140 to be raised out of the estate of John Jones, however, the case is different. Under the will of John Jones, Mrs. Greene has a life interest and, subject thereto, the estate will eventually go to one or other or both of the patients. The reasons urged on behalf of the applicant in support of this part of the case are unconvincing and do not, in my opinion, form a proper basis for directing a settlement to be made of any part of that estate. In the unlikely event of the applicant surviving either or both of the patients she will be the sole next-of-kin and no settlement is needed. On the other hand, if she dies in their lifetime there is no valid reason that I can see why part of the patients' property should be settled on her merely to enable her to confer a benefit upon persons and charities of her selection. When the patient, Rowland Greene, the son, becomes entitled in possession to the Grove Estate, the judge in lunacy will consider what allowances and payments to servants, charities, and other persons or bodies ought properly to be made by the patient as owner of that estate, and will no doubt see that, pending a sale, the estate is adequately kept up on the same lines as theretofore, but that is a very different thing from the court in the lifetime of the patients directing a settlement of a capital sum in favour of the appointees of the tenant for life. It is not the case of the patients being entitled in possession and the applicant herself being in need of money during her lifetime. The main grounds put forward on behalf of the applicant are, first, that she has adequately (or, perhaps, more than adequately) kept up the Grove Estate; and, secondly, that besides maintaining the patients out of her income, she has provided a capital sum for their maintenance. As to the first ground, I am of opinion that the fact that the applicant, as tenant for life in occupation, has kept the Grove Estate in first-rate condition (no doubt mainly for her own satisfaction) affords no valid ground for the proposed settlement. As to the second ground, the fund in question was made over to the patients unconditionally with full knowledge of their permanent incapacity and of their reversionary interest under the will of John Jones. In these circumstances I am of opinion that no case is made out for

re-settling of that fund or its equivalent on the applicant. I agree, however, that the refusal of the court to direct a settlement of £22,140 should not be taken as prejudicing any application which the applicant may deem it advisable to make under s. 117 of the Lunacy Act, 1890, for repayment of any sums expended, or to be expended by her, for the maintenance or benefit of the patients. I concur in the form of order contained in the minutes referred to by the Master of the Rolls, which have been settled by the court. A B

RE WHITWORTH

I agree that this application has no merits whatever. It seems to me to be an attempt to secure by means of a settlement under s. 171, that the property of the patient should devolve according to the law as it existed before the Act of 1925 was passed. The only special reasons alleged are that the applicant's late husband some twenty years ago took an interest in the patient's affairs in his capacity as trustee of the applicant's father's will, and was appointed and for some time acted as trustee of the will of Mary Rushworth under which the patient took an interest, and, further, that the applicant herself corresponded with the patient and sent small presents to the patient herself at Christmas and on her birthday. These reasons have no substance in them and, in my opinion, no settlement ought to be directed by the court in this case. C D

RE E.A.

In my opinion this is a case which clearly comes within both the letter and the spirit of sub-s. (1) (c) of s. 171. Since the patient executed his will in 1887 his children have all married and have had issue and his eldest son has died, leaving a widow and four children. In view of these changes in the circumstances I am satisfied that the family of the deceased son and the family of any other of the patient's children happening to die in the lifetime of the patient would suffer an injustice within the meaning of that expression as interpreted by this court in *Re Freeman* (1), if the patient's property were allowed to devolve under the testamentary disposition executed by him. I agree, therefore, that the court ought to direct a settlement in the terms proposed. E F

RE FRASER

I agree that this is a case where the court can properly accede to the application. The whole of the patient's property has been acquired by him from his maternal relations mainly under the will of his maternal grandfather, under the marriage settlement of his parents, under his mother's will and as heir-at-law of his mother and sister, and the application, therefore, comes within sub-s. (1) (b) of s. 171. The circumstances of this case are very special. The patient's father deserted the patient's mother in 1875. He went to South Africa, and in 1877 the patient's mother obtained a divorce. Since his desertion in 1875 the patient's father has contributed nothing towards the maintenance of the patient's mother or of the patient himself, or of his sister. It is not known whether the father is alive or dead or whether there are any paternal relations of the patient in existence, but neither he nor they have shown the slightest interest in the patient for upwards of fifty years. Since the death of his mother the patient has been cared for and his affairs looked after by his maternal cousins, the applicant and her sister, Mrs. Robinson, and, since the latter's death, by the applicant. It is now desired that the patient should execute a settlement so as to exclude any possible claims on the part of the patient's paternal relations. In my opinion, this is a clear case where the court in the circumstances ought to assist the applicant in her endeavour to keep the patient's property in the mother's family, a course which the patient would, no doubt, have adopted had he been able. G H I

RE WOOD

In this case I am of opinion that the loss of the patient's will is a special circumstance, justifying the court in directing a settlement under s. 171 (1) (c), in

A order to prevent a possible injustice to the applicant. I, therefore, agree with the proposed order.

Solicitors: *Peacock & Goddard; Sewell, Edwards & Nevill, for Hill & Norris, Halifax; Stow, Preston & Lyttelton; Beamish, Hanson, Airy & Co.; Official Solicitor; Solicitor to the Treasury.*

B

[Reported by G. P. LANGWORTHY, ESQ., Barrister-at-Law.]

C

Re COWARD, CHANCE & CO.

[CHANCERY DIVISION (Russell, J.), January 20, 1928]

D

[Reported [1928] Ch. 379; 97 L.J.Ch. 234; 139 L.T. 113;
72 Sol. Jo. 225]

Solicitor—Costs—Non-contentious business—Mortgage—Investigation of title—Further charge—Solicitors' Remuneration Order, 1883, cl. 2 (a), Sched. I, Part I, r. 10.

E

In 1897 the trustees of the will of J., deceased, and his wife executed a consolidated mortgage on certain securities to the Commercial Union Assurance Co. to secure advances amounting to £111,000. From 1924 to 1926 further advances were made to the wife. She died at the end of 1926, leaving the amount outstanding £75,542. The trustees of her will then applied for a further advance of £64,458 on the same securities, the title thereto having been already investigated by the company's solicitors. In March, 1927, the company agreed to advance £17,000 and further sums up to the amount applied for, the old security being kept on foot and there being a fresh proviso for redemption. The company's solicitors delivered their bill according to the scale fee under the Solicitors' Remuneration Order, 1883, Sched. I, Part I, for "investigating title and preparing and completing deed of security." On taxation, the taxing master held that Sched. I did not apply, and taxed the bill accordingly. On an application to the court by the solicitors,

F

Held: there had been an "investigation of the title" of the borrower within the meaning of Sched. I, and the matter must be referred to the taxing master to deal with.

G

Notes. The Solicitors' Remuneration Order, 1883, so named by the Solicitors' Remuneration Order, 1944 (S.R. & O., 1944, No. 203), art. 1 (2), has been amended by the Solicitors' Remuneration Act General Order, 1925 (S.R. & O., 1925, No. 755), and the Solicitors' Remuneration Order, 1953 (S.I., 1953, No. 117). The Solicitors' Remuneration Act, 1881, under which the Order of 1883 was made, was repealed by the Solicitors Act, 1932, but, by virtue of s. 86 (2) of that Act, it was continued in force and had effect as if made under s. 56 of that Act. The Act of 1932 was repealed by the Solicitors Act, 1957, and the Order of 1883 now has effect, by virtue of s. 88 (2) of that Act, as if made under s. 56 of that Act.

I

As to a solicitor's remuneration for non-contentious business, see 31 HALSBURY'S LAWS (2nd Edn.) 140 et seq.; and for cases see 42 DIGEST 232 et seq. For the Solicitors' Remuneration Order, 1883, see 20 HALSBURY'S STATUTORY INSTRUMENTS.

Cases referred to:

(1) *Ex parte London Corpn.* (1887), 34 Ch.D. 452; 56 L.J.Ch. 308; 56 L.T. 13; 85 W.R. 210, C.A.; 42 Digest 241, 2733.

- (2) *Earl of Aylesford v. Earl Poulett*, [1891] 1 Ch. 248; 60 L.J.Ch. 204; 64 L.T. 336; 39 W.R. 241, C.A.; 42 Digest 245, 2769. **A**
- (3) *Re Webster and Jones' Contract*, [1902] 2 Ch. 551; 71 L.J.Ch. 749; 87 L.T. 213; 46 Sol. Jo. 688, C.A.; 42 Digest 240, 2724.

Adjourned Summons.

In 1897 the trustees of the will of the late Captain Jenner and his widow joined in a consolidated mortgage of the Wenvoe Castle estate and shares in the Aire and Calder Navigation Co. to the Commercial Union Assurance Co. to secure the repayment of £111,000 and interest. Between 1924 and 1926, further advances to Mrs. Jenner, the then owner, were made by the same company, on the same security. She died on Oct. 1, 1926, when there was outstanding therein £75,542. In January, 1927, the trustees of her will applied to the same company for a further advance of £64,458 on the same security, the title to which had already been investigated by the solicitors. In March, 1927, the company agreed to the proposal, £17,000 to be advanced at once, and the remainder subsequently. All the old securities were to be included in the further advance, and to be kept on foot to preserve priorities. There was a new proviso for redemption. The company's solicitors, the applicants, later delivered their bill according to the scale fee under the Solicitors' Remuneration Order, 1883, art. 2 (a), Sched. I, Part I. It was said to be for professional charges in connection with an advance to the executors of the will of the late Mrs. L. F. Jenner, on the security of the Wenvoe Castle estate, shares in the Aire and Calder Navigation Co., and other property, "investigating title and preparing and completing deed of security in your favour to secure £17,000, and further advances up to £64,458 in all and interest thereon as per authorised scale." The bill having been ordered to be taxed, it was objected that the case did not fall within Sched. I, Part I. The taxing master so held, and made certain consequential disallowances. The applicants objected, and stated their reasons. This application was then made by them, asking that the items objected to by the taxing master might be allowed, and the matter referred back to him to vary his certificate. **B**
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D
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Daynes, for the applicants, referred to *Ex parte London Corpn.* (1) and *Earl of Aylesford v. Earl Poulett* (2). **F**

Nicholson Combe, for the respondents, referred to *Re Webster and Jones' Contract* (3).

RUSSELL, J.—The short point in this case is whether the bill as carried in is a scale charge under Sched. I to the Solicitors' Remuneration Order, 1883, or whether the matters in question do not fall within s. 1, in which case it would be merely a question of an itemised bill. The amount of the difference between the two bills is a substantial amount. An order was made for the taxation of the bill, and a dispute arose whether it was a case within Sched. I. The taxing master took the view that it was not within Sched. I. The applicants objected to the disallowance and gave their reasons. I need not read the objections or the answers; they are the arguments addressed to me on one side and the other. **G**
H

In substance, the question is whether the work has been done which Sched. I provides for. It is necessary to glance at the provisions of the Order and the schedule and the rules which go with the schedule. The Order, by cl. 2, provides that, subject to a certain exception which is immaterial, **I**

"the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any court, or in the chambers of any judge or master, is to be regulated as follows, namely: (a) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in Part I of Sched. I to this Order, and to be subject to

- A the regulations therein contained [that is, contained in Part I of Sched. I] . . .
(c) In respect of business not hereinbefore provided for, connected with any transaction, the remuneration for which, if completed, is hereinbefore, or in Sched. I hereto, prescribed, but which is not in fact completed, and in respect of settlements, mining leases or licences, or agreements therefor, re-conveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Sched. I hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Sched. I hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Sched. II hereto."
- B
- C Schedule I, Part I, deals with the scale of charges by the mortgagee's solicitor, and those include two heads: (i) "For negotiating loans"—that does not arise here, and (ii) "For investigating title to freehold, copyhold or leasehold property, and preparing and completing mortgage." Then there is set out the scale fee. Pausing there for a moment, there might be a doubt whether the scale fee of the mortgagee's solicitors would include the case of transfer of a mortgage or the case of a further charge, but that matter is set beyond doubt by r. 10, which provides as follows:
- D "The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or on any previous transfer; and it is not to apply to further charges, where the title has been so previously investigated . . ."
- E I read that as meaning that, if it cannot be said that the title has been so previously investigated, then that the scale does apply to further charges. The parties agree that the deed which was executed by the executors of Mrs. Jenner was a further charge either for £17,000 or for the larger sum of £64,000, and the question on which the case really turns is whether there was an investigation of title by the same solicitors within the meaning of this rule.
- F In my opinion, although the solicitors are the same, this was not an investigation of a title which had been previously investigated. The meaning of this rule is that the title in question is to be the title of the person who is coming forward to borrow the money. Although the same solicitors may, down to a previous date, have investigated the title to the property in the hands of A., when B., although claiming under A., comes forward to borrow money, they have to investigate B.'s title to the property; it is impossible to say within r. 10 that the title has been so previously investigated. Take the present case as an example. It was absolutely necessary for the applicants, before they could advise their clients to make this large advance, to satisfy themselves as to the powers of the executors and trustees to make a good title. For that purpose, they would have to be satisfied in the first place that Mrs. Jenner was dead; in the second place what the contents of her will were, and that the trustees had proved the will, and it would not be until they had conducted that investigation of title that they could safely say to their clients: "You may lend the £64,000." Counsel for the respondents has argued that I am to take a broad view, and to hold that, because the solicitors were familiar with the title down to and in Mrs. Jenner, therefore there was in substance no investigation of title since Mrs. Jenner's title, because it only involved being satisfied as to her death, and as to the contents of her will; in other words, that the investigation of title here suggested was minute and involved very little work. I feel precluded from taking what is called the broad view. I must construe the rule in question according to what I think to be the meaning of the language used therein, and I find myself very much in the same position as KAY, J., found himself in *Ex parte London Corpn.* (1), where the examination of title, which I agree was examination for the first time, was of a very minute character, and he said, nevertheless, that there was an investigation of title, although, in his opinion, he thought the solicitor who was charging the scale fee was being remunerated to
- I

an excessive extent. KAY, J., said that was the fault of the order made under the Act of Parliament, and that it was a matter for legislation and not for him. The truth is that this Order may work both ways, and the profession must take the rough with the smooth. This happens to be one of the smooth bits. The result is that I accede to the application made by the solicitors, and allow the objections, and refer the matter back to the taxing master to be dealt with.

Solicitors: *Coward, Chance & Co.; Godden, Holme & Ward.*

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS *v.* REES ROTURBO DEVELOPMENT SYNDICATE, LTD. DUCKER *v.* SAME

[HOUSE OF LORDS (Lord Buckmaster, Viscount Sumner, Lord Wrenbury, Lord Carson and Lord Warrington), February 14, 1928]

[Reported [1928] A.C. 132; 97 L.J.K.B. 317; 138 L.T. 598;
44 T.L.R. 307; 72 Sol. Jo. 171; 13 Tax Cas. 366]

Income Tax—Capital or income—Company incorporated to acquire and use patents—Sale of patents.

Excess Profits Duty—Capital or income—Company incorporated to acquire and use patents—Sale of patents.

A company was formed for the general purpose of purchasing or otherwise acquiring patents, patent rights, brevets d'invention, licences, protections and concessions, and to use them and turn them to account, and in particular to acquire from R. and T.P., Ltd., the benefit of existing inventions relating to centrifugal turbine and similar pumps. The company further had power to sell any part of the property and rights of the company. The company in fact acquired two equal third shares of the said existing inventions and in foreign patents subsequently granted to R. The development of the patents by the granting of manufacturing licences was at all times the main business of the company, although the possibility of the sale of foreign patents was always contemplated. The company and R. granted a licence to an American company to manufacture and sell articles covered by patents in the United States of America, and also an option to purchase the American patents. The American company exercised its option to purchase, paying £26,500 in respect of outstanding royalties and the purchase price. The company brought their share of the royalties into their profit and loss account, but maintained that their share of the purchase price was capital. The special commissioners held that the profits from the sale of the patents arose in the course of the company's business and were taxable.

Held: there was abundant evidence on which the commissioners could find as a fact that the sale of the patents was part of the company's business, and, the commissioners not having misdirected themselves, that finding could not be disturbed.

Decision of the Court of Appeal, [1928] 1 K.B. 506, reversed.

Notes. Considered and Applied: *Hesketh Estates, Ltd. v. Craddock* (1942), 25 Tax Cas. 1. Considered: *Margerison v. Tyresoles, Ltd.* (1942), 25 Tax Cas. 59. Referred to: *Spiers & Son, Ltd. v. Ogden* (1932), 17 Tax Cas. 117; *Wilson Box*

A (*Foreign Rights*), *Ltd. v. Brice*, [1936] 2 All E.R. 452; *Bean v. Doncaster Amalgamated Collieries*, [1944] 2 All E.R. 279; *Cooksey v. Rednall* (1949), 93 Sol. Jo. 134; *Harry Hall, Ltd. v. Barron* (1949), 93 Sol. Jo. 149; *Reynolds and Gibson v. Crompton*, [1950] 2 All E.R. 502; *J. Bolson & Son, Ltd. v. Farrelly* (1953), 34 Tax Cas. 161; *Evans Medical Supplies, Ltd. v. Moriarty*, [1956] 2 All E.R. 706.

As to capital or income, see 20 HALSBURY'S LAWS (3rd Edn.) 12 et seq.; and for cases see 28 DIGEST 17 et seq.

B Cases referred to:

(1) *Californian Copper Syndicate, Ltd. v. Harris (Surveyor of Taxes)* (1905), 5 Tax Cas. 159; 6 F. (Ct. of Sess.) 894; 28 Digest 18, 92ii.

(2) *Taxes Comr. v. Melbourne Trust, Ltd.*, [1914] A.C. 1001; 84 L.J.P.C. 21; 111 L.T. 1040, P.C.; 28 Digest 18, 92i.

C (3) *Collins v. Firth-Brearley Stainless Steel Syndicate, Ltd.* (1925), 133 L.T. 616; 69 Sol. Jo. 695; 9 Tax Cas. 520, C.A.; 28 Digest 18, 93.

D Appeals by the Crown from orders of the Court of Appeal (LORD HANWORTH, M.R., and SARGANT, L.J.; SCRUTTON, L.J., dissenting), reported [1928] 1 K.B. 506, allowing an appeal by the taxpayers from an order of ROWLATT, J., made on a Case stated under the Income Tax Act, 1918, s. 149, by the Special Commissioners of Income Tax for the opinion of the King's Bench Division of the High Court of Justice.

The Case Stated in the first appeal was as follows: "At a meeting of the commissioners held on Dec. 9, 1924, for the purpose of hearing appeals the Rees Roturbo Development Syndicate, Ltd. (hereinafter called the appellant company), appealed against assessments to income tax in the sums of £7,500 for the year ending April 5, 1920, £6,161 for the year ending April 5, 1921, and £5,340 for the year ending April 5, 1922, made upon the appellant company by the Additional Commissioners of Income Tax for the Seisdon Division of the County of Stafford, under the provisions of the Income Tax Acts.

F The appellant company was incorporated under the Companies Acts on Oct. 4, 1906, with a share capital of £30,000 and with the following objects (inter alia): (a) To purchase or by other means acquire, and protect, prolong and renew, whether in the United Kingdom or elsewhere, any patents, patent rights, brevets d'invention, licences, protections and concessions which may appear likely to be useful or advantageous to the company, and to use and turn to account and to manufacture under or grant licences or privileges in respect of the same, and to expend money in experimenting upon and testing and improving or seeking to improve any patents, inventions, or rights which the company may acquire or propose to acquire, and in particular to acquire from Edmund Scott Gustave Rees, of Dunscar, Oaken, near Wolverhampton, in the county of Stafford, electrical engineer, and Thomas Parker, Ltd., the benefit of certain existing inventions in relation to centrifugal turbine and similar pumps, and with a view thereto, to enter into and carry into effect the agreement referred to in art. 2 of the articles of association of this company with such modifications (if any) as may seem expedient. . . . (f) To improve, manage, develop, exchange, let on lease or otherwise, mortgage, sell, dispose of, turn to account, grant rights and privileges in respect of, or otherwise deal with all or any part of the property and rights of the company.

I Early in 1906 Edmund Scott Gustave Rees made and patented an invention consisting of improvements in centrifugal turbine and similar pumps and further developments of the invention were subsequently patented by him. The first patent was dated February, 1906, and was numbered 4810, and the whole series of patents related to one invention, the fundamental basis of which was the Roturbo principle. The word 'Roturbo' was also registered as a trade mark and the new type of pumps was named and became known and is still known as the Rees Roturbo Pump. Edmund Scott Gustave Rees was also managing engineer and director of Thomas Parker, Ltd., a company carrying on the business of electrical engineers. The business of Thomas Parker, Ltd., was restricted owing to lack of capital and when

Edmund Scott Gustave Rees invented the pump in 1906 he desired to extend that business by granting to Thomas Parker, Ltd., an exclusive licence to manufacture the pump. As, however, he was not satisfied with the financial stability of that company, he was unwilling to transfer the ownership of the patents to it and he accordingly caused the appellant company to be formed for the purpose of taking over the existing patents and all future development patents based on the Roturbo principle, and of providing additional working capital for Thomas Parker, Ltd.

By an agreement dated Oct. 22, 1906, being the agreement referred to in art. 3 (a) of the memorandum of association and art. 2 of the articles of association of the appellant company, after reciting that by an agreement dated May 28, 1906, Edmund Scott Gustave Rees had agreed to grant a licence to Thomas Parker, Ltd., to use a certain patent numbered 4810 for improvements in centrifugal turbine and similar pumps for which provisional protection had been granted to Edmund Scott Gustave Rees, it was agreed that the said recited agreement should be cancelled and that Edmund Scott Gustave Rees and Thomas Parker, Ltd., should sell and the appellant company should purchase the benefit of the patent and the benefit of all improvements on the invention to which that patent related, and two equal third parts or shares of and in any foreign patents in respect of the invention or improvements thereon, provided that the remaining one equal third part or share in such foreign patents should remain and be the absolute property of the said Edmund Scott Gustave Rees, and that Edmund Scott Gustave Rees and the appellant company should be tenants in common of such patents and the profits thereof in the shares aforesaid. 'Foreign' patents in relation to the invention were granted to Edmund Scott Gustave Rees in respect of the following countries, amongst others: France, Switzerland, Belgium, Germany, the United States of America and the Dominion of Canada. The consideration for the sale effected by the last-mentioned agreement was the sum of £29,000, viz., £500 for the interest in the patent and patent rights in each of the countries of France, Switzerland, Belgium, Germany, and the United States of America, £500 for the interest in the patent and patent rights in all other foreign or colonial countries, and £26,000 for the interest in the British patent. The purchase price of £29,000 was to be paid and satisfied by the payment to the said Edmund Scott Gustave Rees of £2,000 in cash and the issue to him or his nominees of 5,500 fully paid-up £1 shares in the appellant company and by the payment to Thomas Parker, Ltd., of £21,500 in cash or the issue to that company of fully paid-up shares in the appellant company of the nominal value of the whole or any such part of the said sum of £21,500 as should not be paid in cash.

By a further agreement dated Oct. 22, 1906, made between the appellant company and Thomas Parker, Ltd., and which was entered into in pursuance of a proviso in that behalf contained in the agreement mentioned above, it was provided that Thomas Parker, Ltd., should during the term of the patents have the sole right of manufacturing and should manufacture for the appellant company all pumps, turbines, or other machines required for use in the United Kingdom, the Channel Islands, the Isle of Man, the Colonies or foreign countries subject to any agreement for sale of the foreign patents thereafter made by the appellant company and which could or might be manufactured under the patents. For the purposes aforesaid, but no further, Thomas Parker, Ltd., might exercise and use the rights vested in the appellant company under the patents and might vend such articles in the United Kingdom, the Channel Islands or elsewhere unless the appellant company should have sold the patent rights. Thomas Parker, Ltd., was to pay all costs of manufacture, and was to have the sole and exclusive control of the sale and disposition of all pumps, turbines, machines and goods manufactured under the provisions of the agreement, and was generally to act as the sole and exclusive agent for the sale of such articles and was to defray all the costs of sale. The appellant company was to bear the expenses of protecting, maintaining and renewing the patents or obtaining patents for improvements on or development of the invention. The gross profits were to be divided and paid as to two-thirds to

A Thomas Parker, Ltd., and as to one-third to the appellant company where the gross profit was 40 per cent. or less on the selling price, and if the gross profit on any pumps or articles should exceed 40 per cent. on the selling price, Thomas Parker, Ltd., was to retain one-third of such excess profit and to pay two-thirds to the appellant company. So long as Thomas Parker, Ltd., was able to meet the demands with reasonable dispatch, the appellant company was not to grant to any other persons a licence to use and exercise the invention or any improvements or alterations thereof in the United Kingdom, the Channel Islands, and the Isle of Man.

In 1908 a new company, the Rees Roturbo Manufacturing Co., Ltd., was formed, with the said Edmund Scott Gustave Rees as managing director, to take over the business of Thomas Parker, Ltd., including the licence to manufacture pumps, and since that time this company has carried on the whole manufacture of the pumps in the United Kingdom and the sale of the pumps in the United Kingdom or elsewhere except as regards countries for which exclusive licences have been granted to other concerns or the foreign patents have been sold. The appellant company obtained further patents both in the United Kingdom and abroad, but they all related to the original invention or improvements and development thereof, and throughout the appellant company's existence its assets have consisted entirely of this group of patents and investments, and the receipts brought into its profit and loss accounts have been made up of royalties for the use of the patents, interest, and such incidental receipts as transfer fees. The appellant company has, in fact, never acquired or held or attempted to acquire or hold any patents whatever other than patents relating to Rees Roturbo pumps and certain ancillary or incidental patents relating to Roturbo condensers. The development of the patents by the granting of manufacturing licences has always been the main business of the appellant company, although the possibility of the sale of foreign patents or rights has always been contemplated by the appellant company in respect of such interest as it possessed in the foreign patents, as is shown by the directors' reports submitted to the shareholders at annual general meetings. Edmund Scott Gustave Rees stated in evidence, and the commissioners accepted his evidence, that the appellant company had never originated offers to sell the foreign patents or to grant licences thereunder to foreign manufacturers, but applications for licences had been received from abroad and the experience of the appellant company was that the foreign manufacturers usually required to be given an option of purchase as a condition of agreeing to take a licence. In any case where the appellant company had granted an option of alternate purchase the option price was purposely fixed at a high figure which it was thought would be prohibitive. Messrs. Krupp had refused to enter into a manufacturing agreement unless a syndicate was formed with its head office in Hamburg to take over the German patents, but it was intended that this syndicate should be controlled by the appellant company. Edmund Scott Gustave Rees was at all relevant times owner in his own right of the one-third share in the foreign patents.

H By an agreement dated Mar. 15, 1912, the appellant company and Edmund Scott Gustave Rees agreed to grant to the Manistee Iron Works Co., of Manistee, Michigan, in the United States of America (hereinafter called the Manistee company), an exclusive licence to manufacture and sell pumps and other articles under the American and Canadian patents within the United States of America and Canada for all the unexpired residue of the terms of the patents and any prolonged or extended terms thereof in consideration of a payment of £10,000 to the licensors and royalties at the rate of 10 per cent. on the selling price of all articles made, with guaranteed minimum royalties of £2,000 during 1913, £3,000 during 1914, £4,000 during 1915, and £5,000 during 1916 and every subsequent year, the Manistee company being precluded from exporting either directly or indirectly to the United Kingdom or certain other specified countries. The licensors retained the right by notice in writing to determine the licence in the event of failure to pay the royalties or other breach of the terms of the agreement and thereby the said licence and all rights of the Manistee company thereunder were forthwith to cease

and determine. The Manistee company was also given the option to purchase the American and Canadian patents for £45,000 at any time before June 30, 1912, or for £50,000 at any time between June 30, 1912, and Dec. 31, 1914. On the same date a licence was granted to the Manistee company in accordance with the terms of such agreement. Under the agreement the Manistee company made the stipulated payment of £10,000 of which £6,000 was received by the appellant company in 1912. Of this sum £750 was absorbed by expenses, £1,000 was taken to the credit of the appellant company's profit and loss account, and £4,250 was placed to reserve. The Manistee company did not exercise its option to purchase the American and Canadian patents and it failed to pay the minimum royalties, but the appellant company was satisfied with the efforts made by it to develop the business in America, and allowed the licence to continue in force and the royalties to accumulate. By the end of 1916 the arrears of royalties due from the Manistee company amounted to £13,500. These royalties were not brought into the appellant company's accounts in any form.

The appellant company and Edmund Scott Gustave Rees were desirous of recovering the right to use the patents in Canada, and in January, 1917, they entered into a supplemental agreement with the Manistee company. This supplemental agreement after reciting that the Manistee company had failed to carry out and perform certain obligations set forth in the agreement of Mar. 15, 1912, and was in default thereunder and had requested the licensors to refrain from enforcing their rights, confirmed the said agreement except as amended or altered by the supplemental agreement, and provided that the Manistee company should pay the licensors a minimum royalty of £416 per month during the balance of the term of the said agreement, and that so long as the Manistee company should not be in default in paying the royalties and should not fail to perform any of its obligations from and after Jan. 1, 1917, the licensors should hold the accrued and unpaid royalties due to them, then amounting to £13,500, in suspense and refrain from enforcing their rights, and the unpaid royalties should be liquidated at the rate of £2,250 per annum over a period of six years. The Manistee company surrendered all its rights and interest to the use of Canadian territory and to Canadian licences and patents, but in the event of the Manistee company continuing to fulfil the terms thereof and of the contract thereby amended the Manistee company should continue to hold an option to purchase the United States patent rights outright at any time before Jan. 1, 1918, for the sum of £26,500. In the event of such outright purchase all claims for accrued royalties owing up to Jan. 1, 1917, were to be cancelled and considered and treated by the licensors as paid and liquidated. The Manistee company paid the royalties accruing due during 1917, and then exercised its option to buy the American patents for the sum of £26,500. The royalties received by the appellant company were brought into its profit and loss account. Of the sum of £26,500 paid for the American patents £2,653 was paid to an agent in America, £7,949 to the said Edmund Scott Gustave Rees, and the balance of £15,898 was received by the appellant company. This sum was not included in the appellant company's profit and loss account but (after deduction of £333 for special expenses incurred in connection with the sale) was written off the value of patents in the balance sheet. In 1922, by special resolution passed on July 14 and confirmed on July 31, the appellant company reduced its paid-up capital under s. 40 of the Companies (Consolidation) Act, 1908, by returning out of accumulated profits a sum equal to 95 per cent. of the capital paid up on its shares.

By an agreement dated Jan. 11, 1918, the appellant company and Edmund Scott Gustave Rees granted to the Goldie and McCulloch Co., Ltd., of Galt, Ontario, an exclusive licence to manufacture and sell pumps and other articles comprised in the Canadian patents within the Dominion of Canada in consideration of the sum of \$5,000 and a royalty at the rate of 10 per cent. on the selling price of all vacuum pumps, condensers, and air compressors, and at the rate of 6 per cent. on the selling price of all water pumps and other articles manufactured and sold under the

A patents or licence, subject to the right of the licensors to grant a licence to one other party for the Dominion of Canada in case the royalties paid in any one year should be less than certain minimum amounts. It was further provided that when the total amount of the royalties paid, together with compound interest thereon at 5 per cent. per annum, should have reached the total amount of \$90,000, together with compound interest thereon at 5 per cent. per annum, then all further royalty

B payments should cease and the licensors should transfer and assign all their right, title, and interest to the Canadian patents to the Goldie and McCulloch Co. In the event of failure to pay the royalties or other breach of the terms of the agreement the licensors retained the right by notice in writing to determine the licence and thereupon the licence and all rights of the Goldie and McCulloch Co. thereunder should cease and determine.

C By an agreement dated June 12, 1919, the appellant company and Edmund Scott Gustave Rees granted to La Société des Moteurs Gnome et Rhone, of Paris, an exclusive licence to manufacture and sell water pumps and other articles under the French patents within the Republic of France and the Colonies thereof in consideration of the sum of 130,000 francs, and a royalty at the rate of 5 per cent. on the selling price of all condensers, air pumps, and compressors, and 4 per cent.

D on centrifugal pumps manufactured under the licence, subject to the right of the licensors to grant licences to other manufacturers in France if the royalties paid should be less than certain minimum amounts. It was further provided that when the total amount of the royalties paid, together with compound interest thereon at 5 per cent. per annum, should have reached the total amount of 625,000 francs (£25,000 sterling) together with compound interest thereon at 5 per cent. per

E annum, then any further royalties should be at the rate of 2 per cent. on the selling price of all articles manufactured and sold under the French patents or the licence. If the royalties should be unpaid or there should be other breach of the terms of the agreement the licensors should be at liberty by notice in writing to determine the licence.

F The royalties received by the appellant company in respect of its patents from the date of its incorporation to Dec. 31, 1923, were as follows :

	Period	British			Foreign			Total		
		£	s.	d.	£	s.	d.	£	s.	d.
	Oct. 4, 1906, to Dec. 31, 1907	444	16	9				444	16	9
	Year ended Dec. 31, 1908	1,470	17	6				1,470	17	6
G	" " " 1909	2,585	15	0				2,585	15	0
	" " " 1910	2,820	10	2				2,820	10	2
	" " " 1911	2,538	17	1				2,538	17	1
	" " " 1912	3,139	1	4				3,139	1	4
	" " " 1913	4,378	17	0				4,378	17	0
	" " " 1914	3,877	15	5				3,877	15	5
H	" " " 1915	3,702	6	0				3,702	6	0
	" " " 1916	3,750	0	0				3,750	0	0
	" " " 1917	3,750	0	0	3,083	0	1	6,833	0	1
	" " " 1918	3,750	0	0	2,207	18	0	5,957	18	0
	" " " 1919	3,750	0	0	230	12	7	3,980	12	7
	" " " 1920	8,108	14	0	526	15	9	8,635	9	9
I	" " " 1921	14,539	2	7	602	10	4	15,141	12	11
	" " " 1922	2,100	15	11	470	2	4	2,570	18	3
	" " " 1923	476	14	2	812	2	2	1,288	16	4

The sole question on which the opinion of the court is desired is whether the sum received by the appellant company from the Manistee company on its exercising its option to buy the American patents or any part thereof, was a profit of the appellant company's business in respect of which it was assessable to income tax. The appellant company, while not admitting liability in respect of the sums received from the Goldie and McCulloch Co., Ltd., and La Société des Moteurs Gnome et

Rhone, did not press its objection to the inclusion of these sums in the computations on which the assessments were based. **A**

It was contended on behalf of the appellant company: (a) that the patents sold to the Manistee company were capital assets of the appellant company; (b) that the appellant company, in selling these patents, was realising a part of its capital assets; (c) that the appellant company had not made a business of buying and selling patents but had acquired only a part share as tenants in common of a single group of patents relating to one invention and improvements thereof with the main object of holding such patents and obtaining an income from royalties for the use of them; (d) that the sum received from the Manistee company was not as a whole or in regard to any part thereof a profit of its trade or business in respect of which it was assessable to income tax or excess profits duty. It was contended on behalf of the Crown (inter alia): (a) that the sum of £26,500 received from the Manistee company was a receipt of the appellant company's business and as such assessable to income tax; (b) that the assessments appealed against were in this respect correct and should be confirmed. **B**

The commissioners who heard the appeal, after considering the facts and arguments, gave their decision on Mar. 18, 1925, that the profits of sale of patents arose in the course of the appellant company's business and were chargeable to income tax and excess profits duty, and amended the assessments to amounts which, on this basis, were agreed between the parties to be correct as a matter of figures. **C**

The Court of Appeal held that the special commissioners had misdirected themselves in a matter of law, and their decision was therefore appealable. The majority of the Court of Appeal held that the sale of a patent by the taxpayers did not result in a trading profit, but was the realisation of a capital asset and its transmutation into money. The taxpayers did not trade in the sale of patents, and never originated offers to sell their patents. The assessment was discharged. **D**

The second appeal, relating to the same facts, had reference to excess profits duty. No separate opinions were delivered, the questions to be considered being identical in each case. The Case Stated was in similar terms to that set out above. **E**

The Attorney-General (Sir Douglas Hogg, K.C.), The Solicitor-General (Sir Thomas Inskip, K.C.), and Reginald Hills for the Crown. **F**

Latter, K.C., J. H. Stamp, and J. H. Bove for the taxpayers.

LORD BUCKMASTER.—This is an appeal from the Court of Appeal by the Crown, seeking to reverse a judgment given by that court (SCRUTTON, L.J., dissenting) which overruled a judgment of ROWLATT, J., who had affirmed a finding of the commissioners assessing the present respondents as liable to income tax. The amount of the assessment is not in dispute. The respondents have been assessed on a sum which the respondents say in fact represents part of their capital assets and ought not to be brought into account for the purpose of considering profits subject to income tax. **G**

The respondent company was formed on Oct. 4, 1906, for the general purpose of purchasing and acquiring patents, licences, and concessions, improving them, using them, and turning them to account, and with the special purpose of acquiring from a Mr. Rees and Thomas Parker & Co., Ltd., the rights in regard to a particular invention that had relation to centrifugal turbine pumps. By virtue of one of the general clauses of their memorandum of association, the respondents also had power to sell, dispose, turn to account and grant rights and privileges in respect of all or any part of the property and rights of the company. The special purpose was carried out, but it was not the whole of the patent rights that they so acquired; one-third of the rights in foreign patents was reserved to the vendors, and it was in conjunction with the vendors that the respondents proceeded to carry on their business. The respondents appear to have decided from the first that they would never manufacture under these patents, but that they would either grant licences to other people to manufacture or deal with the patents in such manner as they thought fit. In the course of their business they acquired further foreign patents— **H**

I

A in France, Switzerland, Belgium, Germany, the United States of America, and the Dominion of Canada. They dealt with the patent rights in the United States by granting to an American company the right to use the invention, which the patent protected, on the terms of paying royalties, with an ultimate right of acquiring the whole patent by purchase. It is unnecessary to go through the history of the agreements by which this result was reached, but in the end it led to the conclusion

B that there was a substantial sum of money owing in respect of royalties from the American company, and this sum was brought into account with another sum, making up together the purchase price of £26,500 for which the patent was sold. It is the respondents' share of this sum less proper expenses which has been the subject of the present assessment. The respondents also dealt with the patents in Canada and the patents in France, not under agreements containing exactly the

C same provisions, but by agreements which enabled the people with whom they dealt in each case in certain circumstances to acquire the whole of the patent rights. The respondents contend that the transaction which they entered into with the American company was the disposition of a capital asset, and that the proceeds arising therefrom should not be brought into account. I think it is undesirable in these cases to attempt to repeat in different words a rule or principle which has

D already been found applicable and has received judicial approval, and I find that in *Californian Copper Syndicate, Ltd. v. Harris* (1) (5 Tax Cas. 159) it is declared that in considering a matter similar to the present the test to be applied is whether the amount in dispute was "a gain made in an operation of business in carrying out a scheme for profit making." That principle was approved in a judgment of the Privy Council in *Taxes Comr. v. Melbourne Trust, Ltd.* (2) ([1914] A.C. 1001),

E and it is, I think, the right principle to apply.

Following from that two questions arise. First of all, did the commissioners properly direct themselves with regard to determining whether these moneys were profits in accordance with this test or no? The second is whether in fact they have done so. The real contention has been chiefly directed to the form of the commissioners' finding, which it is suggested was based on a mistaken view of the

F law rather than a proper consideration of the facts. The reasons which have been urged by the respondents in support of their view depend to a large extent on the fact that in *Collins v. Firth-Breareley Stainless Steel Syndicate, Ltd.* (3) a finding of the commissioners in a closely similar case had been upset by ROWLATT, J., on Mar. 2, 1925, and his decision was in turn reversed by the Court of Appeal on June 26, 1925. The commissioners' finding in the present case was on Mar. 18,

G 1925, and it is therefore argued that it is based on the direction of ROWLATT, J., which had been given on the 2nd of the same month, and that as that direction had been held to be unsound it followed that the foundation of their finding had fallen away. There are one or two comments to be made on that argument. In the first place, what ROWLATT, J., did was to reverse a finding of fact, and the enunciation that he made of the law appears to me to be open to very little criticism. In the Court of Appeal each one of the learned judges who reversed his finding expressly and definitely stated that the circumstances were such as to lead to the conclusion that the finding was essentially a finding of fact by the commissioners which, when once found, ought not to be interfered with. It seems to me impossible in those circumstances to say that ROWLATT, J., in inadvertently disturbing a finding of fact of the commissioners, which the Court of Appeal restored, was

H laying down directions which were so unsound that the commissioners, whose finding in this case followed his judgment, must necessarily have been led to their conclusion by erroneous arguments. Turning to the findings of the commissioners, I find that they set out in detail the circumstances connected with the working of the respondents, and, in particular, the reports, which begin in 1907 and continue down to 1918. These reports show that the directors were contemplating from the earliest the possibility of the sale of some of these patents. It is quite true that they preferred not to sell them if a sale could be avoided, but the statement in para. 11 of the Case is quite plain, that

"the possibility of the sale of the foreign patents or rights has always been contemplated by the appellant company in respect of such interest as it possessed in the foreign patents." A

It is one of the foreign patents with which this appeal has to do, and the agreements, which are set out, showing the way in which the foreign patents in the case of France and of Canada have also been dealt with, show that that statement was not a statement of a mere accidental dealing with a particular class of property, but that it was part of their business which, though not of necessity the line on which they desired their business most extensively to develop, was one which they were prepared to undertake. I find myself unable to see that in this case that the commissioners have wrongly directed themselves, and, if they have not wrongly directed themselves, there appears to me to be abundant evidence on which their conclusion of fact could be supported. It is for this reason that I think this appeal should be allowed. B C

VISCOUNT SUMNER.—I agree.

LORD WRENBURY.—I agree, and I do not feel it necessary to add anything at all. D

LORD CARSON.—I also agree.

LORD WARRINGTON.—I agree.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue; Sharpe, Pritchard & Co., for Neve, Taylor & Co., Wolverhampton.* E

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

WOODLAND v. WOODLAND (OTHERWISE BELIN OR BARTON)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), February 22, March 27, 1928] F

[Reported [1928] P. 169; 97 L.J.P. 92; 139 L.T. 262;
44 T.L.R. 495; 72 Sol. Jo. 303]

Nullity—Estoppel—Petition for nullity on ground of bigamy—Previous suit for restitution of conjugal rights—Validity of marriage found in restitution suit. H

A husband petitioned for nullity of marriage on the ground that the wife was a married woman at the date of the marriage. Between the date of the marriage and the filing of the petition for nullity, the wife had obtained a decree of restitution of conjugal rights against the husband, in which he had appeared but had not filed an answer. The decree for restitution found that the parties were lawfully married. I

Held: the husband was estopped from denying the validity of the marriage.

Notes. Approved and Applied: *Lindsay v. Lindsay*, [1934] All E.R.Rep. 149. Considered: *In the Estate of Park, Park v. Park*, [1953] 2 All E.R. 408. Referred to: *Papadopoulos v. Papadopoulos*, [1929] All E.R.Rep. 310; *Tindall v. Tindall*, [1953] 1 All E.R. 139.

As to estoppel in matrimonial proceedings, see 15 HALSBURY'S LAWS (3rd Edn.) 183-184; and for cases see 27 DIGEST (Repl.) 374-378.

A Cases referred to :

- (1) *Miles v. Chilton* (*falsely calling herself Miles*) (1849), 1 Rob. Eccl. 684; 6 Notes of Cases, 636; 163 E.R. 1178; 27 Digest (Repl.) 448, 3798.
- (2) *Wilkins v. Wilkins*, [1896] P. 108; 65 L.J.P. 55; 74 L.T. 62; 44 W.R. 305; 12 T.L.R. 212; 40 Sol. Jo. 274, C.A.; 27 Digest (Repl.) 598, 5596.
- (3) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 25 T.L.R. 291; 53 Sol. Jo. 265, C.A.; 27 Digest (Repl.) 580, 5382.
- (4) *Humphries v. Humphries*, [1910] 2 K.B. 531; 79 L.J.K.B. 919; 103 L.T. 14, C.A.; 21 Digest 177, 294.
- (5) *Cowley v. Cowley*, [1913] P. 154; 82 L.J.P. 120; 109 L.T. 48; 29 T.L.R. 690; 27 Digest (Repl.) 518, 4610.
- (6) *Rudd v. Rudd*, [1924] P. 72; 93 L.J.P. 45; 130 L.T. 575; 40 T.L.R. 197; 11 Digest (Repl.) 472, 1036.
- (7) *Hoystead v. Taxation Comrs.*, [1926] A.C. 155; 94 L.J.P.C. 79; 134 L.T. 354; 42 T.L.R. 207, P.C.; Digest Supp.

Petition for nullity of marriage filed on June 10, 1927, by Percy Maurice Woodland.

- D** By his petition, he stated that, on Dec. 5, 1914, at the register office, St. Martin's, London, he went through a ceremony of marriage with Ivy Vera Belin, the respondent, who described herself as a spinster. The husband alleged that, on Dec. 5, 1914, at the date of this ceremony of marriage, the wife, who, on Mar. 21, 1907, had married Francis Saville Barton, at the register office, St. George's, Hanover Square, was a married woman, her husband, Mr. Barton, being then
- E** alive. By her answer the wife stated that her marriage with Mr. Barton was lawfully dissolved by the Civil Tribunal of the Seine, Paris, on Nov. 18, 1914. This the husband, by his reply, denied. At the hearing on Feb. 22, 1928, the wife's marriage with Mr. Barton on Mar. 21, 1907, was proved. On May 5, 1914, it appeared that Mr. Barton brought a suit for divorce against the wife on the ground of her relations with the present petitioner before the Civil Tribunal of the
- F** Seine. The suit was undefended, and that court granted a decree dissolving the marriage on Nov. 18, 1914. The wife thereupon at once came to England, where the husband, then serving in the Royal Naval Air Service, was under orders to go abroad on war service. The parties went through a ceremony of marriage and cohabited for three or four weeks before the husband was sent abroad. They had never cohabited since. On Dec. 5, 1914, Mr. Barton was alive. The husband
- G** was taken prisoner by the Turks in Palestine and was released in 1919. In 1920 the wife saw the husband and asked him for support, and in 1921 the wife petitioned in England for restitution of conjugal rights. In her petition she alleged the fact of her marriage with the husband on Dec. 5, 1914. The husband appeared but did not file an answer, and a decree was granted for restitution of conjugal rights on July 29, 1921. The decree of the court pronounced in terms
- H** that the wife had sufficiently proved the contents of the petition and that the parties "were and are lawfully married," and ordered the husband within forty days from the service of the order to return home to the wife and render her conjugal rights. The husband stated that, in 1922, he obtained advice as to his marriage of Dec. 5, 1914, and he then learnt for the first time that there was some doubt as to its validity, and he explained that he would have filed his petition for
- I** nullity at an earlier date had he been in a financial position to do so. Expert legal evidence was given by a French advocate and a member of the English Bar for the husband that, by French law, the wife could not marry again after the decree of Nov. 18, 1914, dissolving her marriage with Mr. Barton until (a) the time within which an appeal could be brought had expired (two months), and (b) the judgment of the court had been transcribed into the Register of Civil Status. The transcription was not made in this case until July 29, 1915. Even then a further interval was prescribed—but that was not material to the present case. Accordingly, by French law the parties were not able to marry on Dec. 5, 1914.

Counsel for the wife stated that the expert evidence in French law which they were prepared to call did not differ from that given for the husband. **HILL, J.**, having raised the question whether the decree for restitution of conjugal rights did not estop the husband from disputing the validity of the marriage by a claim for nullity, adjourned the case to enable the pleadings to be amended, and for counsel to consider the point. **A**

Victor Russell for the husband.

G. Tyndale and *H. Rolfe* for the wife. **B**

The following cases were cited: *Miles v. Chilton* (1), *Wilkins v. Wilkins* (2), *Harriman v. Harriman* (3), *Humphries v. Humphries* (4), *Cowley v. Cowley* (5), *Rudd v. Rudd* (6), and *Hoystead v. Taxation Comrs.* (7). **C**

HILL, J., stated the facts, and continued: The suggestion, I think, first came from me that this decree might create difficulties in the way of the husband's now setting up the case that the original marriage was void. The matter stood over for counsel to consider the point, and they have assisted me very much by their argument. They have asked that I should express my opinion both on the merits of the question of nullity as well as on the point as to estoppel, and I, therefore, do so at their request, because, although I think that, if the estoppel point is good, I am, in truth, debarred from considering the case on the merits, yet it may be convenient, if the case is taken to a higher court and I am wrong on the estoppel point, that the Court of Appeal should know what my decision would have been if the matter were open, on the merits. It is clear—and, indeed, counsel for the wife really did not contend to the contrary having heard the evidence of the French lawyers—that the decree of the French Tribunal on Nov. 18, 1914, did not operate to dissolve the marriage. It was a preliminary step like a decree nisi for the dissolution of marriage, but it was not effective to dissolve it. And the necessary steps to convert it into a dissolution of marriage had not been taken by Dec. 5, 1914, when the husband entered into a ceremony of marriage with the wife. I think it is clear from the evidence of the French lawyers that the judgment of the court did not, in itself, effect any change of status. It did not of itself dissolve the marriage. Further requirements were necessary. Certain intervals of time had to elapse, and the decree had to be transcribed into the Register of Civil Status before the marriage was dissolved. On Dec. 5, 1914, the necessary time had not expired and the decree had not been transcribed into the Register of Civil Status. It follows that, on that date, the wife was still the wife of Mr. Barton, and, therefore, incapable of marrying the present husband. Therefore, in my opinion, if the matter were open to the husband, he would be entitled to a decree of nullity. **D**

I cannot, however, see how the husband can be heard to say that he did not become the legal husband of the wife by reason of the ceremony of Dec. 5, 1914. In 1921 the wife brought proceedings for the restitution of conjugal rights. She had to allege the fact of the marriage in her petition. The court would have had no jurisdiction to make a decree of restitution of conjugal rights unless it found the marriage proved. The decree of the court pronounced in terms that the wife "had sufficiently proved the contents of the petition," and that the husband and the wife "were and are lawfully married," and ordered "that the said respondent do within forty days from the service of this order on him return home to the petitioner and render her conjugal rights," and so on. It may be that such a decree does not directly affect the status of the parties, but it is a final decree, and it can only be made on the finding of status, namely, that the husband and wife were and are lawful husband and wife. The husband and wife were both parties to that suit. The husband appeared, and he put in no answer, but he might in that suit have traversed the wife's allegation of the marriage; he might have put the marriage in issue. He did not do so. It may well be that, at that time, he had not ascertained that there were any grounds for disputing the validity of the marriage. He may not have ascertained his rights, but he did not file an **E**

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A answer, and the decree went by default on the wife's proof of the marriage, which, at that time, no doubt she believed to be a valid marriage, and on proof of the other matters entitling her to a decree. Can it be that, in such circumstances, it is open to the husband to allege that the marriage was not a valid marriage? No doubt in some respects the questions which arise under a contract of marriage are different from questions which arise under other contracts, but I have listened to the argument and attended to the cases that have been cited, and I am unable to find that there is anything in the law peculiar to this Division which renders inapplicable the general law of estoppel. As stated in art. 47 of STEPHEN'S DIGEST OF THE LAW OF EVIDENCE:

C "Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved."

D The marriage was directly in issue in the proceedings for restitution. It was actually decided by the court, and the court could not have granted the decree without finding that there had been a valid marriage. That appears from the judgment itself to be the ground on which it was based. There was a finding that the parties were lawful husband and wife. I can see no reason for saying that, because this was a marriage contract, I am to refuse to apply the principles laid down in the cases cited to me.

E In forming this view, I have been very much assisted by the decision in *Wilkins v. Wilkins* (2), where it is clear that GORELL BARNES, J., felt the same difficulty which presented itself to me when this case was opened. In that case, the wife took proceedings for judicial separation on the ground of the husband's adultery, and the husband put the marriage in issue. The jury found against him, and a decree for judicial separation was made. He put the marriage in issue on the ground that a previous husband of the wife was alive at the time of the marriage, but the jury found otherwise, and a decree of judicial separation was granted. Apparently the former husband had not been heard of for nearly forty years, but he appeared nine months after the finding of the jury and the husband then petitioned for nullity. GORELL BARNES, J., said that he had no doubt that the man who appeared was the real first husband, but he felt a difficulty in making a decree of nullity by reason of the verdict and decree in the former suit, and he adjourned the consideration of the case in order that the then petitioner might make an application to the Court of Appeal. He felt the same difficulty that I do here. It is quite true that there the validity of the marriage had been put in issue by the husband and the question had been fought out, but that can make no difference. Here, in the case of this wife's petition for restitution of conjugal rights, she alleged the validity of the marriage, and the husband, if he had chosen, might have appeared to traverse it, but he did not choose to do so at that time. Therefore, I have felt myself in the same difficulty in which GORELL BARNES, J., found himself in *Wilkins v. Wilkins* (2). In that case, the learned judge adjourned the consideration of the case that Wilkins might make an application to the Court of Appeal. The way in which the Court of Appeal dealt with the matter was to extend the time for appealing against the decree for judicial separation, and it was not suggested in the Court of Appeal that the decree was not binding as long as it stood. Indeed, KAY, L.J., clearly expressed his view that it was binding. He said ([1896] P. at p. 114):

I "As evidence is now forthcoming which could not by the exercise of reasonable diligence have been obtained at the first trial, there must be some mode of getting over an estoppel arising from a verdict which was obtained under a misapprehension of the real facts. In my opinion we have jurisdiction to enlarge the time for moving for a new trial of the first suit, and I am also

clearly of opinion that the case is one in which the jurisdiction ought to be exercised." A

The estoppel was clearly there recognised and a way of getting round it was found. I asked counsel for the husband if he would like me to do what GORELL BARNES, J., did in that case, and he said he would rather I dealt with the case as it stood. No doubt he can go to the Court of Appeal. If I am wrong in finding that there is an estoppel, the matter is open to the husband. I have stated, in my opinion, what will be the result if I am competent to deal with the merits. If, on the other hand, the Court of Appeal think that the proper way is to extend the time for appeal, it is within their power to deal with it in that way, but for the moment I must dismiss the petition with costs. B

Solicitors: *J. J. Warden Gowing; Bartlett & Co.*

[Reported by C. G. MORAN, Esq., Barrister-at-Law.] C

Re MARSHALL. GRAHAM v. MARSHALL

[CHANCERY DIVISION (Eve, J.), May 17, 1928]

[Reported [1928] Ch. 661; 97 L.J.Ch. 415; 189 L.T. 189]

Trust—Resulting trust—Absolute gift qualified by trust—Failure of trust—Re-establishment of original gift. E

By his will a testator directed his trustees to stand possessed of his real and personal estate upon trust for sale and investment and to pay the income to his wife for life or widowhood, and then divide into sevenths and pay two of them to his son M., two to his son A., and one to each of his three daughters, the shares of M. and the daughters to be retained, and if M. died without issue, then his share to fall into residue, such residue to be divided among charitable or benevolent objects as the trustees should select. By a codicil the testator revoked the gift of income to the wife and children and gave her an annuity of £2,500, and to each child an annuity of £200. He died in 1924 and M. in 1927, a bachelor and intestate. On a summons being taken out asking if the gift of residue were invalid, it was held that it was so. F

Held: there being an absolute gift qualified by the imposition of trusts, all of which had failed, on the failure of the trusts the absolute gift took effect, and, therefore, the share of M. passed to his legal personal representative. G

Rule in *Lassence v. Tierney* (1) (1849), 1 Mac. & G. 551, and observations of LORD DAVEY in *Hancock v. Watson* (2), [1902] A.C. 14, applied.

Re Payne (3), [1927] 2 Ch. 1, distinguished. H

Notes. As to resulting trusts, see 33 HALSBURY'S LAWS (2nd Edn.) 141 et seq.; and for rule in *Lassence v. Tierney* (1), see *ibid.*, vol. 34, p. 214. For cases see 43 DIGEST 642 et seq.

Cases referred to:

- (1) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; sub nom. *Lassence v. Tierney*, *Lassence v. Lescher*, 14 Jur. 182, H.L.; 43 Digest 643, 790. I
- (2) *Hancock v. Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 43 Digest 644, 792.
- (3) *Re Payne*, *Taylor v. Payne*, [1927] 2 Ch. 1; 96 L.J.Ch. 291; 137 L.T. 117; 43 Digest 644, 798.
- (4) *Hunter v. A.-G.*, [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530, H.L.; 44 Digest 545, 3625.

A Adjourned Summons.

The testator made his will in 1923 and thereby, after appointing executors and trustees thereof and making certain specific and pecuniary bequests, devised and bequeathed all his real and personal estate to his trustees to convert and out of the proceeds pay certain sums and invest the remainder, called the trust fund, as therein mentioned and pay the income thereof to his wife during widowhood, and then divide the corpus into sevenths and pay and transfer two-sevenths to his son Matthew, and two others to his son Aubrey, and one-seventh to each of his daughters Gwendolin, Monica, and Lettice, provided that the shares of Matthew and the daughters should not vest in them absolutely, but should be retained by the trustees on the trusts thereafter contained. In the event of Matthew's death without leaving children, his share was to sink into and form part of the residuary estate thereafter mentioned, which estate was directed to be divided among such charitable or benevolent objects as his trustees should in their absolute discretion select. The testator made a codicil in November, 1923, and thereby revoked the bequest of income to his wife and children and substituted annuities therefor. He died in 1924, his wife and five children surviving him. Matthew died in 1927 intestate and without having been married, and administration was granted to his widow as Matthew's personal representative, subject to the trusts of income for her life.

E A. V. Nesbitt, for the summons, said that the question was whether the two-sevenths of the estate went in accordance with the rule in *Lassence v. Tierney* (1) or fell into and formed part of the residue.

Bonner, for children claiming an intestacy, referred to *Re Payne* (3).

Crossman, for the Attorney-General, referred to *Hancock v. Watson* (2).

Daynes for the legal personal representative of the son.—The gift of residue is not a good gift: *Hunter v. A.-G.* (4).

F **EVE, J.**—But for the recent decision of *ASTBURY, J.*, in *Re Payne* (3), I should have but little hesitation in holding that the rule in *Lassence v. Tierney* (1) applies here. Under this will there was in substance an absolute gift to Matthew, followed by a settlement introduced, it is true, by a declaration that the shares given to Matthew and the daughters were not to vest absolutely in them, but were to be retained upon certain trusts. Those introductory words do not effect more than would have been effected if the testator had merely directed his trustees to retain the share upon certain trusts, instead of paying it over to Matthew. In *Re Payne* (3) the language was a little different and the learned judge seems to have relied on the language used there. It was "in trust to appropriate one of such shares to each of my sons now living." *ASTBURY, J.*, came to the conclusion that that language, coupled with a declaration that the shares were not to vest absolutely, prevented there being any point at which the court could say that there was an absolute gift. In this case the will is not so worded and it would be departing from the high authority to be found in the speech of *LORD DAVEY* in *Hancock v. Watson* (2) to hold that, there being here an absolute gift qualified by the imposition of trusts, all of which had failed, on the failure of the particular trusts the absolute gift did not survive. In my opinion, it did so survive, and in the circumstances of this case the interest of Matthew under his father's will passed to his legal personal representative.

I Solicitors: *Hancock & Willis*, for *Jonathan Couch*, St. Austell; *The Treasury Solicitor*.

[Reported by A. W. CHASTER, Esq., Barrister-at-Law.]

A

Re KNAPP. SPRECKLEY v. ATTORNEY-GENERAL

[CHANCERY DIVISION (Maugham, J.), December 7, 1928]

[Reported [1929] 1 Ch. 341; 98 L.J.Ch. 95; 140 L.T. 533]

Charity—Accumulation of fund—Directory provision—Duty of trustees—Gift by will to trustees to accumulate, buy land, and build almshouses—Validity.

B

By his will a testator gave everything subject to certain bequests in trust for the trustees of municipal charities at S., and desired that the interest of his investments should accumulate for twenty-one years, or so long as the law permitted, and be applied in the purchase of land and the building thereon of almshouses for the aged poor and the cost of upkeep thereof.

C

Held: the trust was binding, but the direction to accumulate was only a directory provision which the trustees of a charity ought to carry out in the performance of their trust, and, therefore, the trustees were not bound to accumulate the income except in so far as was necessary for the purpose of carrying out the scheme.

D

Notes. As to accumulation of charitable funds, see 4 HALSBURY'S LAWS (3rd Edn.) 302; and for cases see 8 DIGEST (Repl.) 442, 443.

Cases referred to:

- (1) *Morice v. Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 336.
- (2) *Re Freeman, Shilton v. Freeman*, [1908] 1 Ch. 720; 77 L.J.Ch. 401; 98 L.T. 429; 24 T.L.R. 300; 52 Sol. Jo. 262, C.A.; 8 Digest (Repl.) 388, 813.
- (3) *Re Davidson, Minty v. Bourne*, [1909] 1 Ch. 567; 78 L.J.Ch. 437; 99 L.T. 222; 24 T.L.R. 760; 52 Sol. Jo. 622, C.A.; 8 Digest (Repl.) 396, 883.
- (4) *Harbin v. Masterman* (1871), L.R. 12 Eq. 559; [1894] 2 Ch. 184; 63 L.J.Ch. 388; 70 L.T. 357, C.A.; affirmed sub nom. *Wharton v. Masterman*, [1895] A.C. 186; 64 L.J.Ch. 369; 72 L.T. 431; 43 W.R. 449; 11 T.L.R. 301; 11 R. 169, H.L.; 8 Digest (Repl.) 442, 1324.
- (5) *Re Swain, Monckton v. Hands*, [1905] 1 Ch. 669; 74 L.J.Ch. 354; 92 L.T. 715, C.A.; 8 Digest (Repl.) 439, 1301.

E

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Adjourned Summons.

The testator by his will made in December, 1921, after appointing an executrix thereof and bequeathing certain annuities and specific chattels, continued:

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"Subject to the above charges I bequeath everything that I may have [in trust] for the trustees of the Scarborough Municipal Charities (after payment of all my just debts and other expenses), and my wish is that the interest on my investments may be allowed to accumulate for a period of twenty-one years or so long as the law will allow and from that time the interest only from my investments be applied for the purchase of land and the building thereon of almshouses for the aged poor of Scarborough and to the payment of the rates upon the same and the keeping of the buildings in a good state of repair. My wish is that the total amount of money including the accumulated interest at the end of the twenty-one years should remain intact for all time."

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There were two codicils which confirmed this bequest. The testator died in 1927 and the will and codicils were duly proved by the executrix. This summons was then taken out by her, asking whether the direction to accumulate was valid, and, if not, whether the income belonged as to any period to the Scarborough Municipal Charities trustees or went as an intestacy, and whether the direction to purchase land and build almshouses thereon and pay rates and keep in good repair was valid and binding on the said trustees or whether the income was available for the general purposes of such charities.

A *A. J. Belsham* for the executrix.

Swords, for the charities, submitted that there was a binding trust on the trustees.

Turnbull, for the next-of-kin, contended that the residue was undisposed of. No trusts were declared: *Morice v. Bishop of Durham* (1); *Re Freeman* (2); *Re Davidson* (3).

B *Crossman* for the Attorney-General.—The words here are sufficient to create a binding trust: *Wharton v. Masterman* (4); *Re Swain* (5).

MAUGHAM, J. (after holding that on the true construction of the testator's will there was a binding trust, said): The next question is as to the direction to accumulate. A similar question was considered in *Harbin v. Masterman* (4). That case

C dealt with a direction to accumulate, the residuary legatees, who were to benefit by the accumulations and to take the whole of the personalty at the end of the period of accumulation, being charities. It was held, that the ordinary rule applied, but that the residuary legatees, being charities, were not entitled to have the accumulations stopped and to take the money at once, and it was, therefore, held that the accumulations should continue until further order. But in *Wharton v. Masterman*

D (4) the House of Lords overruled *WICKERS, V.-C.*, on that point, *LORD MACNAGHTEN* ([1895] A.C. at p. 195) saying that he was "unable to see any substantial distinction between the case of . . . a charity and an individual." The result of authority is that the trustees in the present case who are bound by the trust are not strictly bound by the direction to accumulate—that direction is a directory provision of a kind which trustees of charities ought *primâ facie* to bear in mind, and to carry

E out in the performance of their trusts, but it is no more than that. The testator, however, has shown that he desires the fund to be such that the income shall be available for buying land and building houses, and it will, therefore, be advisable to accumulate until the income is enough for the scheme to be carried out. There will be a reference to chambers to settle the scheme. I desire to add in conclusion that under s. 166 of the Law of Property Act, 1925 (replacing s. 1 of the Accumulations Act, 1892), accumulations of which the only object is the purchase of land

F are prohibited, but that is not the present case, and, therefore, the section does not apply.

Solicitors: *Radford & Frankland*, for *Birdsall & Snowball*, Scarborough; *Treasury Solicitor*.

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

BERNARD v. WILLIAMS

[KING'S BENCH DIVISION (Talbot and Humphreys, JJ.), March 13, 23, 1928]

[Reported 139 L.T. 22; 44 T.L.R. 437]

Sale of Land—Contract—Time of the essence—Circumstances showing time stated for completion not mere formality—Time originally not of essence—Made of essence by later notice, either before or after completion date.

A time is necessarily fixed for the completion of a sale of land in order to give legal rights, and, if nothing more appears, equity will enforce the contract although performance of it at the stipulated time has become impossible, but, if there is anything in the contract itself or in the circumstances which shows that there was real importance in the time fixed and that the party who insists on it stipulated for it, not as a mere formality, but with the intention of binding the other to it, then on a failure to keep the date assigned by the contract specific performance will be refused, at any rate where this was brought to the knowledge of the party claiming performance, since there is no equity in compelling a party to a contract to dispense with something for which he deliberately bargained and on the performance of which he relied. Even when time was not originally of the essence of the contract it may be made so by a later notice, either before or after the day named in the contract, requiring completion by a particular day, if the time allowed is reasonable. Merely extending the time originally fixed does not waive the condition as to time when it is of the essence of the contract.

On Oct. 28, 1926, the plaintiff paid £50 to the defendant by way of deposit in connection with the proposed purchase of a lease of premises. On Oct. 29 she signed a document, agreeing to purchase the lease for a sum of £350 per annum, and a premium of £150, possession to be given "on or about Dec. 6, 1926." On the same day the plaintiff paid a second sum of £50 on account of premium, in consideration of the defendant's promise to commence certain work on the premises at once. The plaintiff intended, as the defendant knew, to carry on a garage business there, and the work was necessary for that purpose. The time for giving possession was subsequently extended by mutual agreement to Dec. 15. By Dec. 10 it was apparent that the defendant could not do the work he had undertaken to do by Dec. 15 and the plaintiff then declined to proceed with the matter. In an action by the plaintiff for the recovery of the two sums of £50,

Held: in the circumstances of the case, time was of the essence of the contract; performance of the contract had become impossible by Dec. 10; and the plaintiff was entitled to rescind the contract on that day and to recover the two sums of £50.

Sale of Land—Contract—No agreement or memorandum in writing—Failure to keep contract date for completion—Equitable relief—Right of purchaser to rescind.

Semble: (i) A purchaser cannot rescind a contract for the sale of land and recover his deposit as against a vendor who is willing to complete, merely because there is no agreement or memorandum in writing to satisfy s. 40 of the Law of Property Act, 1925.

Casson v. Roberts (1) (1862), 31 Beav. 613, doubted.

(ii) the equitable rule regarding relief against failure to keep the dates specified in a contract will apply although there is no agreement or memorandum in writing to satisfy s. 40, if the contract is such, and the circumstances surrounding it are such, that, apart from the question of evidence (with which alone the Act of 1925 is concerned), specific performance of it could be decreed.

Notes. As to the need for a contract for the sale of land to be in writing, as to the date for completion of the contract, and as to rescission, see 29 HALSBURY'S

A LAWS (2nd Edn.) 240 et seq., 296, 379-381, and 464. For cases see 40 DIGEST (Repl.) 11 et seq., 116 et seq., 235 et seq., 386 et seq. For Law of Property Act, 1925, s. 40, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to :

- B** (1) *Casson v. Roberts* (1862), 31 Beav. 613; 1 New Rep. 9; 32 L.J.Ch. 105; 7 L.T. 588; 27 J.P. 73; 8 Jur.N.S. 1199; 11 W.R. 102; 54 E.R. 1277; 40 Digest (Repl.) 248, 2086.
- (2) *Tilley v. Thomas* (1867), 3 Ch. App. 61; 17 L.T. 422; 32 J.P. 180; 16 W.R. 166, L.J.J.; 40 Digest (Repl.) 118, 924.
- (3) *Stickney v. Keeble*, [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664, H.L.; 40 Digest (Repl.) 120, 942.
- C** (4) *Roberts v. Berry* (1853), 3 De G.M. & G. 284; 22 L.J.Ch. 398; 20 L.T.O.S. 215; 43 E.R. 112, L.J.J.; 40 Digest (Repl.) 87, 659.
- (5) *Benson v. Lamb* (1846), 9 Beav. 502; 15 L.J.Ch. 218; 7 L.T.O.S. 385; 50 E.R. 438; 40 Digest (Repl.) 294, 2455.
- (6) *Parkin v. Thorold* (1852), 16 Beav. 59; 22 L.J.Ch. 170; 16 Jur. 959; 51 E.R. 698; affirmed, see L.R. 5 Eq. at p. 543, L.J.J.; 40 Digest (Repl.) 120, 943.
- D** (7) *Crawford v. Toogood* (1879), 13 Ch.D. 153; 49 L.J.Ch. 108; 41 L.T. 549; 28 W.R. 248; 40 Digest (Repl.) 121, 947.
- (8) *Barclay v. Messenger* (1874), 43 L.J.Ch. 449; 30 L.T. 351; 22 W.R. 522; 40 Digest (Repl.) 122, 956.
- (9) *Jones v. Jones* (1840), 6 M. & W. 84; 9 L.J.Ex. 178; 151 E.R. 331; 6 Digest 161, 1033.
- E** (10) *Thomas v. Brown* (1876), 1 Q.B.D. 714; 45 L.J.Q.B. 811; 35 L.T. 237; 24 W.R. 821, D.C.; 40 Digest (Repl.) 248, 2087.

Appeal from Croydon County Court.

On Oct. 28, 1926, the plaintiff paid £50 to the defendant by way of deposit in connection with the proposed purchase of a lease of certain premises at Thornton Heath. On Oct. 29 the plaintiff signed a document, agreeing to purchase the lease for a sum of £350 per annum, and a premium of £150, possession to be given "on or about the 6th day of Dec., 1926." The plaintiff intended, as the defendant knew, to carry on a garage business there, and the defendant agreed to remove a hedge and trees and to lay concrete on the space in front of the house. On Oct. 29 the plaintiff paid a second sum of £50 on account of premium in consideration of the defendant's promise to commence the work at once. The time for giving possession was subsequently extended by mutual agreement to Dec. 15. By Dec. 10 it was apparent that the defendant could not do the work he had undertaken to do by Dec. 15, and the plaintiff's solicitors then wrote to the defendant's solicitors to the effect that the plaintiff was not now prepared to proceed with the matter. The plaintiff subsequently brought an action for the recovery of the two sums of £50, as money received by the defendant to the plaintiff's use, on the ground of total failure of consideration. The county court judge held that time was not of the essence of the contract, and that it was not a condition that the work should be done by a particular date so as to entitle the plaintiff to rescind when it became impossible that the work should be completed by that date. He gave judgment for the defendant. The plaintiff appealed.

G *J. B. Matthews, K.C., and S. K. de Ferrars* for the plaintiff (the purchaser).

I *F. P. M. Schiller, K.C., and T. F. Davis* for the defendant (the vendor).

Cur. adv. vult.

Mar. 23. **TALBOT, J.**, read the following judgment of the court. This was an action for the recovery of two sums of £50, money received by the defendant to the plaintiff's use, as on total failure of consideration. The money in question was paid by the plaintiff to the defendant in connection with a proposed lease to the plaintiff by the defendant of certain premises at Thornton Heath. The first payment was on Oct. 28, 1926, and the second the next day. On that day, Oct. 29, the plaintiff signed a document in these terms :

"I, Sarah Ellen Bernard, of Railway View, Willington, near Derby, hereby agree to purchase a lease of seven, fourteen, twenty-one years of the house and garages now known as 'Homefield' for the sum of £350 per annum, and a premium of £150, possession of the premises to be given to Mrs. Bernard on or about the 6th day of Dec., 1926."

It was common ground between the parties that the time for possession was subsequently extended by mutual agreement to Dec. 15. The first payment of £50 was made by way of deposit, and it is expressed to be so received in a receipt by the defendant's agents.

The place was, in October, 1926, used partly as a residence, and partly as a garage or garages. It had, no doubt, until a few years ago, been an ordinary residence and grounds, and in October, 1926, there was still in front of the house a carriage drive, a hedge and some trees, shrubs, and flower beds. The plaintiff intended to develop the garage business there, and she required the defendant, and he agreed, to remove the hedge, trees, &c., and lay concrete on the space in front of the house, so that petrol pumps could be placed there. It was admitted that the plaintiff paid the second sum of £50 in consideration of the defendant's promise that he would proceed at once with this work.

On Nov. 8, 1926, the defendant's solicitors wrote to the plaintiff in regard to the preparation of a lease. They were referred to Mr. Russell, then the plaintiff's solicitor, and the draft passed between the solicitors. Ultimately the form of it was agreed, but it was never executed, as the plaintiff refused to execute on the ground now to be explained. The plaintiff's case is that she always stipulated that the work above-mentioned should be done before the time came for giving her possession, and that it was to make sure of this that she paid the second £50. The evidence was that the work would take at least a fortnight. On Nov. 22, more than three weeks after that payment, the plaintiff wrote to the defendant's agent as follows:

"Dear Mr. Griffiths, I am writing you about the place at 267, London Road, Croydon. My husband has been over twice on a Saturday afternoon and expecting to see some alterations on the forecourt of the house, making ready for us to lay in pumps, &c., as soon as we get possession, which your agreement stated on the 1st or 6th Dec. This job was to be made and that was the understanding that Mr. Williams wanted another £50 before he commenced to make alterations. The time is now getting so short and my husband has his pumps all ready, and if it has to be done after we get there, well, there is a big loss just at a good time coming Christmas. It is no fault of yours, I am sure. I might as well say now that I shall not sign anything further unless I hear of the progression of the front, and I must be able to have the place at date stated. My solicitor received the lease for approval and did lengthen the time to the 15th Dec., that was meeting it halfway. I am all prepared here [Derby] for an early removal. My notice expires, as my place is taken. Hoping, dear Mr. Griffiths, that you are quite well, and thanking you in advance, I remain, yours faithfully, S. E. Bernard."

To this there is a reply dated Nov. 24:

"Dear Mrs. Bernard, Mr. Griffith is at present unable to attend business; he has had a very bad attack of bronchitis. I 'phoned to him to-day and he tells me he is quite sure if you have signed the lease Mr. Williams will immediately place the work in connection with the frontage in hand. Yours faithfully, For and on behalf of Tiller and Co., Ltd."

On Nov. 26 the plaintiffs' solicitors wrote to the defendant's solicitors as follows:

"Dear Sirs,—I thank you for your letter of yesterday's date, and herewith return draft lease approved. Your client's agent undertook that all front hedges and trees should be removed and the whole of the front concreted and

A gravelled, and it was upon this understanding that my client paid the second deposit on account of the premium. This work must, therefore, be completed before the lease is signed or a written undertaking given by your client that he will carry out the work before the end of this year."

B There appears to be no evidence that the plaintiff's solicitors had any authority from the plaintiff to accept an undertaking to do the work by the end of the year instead of doing the work before the lease was signed, but this seems to be immaterial, as on Nov. 30 the defendant's agent assured the plaintiff that the contractor had actually been instructed to proceed with the work. The question of an undertaking to do it before the end of the year accordingly never arose. On Dec. 8 the plaintiff's solicitor wrote to the defendant's solicitors as follows:

C "Dear Sirs,—I shall be pleased to receive lease for execution by my client and to know that all the work which your client undertook to have done has been completed."

Nothing, so far as appears, was done, and on Dec. 10, it being then impossible to finish the work by the 15th, the agreed date for giving possession, the plaintiff's solicitor wrote to the defendant's solicitors this letter:

D "My client has been in to-day, and she informs me that the arrangement was that possession should be given and the work completed on the 1st instant, and that it was expressly upon that understanding that she paid the second £50. Your client has broken the agreement, and my client is not now prepared to proceed with the matter, and has instructed me to ask for the return of the £100 that has already been paid. I return engrossment of lease."

E The word "1st" in the first sentence of that letter appears to be a slip.

F The question is whether the plaintiff was entitled, on Dec. 10, to a return of the £100 which she had paid, on the footing that the consideration for the payment had wholly failed. The judge has decided that, time not being of the essence of the contract, it was not a condition that the work should be done by a particular date so as to entitle the plaintiff to rescind when it had become impossible that it should be done by that date. The plaintiff says that this is wrong because: (i) A purchaser's deposit is always recoverable if either there is no valid contract, or a valid contract, performance of which has become impossible by the vendor's default; (ii) there has been no valid contract, the contract being for the sale of land and there being no memorandum of it sufficient to satisfy s. 40 of the Law of Property Act, 1925; (iii) if there is a sufficient memorandum, the performance of the contract has become impossible by the defendant's default; (iv) the equitable rule about time does not apply because there is no contract of which specific performance could be ordered; (v) if the rule does apply, time was, in the circumstances of this case, of the essence of the contract. The defendant contends that: (i) There is a sufficient memorandum of the contract; (ii) if not, specific performance of the contract can be ordered because it has been partly performed; and he claims an opportunity, if necessary, of proving such part performance; (iii) the agreement to do the work in front of the house was not a condition of the contract, but a collateral agreement; (iv) time was not the essence of the contract according to the rule of equity applied by s. 41 of the Law of Property Act, 1925.

H We take the last point first. The learned county court judge lays it down that I it is

"quite clear that as between vendor and purchaser . . . the time for completion has never been treated as of the essence of the contract unless in the clearest terms it is made so."

In our opinion, this is too strongly stated. The true rule is stated by LORD CAIRNS in *Tilley v. Thomas* (2) (L.R. 3 Ch. at p. 67): "A court of equity will indeed relieve against . . ." There is clearly a clerical error in the report there, as is pointed out by LORD ATKINSON in *Stickney v. Keeble* (3) ([1915] A.C. at p. 402). Probably it ought to read:

"A court of equity will indeed relieve against a breach of contract, and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as TURNER, L.J., said in *Roberts v. Berry* (4), 3 De G.M. & G. 284), there is nothing in 'the express stipulations between the parties, the nature of the property, or the surrounding circumstances' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract."

As is said by TURNER, L.J., in *Roberts v. Berry* (4) (3 De G.M. & G. at p. 292), a time is necessarily fixed for the completion of a sale "in order to give legal rights," and if nothing more appears, equity will enforce the contract although performance of it at the stipulated time has become impossible; but if there is anything in the contract itself, or in the circumstances, which shows that there was real importance in the time fixed, and that the party who insists upon it stipulated for it not as a mere formality, but with the intention of binding the other to it, then specific performance will be refused, at any rate where this was brought to the knowledge of the party claiming performance, since there is no equity in compelling a party to a contract to dispense with something for which he deliberately bargained and on the performance of which he relied.

This is the principle of all the authorities, and, in our opinion, it is plain from the facts of this case that the plaintiff did attach great importance to getting possession not later than Dec. 15, 1926, and to the completion of the work in front of the house before she went into possession, and that the defendant was fully aware of this. This appears from the fact that the plaintiff paid in advance £50 of this premium for the lease (in addition to a deposit of £50) on Oct. 29 in consideration of the defendant's promise to put the work in hand at once, and from her letter to the defendant's agent of Nov. 22, in which the importance to her of getting possession on the day mentioned, and of having the work which the defendant had promised to do finished before that day, was forcibly stated, when there was still ample time for the defendant to do what was required. It is clear that even when time was not originally of the essence of the contract it may be made so by a later notice, either before or after the day named in the contract, requiring completion by a particular day, if the time allowed is reasonable: see *Benson v. Lamb* (5); *Parkin v. Thorold* (6); *Crawford v. Toogood* (7). Merely extending the time originally fixed does not waive the condition as to time when it is of the essence of the contract: *Barclay v. Messenger* (8); and, indeed, here the substitution of a definite date, Dec. 15, for the indefinite "on or about" Dec. 6 is additional proof of the importance attached by the plaintiff to the time for completion. It is, in truth, rather a precise definition than an extension of the time. Even, therefore, if there was a contract which the plaintiff could have been ordered to perform specifically if the defendant had been able to give possession of the premises with the agreed alterations on Dec. 15, we are of opinion that, as this was impossible on Dec. 10, the plaintiff was entitled on that day to treat the contract as at an end, and to recover the £100 which she had paid under it.

It was urged for the defendant that the learned judge has found that the agreement to do this work was collateral to this contract for the lease, and not part of it, and that this, being a finding of fact, binds this court on appeal. We do not think that the judge did find that this agreement was collateral in the sense alleged by the defendant. He says:

"The bargain between the parties is, taking the agreement as set out in the written agreement and the collateral agreement according to the oral evidence, that possession of the premises in their repaired condition should be delivered to the plaintiff on the 15th Dec."

It is evident, we think, that he uses the word "collateral" merely to distinguish the written memorandum from the agreement proved orally. In our opinion, his

A finding in regard to what the contract was was the only one possible on this evidence. And it follows, if, as we hold, time was of the essence of the contract, that, it being impossible to give "possession of the premises in their repaired condition" on Dec. 15, the plaintiff was entitled, as soon as that fact was ascertained, to treat the contract as at an end and recover what she has paid.

B These reasons are sufficient for the decision of the appeal, and it is not necessary to discuss the question whether there was here a memorandum sufficient to satisfy s. 40 of the Law of Property Act, 1925. It is enough to say that we should have very great difficulty in saying that there was. We doubt, however, very much whether, if we took a different view of the question whether time was of the essence of the contract, the plaintiff could found a case upon the absence of a sufficient memorandum. We cannot think that a purchaser can rescind a C contract and recover his deposit, as against a vendor who is willing to complete, merely because there is no writing to satisfy s. 40: see *Jones v. Jones* (9); *Thomas v. Brown* (10). It appears to us from these cases, and on principle, very difficult to accept the judgment in *Casson v. Roberts* (1), cited by counsel for the plaintiff, as an accurate statement of the law: see WILLIAMS ON VENDOR AND PURCHASER (3rd Edn.), vol. 2, p. 842. Nor are we prepared to accept the contention that the D equitable rule as to time cannot apply unless there is a sufficient memorandum to satisfy the statute. No doubt, the rule will only apply when a court of equity would, before the Judicature Acts, have applied it—that is, to contracts such as are within the equitable jurisdiction of specific performance, and in circumstances in which a court of equity would have applied the rule: *Stickney v. Keeble* (3). E But that case is no authority for saying that, merely because by s. 40 of the statute a contract cannot be proved, the equitable rule as to time will not apply to it if the contract is such, and the circumstances surrounding it are such, that, apart from the question of evidence (with which alone this statute is concerned), specific performance of it could be decreed. It seems unreasonable that a purchaser could hold a vendor to the letter of his bargain as to time on the ground, not that time F is of the essence of the contract in equity, but that if the vendor were suing for specific performance the statute would be a good defence. We do not see how, in an action for recovery of a deposit, a plaintiff can rely on the Law of Property Act, s. 40, at all, if the defendant is ready and willing to complete, and is, apart from the statute, entitled to specific performance. The appeal is allowed, and judgment must be entered for the plaintiff for the amount claimed, with costs here and below.

Appeal allowed.

G Solicitors: *Gibson & Weldon*, for *Frederick Gowen*, Croydon; *Boustred & Sons*.

[*Reported by T. R. FITZWALTER BUTLER, ESQ., Barrister-at-Law.*]

THOMAS AND ANOTHER v. JONES AND OTHERS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), February 16, 17, 28, 29, March 1, 2, 6, 19, 1928]

[Reported [1928] P. 162; 97 L.J.P. 81; 139 L.T. 214; 44 T.L.R. 467; 72 Sol. Jo. 255]

Probate—Costs—Executor propounding will—Order personally to pay part of costs—Attempt to obtain will in daughter's favour—Acquiescence by co-executor.

An executor who succeeds in an action in the Probate Division in establishing a will is *prima facie* entitled to have costs as between solicitor and client out of the testator's estate, but this *prima facie* right that he has is lost or curtailed by such inequitable conduct as may amount to a violation or culpable neglect of his duty and is subject to the limitation that the costs and charges in question are not improperly incurred.

In *the Estate of Plant* (1), [1926] P. 139, and observations of SIR GEORGE JESSEL, M.R., in *Turner v. Hancock* (2) (1882), 20 Ch.D. 303, and of LINDLEY, L.J., in *Re Beddoe* (3), [1893] 1 Ch. 547, applied.

One of two co-executors, a solicitor, had laboured, while the testator's testamentary capacity was failing, to secure a will in a form advantageous to his (the solicitor's) daughter. The other executor, B., who was not a solicitor, had no knowledge of this, but soon after the testator's death, when he had abundant means of knowledge of the doubts which existed regarding the testator's capacity, he had made common cause with his co-executor.

Held: a solicitor who knowingly and for his own purpose involved his own affairs and interests with those of his client without the client's effectual consent, or where there was doubtful mental capacity and no competent proof of a capable consent, was a wrongdoer; B. had had full means of knowing the nature and prospects of the controversy about the will; and, therefore, the executors' costs would be taxed and as to one-fourth of the ascertained amount they must be borne by the executors personally, and, further, as the defendants' costs had been needlessly increased, the executors would also personally pay one-fourth of the defendants' costs.

Notes. As to costs in Probate actions, see 16 HALSBURY'S LAWS (3rd Edn.) 209-211; and for cases see 23 DIGEST (Repl.) 265 et seq.

Cases referred to:

- (1) *In the Estate of Plant, Wild v. Plant*, [1926] P. 139; sub nom. *Re Plant, Wild v. Plant*, 95 L.J.P. 87; 135 L.T. 238; 42 T.L.R. 443; 70 Sol. Jo. 605, C.A.; 23 Digest (Repl.) 266, 3242.
- (2) *Turner v. Hancock* (1882), 20 Ch.D. 303; 51 L.J.Ch. 517; 46 L.T. 750; 30 W.R. 480, C.A.; 43 Digest 831, 2763.
- (3) *Re Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547; 62 L.J.Ch. 233; 68 L.T. 595; 41 W.R. 17; 37 Sol. Jo. 99; 2 R. 223, C.A.; 43 Digest 763, 2057.
- (4) *Parker v. Felgate* (1883), 8 P.D. 171; 52 L.J.P. 95; 47 J.P. 808; 32 W.R. 186; 44 Digest 251, 779.
- (5) *Perera v. Perera*, [1901] A.C. 354; 70 L.J.P.C. 46; 84 L.T. 371; 17 T.L.R. 389, P.C.; Digest Supp.
- (6) *In the Estate of Barlow, Haydon v. Pring*, [1919] P. 131; 88 L.J.P. 82; 120 L.T. 645; 35 T.L.R. 326, C.A.; 23 Digest (Repl.) 266, 3241.

Probate Action.

The facts and arguments appear sufficiently from the judgment of LORD MERRIVALE, P.

Bayford, K.C., Clifford Mortimer, and Richard Ellis for the plaintiffs, propounding as executors a will dated May 5, 1927.

A *Willis, K.C., and R. M. Middleton* for the defendants, the testator's widow and other parties interested under a former will.

Cur. adv. vult.

Mar. 19. **LORD MERRIVALE, P.**, read the following judgment.—Certain questions of costs arise in this case in circumstances which make a decision between the parties, as litigants in a dispute as to probate, a matter of some difficulty.

B The testator, who seems to have made a considerable fortune as a trader, had been for some time retired from business when in November, 1926, he was found to be suffering from a malignant disease which necessitated an operation. He spent a substantial part of the day before the operation with his solicitor, the plaintiff Thomas, framing a will. He was not able to make up his mind then about various matters, or about the disposal of the bulk of his estate after the death of his wife, the defendant, Mrs. Jones, whom he married late in life when she was a widow. He executed the engrossment which was hastily prepared and intended to make a new will later if he should recover. After the operation he appeared for some time to be regaining his normal health, and he took up again with the solicitor, with whom he was on confidential terms, the question of the will. Various uncertainties in his mind, however, postponed further definite action, and the testator presently became very seriously ill. Ultimately, after his condition was known to be hopeless, the solicitor, who had meanwhile been constantly visiting supposedly as a friend, attended at the house on May 5, 1927, for the purpose of obtaining execution of the will in question. It was signed and witnessed, and after the testator's funeral was produced and read. Very promptly, and not unnaturally in view of its effect on her position, it was contested by the testator's widow. The will of May 5 was remarkable in that it severely reduced the provision made in the earlier will for the widow (with whom, apparently, the testator had remained on very good terms to the end of his life) and in that it contained a residuary clause in favour of new beneficiaries, two of whom were cousins of the testator and one the daughter of his solicitor, a girl of nineteen with whom the testator had practically no personal acquaintance. This young lady is also named in the body of the will as a legatee of £1,500. The revoked will had appointed three executors; the solicitor, a former partner of the testator, and a friend of the testator's widow. The latter will omitted the third executor. The testator told her this executor had been included as her friend. No medical opinion as to the testator's capacity and fitness to execute a will on May 5 was obtained by the plaintiff Thomas. There were scanty instructions in the testator's handwriting with regard to the new will; none as to the parts of the will to which I have referred. The widow supposed, upon information given her by the solicitor, that when the will of May 5 was executed her husband was making a codicil of trifling effect. Apart from the knowledge of the testator, there was no knowledge outside the solicitor's office of the fact that—as was alleged by the solicitor—the testator was repeatedly occupied during the later stages of his illness in discussing testamentary dispositions. The solicitor was supposed to be with him as an old friend.

H The hearing of the cause occupied a number of days. The case for the will of May 5 depended in the main upon the oral evidence and entries of and documents prepared by the plaintiff Thomas. He failed to give any clear account of the directions given by the testator, intentions expressed by him, or motives he declared, and in respect of such matters as he enlarged upon he was an unconvincing witness. The documents he produced were not connected, to my satisfaction, with the matters dealt with in them, and inasmuch as those relating to the period in doubt were documents of which the main feature was the benefaction to the solicitor's daughter they could not be accepted as being in themselves satisfactory or cogent evidence. The evidence of various reliable witnesses showed that the testator's powers, mental and physical, underwent a continuous process of en-

feeblement from early in April to the time of his death on May 31, 1927. From April 26 onward the deterioration was marked and rapid. On April 29 and from then to the end, the testator was subject to delusions, incapable of concentration, and, as Dr. Dunbar described it, "facile and childish." From May 22 onward he was unfit to transact any business which required a present exercise of judgment or the taking of a new decision. A

Giving all such weight as I could to the evidence in support of the will of May 5, I found that before April 29 this instrument had been determined upon as to all its contents except the residuary clause. The disposal of the residue of the estate, after the specific devises and bequests in the will, had not been decided by the testator. There had been conversations between the testator and the plaintiff Thomas with regard to it, and the name of his daughter had been from time to time spoken of, but the matter was at large, so much so that after the time when Mr. Thomas at the trial suggested that it had been settled in the form in which it appeared in the will of May 5, he dictated for engrossment a clause which would have given his daughter not a third or fourth but half of the residue. The residue was spoken of in course of the argument as a body of assets which, upon the death of the defendant, the testator's widow, would exceed £19,000. Upon close consideration, after the case was complete, of the evidence as to the testator's condition on May 5, I was confirmed in the view the case presented to my mind as I heard it that the testator had not on that afternoon, or at any material time on that day, capacity to determine upon any testamentary disposition. He had not then a disposing mind, memory, or understanding. He had, however, such a degree of knowledge and understanding as to recognise those about him, to know the plaintiff Thomas quite well, to remember that the plaintiff and he had been engaged in preparing his will, and to appreciate that he was asked to execute as his will the document which was then put before him. Testamentary capacity to any greater extent he had not, and I have not been able to satisfy myself that any understanding person who fully considered the facts which were already known, or which were then apparent to this plaintiff, could have been convinced that he had. In the view I took of the case it appeared to fall within the operation of a principle of testamentary law enunciated in 1883 by SIR JAMES HANNEN, P., in *Parker v. Felgate* (4), and affirmed by the Judicial Committee of the Privy Council in *Perera v. Perera* (5). The law was stated by SIR JAMES HANNEN in these words (8 P.D. at p. 174): B C D E F

"A person might no longer have capacity to go over the whole transaction and take up the threads of business from the beginning to the end, and think it all over again, but if he is able to say to himself: 'I have settled that business with my solicitor; I rely upon his having embodied it in proper words; and I accept the paper which is put before me as embodying it'—it is not, of course, necessary that he should use these words—but if he is capable of that train of thought, in my judgment, that is sufficient." G

LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH were members of the board by which SIR JAMES HANNEN's pronouncement was approved. H

Applying the principle laid down in *Parker v. Felgate* (4), I come to the conclusion that the testator's execution of the will, so far as it had been resolved upon while he had the capacity was pro tanto good execution—that the residuary clause was severable and must be excluded from probate, and that probate of the remaining parts of the will could be and ought to be granted. I

Probate of the will of May 5, 1927, excepting the residuary clause having been decreed, the question as to costs arose which it is necessary now to determine. On behalf of the plaintiffs as the executors it was said they had established the will of the testator, and that whether they got judgment, with costs or not, they had become entitled as a matter of law and without any order of the court, to take their costs out of the estate. As to the costs of the defendants, it was submitted

A that while there is a discretionary power in the court to leave the defendants to pay them, or to order payment of all or part out of the estate, there is no power in the court to order payment by the plaintiffs.

The rules of practice, if not of law, with regard to the costs of executors in and about probate of testamentary papers were fully discussed recently in the Court of Appeal in *In the Estate of Plant* (1), and it was definitely determined that under B the Judicature Acts and Rules of the Supreme Court, and especially under Ord. 65, r. 1, an executor who succeeds in an action here in establishing a will is *primâ facie* entitled to have costs as between solicitor and client out of the testator's estate, and that he has this right absolutely unless, as was said of a trustee by SIR GEORGE JESSELL, M.R., in *Turner v. Hancock* (2), the *primâ facie* right is "lost or curtailed by such inequitable conduct . . . as may amount to a violation or C culpable neglect of his duty," and subject to the limitation stated by LINDLEY, L.J., in *Re Beddoe, Downes v. Cottam* (3), that the costs and charges in question are "costs and charges not improperly incurred." The plaintiffs are entitled to be reimbursed from the testator's estate costs and charges properly incurred. Are they entitled then, as a matter of law in all events, to costs incurred by reason of D their insisting upon probate, not only of clauses expressing the testamentary mind of the testator, but of a clause which was not his testamentary act. This must depend, I think, upon the two tests supplied by the authorities I have mentioned. Did they properly incur these additional costs, or were the same incurred by reason of a "violation or culpable neglect of duty"? The answer to the inquiry so raised depends on a clear view of the conduct of the plaintiff Thomas. Not with a sole regard to his duty as a solicitor he laboured while the testator's powers were failing E to secure a will in a form advantageous to a member of his own family. In a position in which his parental interests constantly influenced his action he had long interviews with the testator, professedly as a friend, of which no account could be had except his own. With accurate information of the opinion of the medical attendants as to his client's desperate condition he omitted to consult them as to the client's dispositive capacity. He moreover omitted to secure that F there should be competent independent evidence of the client's capacity to execute a will. After the death of the testator the plaintiff Thomas on behalf of the executors unsuccessfully used ingenious means to secure statements in support of the will of May 5 from the doctors and others and knowing the opinion of the doctors that their patient had not testamentary capacity at the material times, the plaintiffs did not call them as witnesses. This course was taken not because G the plaintiffs as executors challenged the honesty or competence of the medical men, but because as litigants—and one of them an interested litigant—they desired the tactical advantages of cross-examination of the doctors as witnesses called by their opponents. In all the matters with which I have dealt the course of the plaintiffs was governed by the interests of the plaintiff Thomas. The issues involved in the trial were confused and the length of the hearing was very substantially increased by the mode in which the plaintiff Thomas fell back on vague H general statements when critical matters were in question, and the difficulty this caused in testing material allegations of fact which rested entirely on his scanty testimony as to his own conduct which he—an interested witness—gave to this court.

I In my judgment, a solicitor who knowingly and for his own purpose involves his own affairs and interests with those of his client, without the client's effectual consent or where there is doubtful capacity and no competent proof of a capable consent, is a wrongdoer. Being in a position of trust he disregards his fiduciary obligation. This I find to have been done by the plaintiff Thomas. There are, therefore, grounds in this case for an order which impinges the *primâ facie* right of executors propounding a will to receive out of the testator's estate costs not otherwise provided for. In some particulars the position of the two plaintiffs differs. The plaintiff Banbury had not the skill or knowledge any more than he had the professional responsibility of the plaintiff Thomas. At an early period

after the testator's death, however, with abundant means of knowledge of the doubts which existed, he made common cause with his co-plaintiff. I accept the evidence of Dr. Dunbar, in preference to his, as to what took place at an interview in 1926 when Mr. Banbury had full means of knowing the nature and prospects of the controversy over this will of May 5. The evidence of the testator's widow, Mrs. Jones, and his sister, Mrs. Morgan, gave me a surer view, also, as to the state of the testator after May 5 than did Mr. Banbury's account of it. Further, for the conduct of the cause as a whole he must be held jointly responsible with his co-plaintiff. I must not disregard either, the view expressed in the Court of Appeal in *In the Estate of Barlow* (6), that in proceedings for probate an innocent executor may be involved in liability for costs involved by the action of an executor affected by knowledge. Ascertainment by taxation of the proportion of the costs, liability for which ought not to fall on the estate, is in the present case impossible. There is no clearly severable issue with regard to which they can be measured. Probably the costs in this action were doubled by the errors in conduct which I have found to be established against the plaintiff Thomas. I am satisfied beyond doubt that they were increased by more than a third. I, therefore, direct that the plaintiffs' costs of the action be taxed and that as to one-fourth of the ascertained amount they be borne by the plaintiffs personally. The defendants' costs have also to be dealt with. The defence, though no doubt inspired by a natural sense of grievance which was not an actionable wrong, supplied the court with much necessary information not provided by the plaintiffs. The will of May 5 was established without the residuary clause. As to the residuary estate there is an intestacy and this widow has a statutory interest in it antecedent to the rights of the next-of-kin. To direct payment of the whole of the costs of the defendants out of this fund would be manifestly unsatisfactory. On the other hand, neither the whole of these costs nor a separable part of them attributable to distinct issues can be taxed against the plaintiffs either as executors or personally. In the event, I have arrived at the conclusion that three-fourths of the costs of the defence should come out of the estate and that as the defendants' costs were needlessly increased in like manner with the costs of the action as a whole, one-fourth of the defendants' costs should be paid by the plaintiffs personally.

Order accordingly

Solicitors: *Kinch & Richardson*, for Henry John Thomas, Cardiff; *Wrentmore & Son*, for Ewan G. Davies, Cardiff.

[Reported by C. G. MORAN, Esq., Barrister-at-Law.]

ORMOND INVESTMENT CO., LTD. v. BETTS

[HOUSE OF LORDS (Lord Buckmaster, Viscount Sumner, Lord Atkinson, Lord Wrenbury and Lord Warrington), February 2, 3, 24, 1928]

[Reported [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600;
13 Tax Cas. 400]

Income Tax—Foreign possessions—Basis of computation—Investment company—Acquisition of foreign investments during first year of existence—Dividend paid during that year—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sched. D, Case I, Case V, Rule applicable to Case I, Rules applicable to Cases I and II, r. 1 (2).

Statute—Construction—Assumption in later statute of effect of earlier statute.

In June, 1922, an investment company was formed and in August, 1922, it acquired shares in an American company carrying on business in the United States of America. In December, 1922, the company received from the American company a dividend of £601,717 on its holding of shares, representing its proportion of two years' profits. In respect of that dividend the company was assessed to income tax under the Income Tax Act, 1918, Sched. D, Case V, r. 1, for 1922–3 in the sum of £859,596, and for 1923–4 in the sum of £1,031,372, the figure for 1922–3 representing ten-sevenths of the said dividend (the company having been in existence for ten months) and the figure for 1923–4 representing twelve-sevenths of the said dividend.

Held (LORD BUCKMASTER dissenting): the words "as directed in Case I" in r. 1 of Case V of Sched. D did not render applicable to these assessments r. 1 (2) of the Rules applicable to Cases I and II of Sched. D, but only the Rule applicable to Case I, because the acquisition of shares was not the setting up and commencement of trade within r. 1 (2), but was merely the making of an investment; and, therefore, the assessments would be reduced to nil for 1922–3, and to £200,572 for 1923–4.

Held, further: the Finance Act, 1924, s. 26, which was not expressed to be retrospective, and which did not expressly or inferentially purport to put a construction on the Act of 1918, could not affect the construction of Case V, r. 1.

Decision of the Court of Appeal, [1927] 2 K.B. 326, reversed.

Notes. Considered: *Fry v. Burma Corpn.*, [1930] 1 K.B. 249; *Port of London Authority v. Canvey Island Comrs.*, [1932] 1 Ch. 446; *Re MacManaway*, [1951] A.C. 161. Applied: *Camille and Henry Dreyfus Foundation, Inc. v. I.R.Comrs.*, [1954] 2 All E.R. 466. Followed: *Kirkness (Inspector of Taxes) v. John Hudson & Co., Ltd.*, [1955] 2 All E.R. 345. Referred to: *Curtis Brown, Ltd. v. Jarvis*, *Jarvis v. Curtis Brown* (1929), 14 Tax Cas. 744; *Dewar v. I.R.Comrs.*, [1935] 2 K.B. 351; *Simpson v. Grange Trust, Ltd.* (1935), 19 Tax Cas. 281; *Benn v. I.R.Comrs.*, [1937] 3 All E.R. 852; *Penang and General Investment Trust, Ltd. v. I.R.Comrs.*, [1943] 1 All E.R. 514; *Re Earl Fitzwilliam's Agreement*, [1950] 1 All E.R. 191; *Willock v. Muckle*, [1951] 2 All E.R. 367; *Camille and Henry Dreyfus Foundation, Inc. v. I.R.Comrs.*, [1955] 3 All E.R. 97; *A.-G. v. Prince Ernest Augustus of Hanover*, [1957] 1 All E.R. 49.

As to computation under Case I of Sched. D, see the Income Tax Act, 1952, s. 127 and s. 128. As to interpretation of taxing statute, see 20 HALSBURY'S LAWS (3rd Edn.) 27 et seq.

Cases referred to:

- (1) *Coltress Iron Co. v. Black* (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 29 W.R. 717; 1 Tax Cas. 287, H.L.; 28 Digest 6, 18.
- (2) *Skerratt v. Oakley* (1798), 7 Term Rep. 492; 101 E.R. 1094; 44 Digest 384, 2192.

- (3) *Darley v. Martin* (1853), 13 C.B. 683; 1 C.L.R. 729; 22 L.J.C.P. 249; 17 Jur. 1125; 138 E.R. 1368; 44 Digest 384, 2193. A
- (4) *Williamson v. Advocate-General* (1843), 10 Cl. & Fin. 1; 8 E.R. 641, H.L.; 20 Digest 352, 915.
- (5) *A.-G. v. Clarkson*, [1900] 1 Q.B. 156; 69 L.J.Q.B. 81; 81 L.T. 617; 48 216; 16 T.L.R. 51; 44 Sol. Jo. 74, C.A.; 42 Digest 665, 751.
- (6) *Cape Brandy Syndicate v. I.R.Comrs.*, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 37 T.L.R. 402; 65 Sol. Jo. 377; 12 Tax Cas. 358, C.A.; 42 Digest 666, 765. B
- (7) *Partington v. A.-G.* (1869), L.R. 4 H.L. 100; 38 L.J.Ex. 205; 21 L.T. 370, H.L.; 42 Digest 736, 1603.
- (8) *Gilbertson v. Fergusson* (1881), 7 Q.B.D. 562; 46 L.T. 10; 1 Tax Cas. 501, C.A.; 28 Digest 79, 431. C
- (9) *Re Micklethwait* (1855), 11 Exch. 452; 25 L.J.Ex. 19; 156 E.R. 908; 42 Digest 734, 1571.
- (10) *Tennant v. Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 8 T.L.R. 434; 3 Tax Cas. 158, H.L.; 42 Digest 734, 1577.
- (11) *Dore v. Gray* (1788), 2 Term Rep. 358; 100 E.R. 193; 42 Digest 773, 2009.
- (12) *Earl of Shrewsbury v. Scott* (1859), 6 C.B.N.S. 1; 29 L.J.C.P. 34; 33 L.T.O.S. 368; 6 Jur.N.S. 452; 141 E.R. 350; affirmed (1860), 6 C.B.N.S. 221; 29 L.J.C.P. 190; 6 Jur.N.S. 472; 141 E.R. 437, Ex. Ch.; 42 Digest 604, 50. D
- (13) *Re Direct West End and Croydon Rail. Co., Ex parte Lloyd* (1851), 1 Sim.N.S. 248; 61 E.R. 96; 42 Digest 611, 113.
- (14) *A.-G. v. Wood*, [1897] 2 Q.B. 102; 66 L.J.Q.B. 522; 76 L.T. 654; 45 W.R. 663; 13 T.L.R. 435; 41 Sol. Jo. 544, D.C.; 21 Digest 14, 68. E
- (15) *A.-G. v. Fairley*, [1897] 1 Q.B. 698; 66 L.J.Q.B. 454; 76 L.T. 526; 45 W.R. 589; 13 T.L.R. 320; 41 Sol. Jo. 439, D.C.; 21 Digest 45, 287. F

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., SARGANT and LAWRENCE, L.JJ.) (reported [1927] 2 K.B. 326) allowing an appeal from an order of ROWLATT, J., on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts. F

The appellant company, which was formed in June, 1922, and incorporated under the Companies Acts, carried on the business of an investment company in Bradford. It appealed against assessments to income tax in the sums of £859,596 and £1,031,372 for the years ending April 5, 1923, and April 5, 1924, respectively, made on it under Case V of Sched. D of the Income Tax Act, 1918. G

In August, 1922, the appellant company acquired a very large holding of shares in Joseph Benn & Sons, a company incorporated and carrying on business in the United States of America. On Dec. 7, 1922, the appellant company received a dividend of £601,717 on its holding of these shares. It received no further dividend on these shares nor any other income from possessions out of the United Kingdom up to April 5, 1923. Dividends were declared by Joseph Benn & Sons not more often than once a year and the dividend paid in December, 1922, was in fact a distribution of two years' profits. The appellant company made up the accounts of its business for the period of seven months from June 7 to Dec. 31, 1922. The assessments under appeal were computed by taking the income of £601,717 shown in this seven months' account and multiplying it by ten-sevenths to arrive at the income for the purpose of assessment for the year ending April 5, 1923 (the company having been in existence for ten months of that year) and by twelve-sevenths to arrive at the assessment for the year ending April 5, 1924. The assessments were made in accordance with the provisions of r. 1 of Case V of Sched. D, which enacts that: H

"The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I, whether the I

A income has been or will be received in the United Kingdom or not, subject, in the case of income not received in the United Kingdom, to the same deductions and allowances as are provided in r. 1 of the Rules applicable to Case IV."

It was contended on behalf of the appellant company that the words "as directed in Case I" in r. 1 of Case V of Sched. D referred only to the Rule applicable to Case I, and did not refer to r. 1 (2) of the Rules applicable to Cases I and II, and that accordingly the assessments should be computed on the average of the amounts of the income arising in the three preceding years. It was immaterial whether the appellant company was in existence during the whole of that period, and the assessment for 1922-3 should thus be computed on the average income for the three years ending April 5, 1922, and should, therefore, be reduced to nil, and the assessment for the year 1923-4 should be computed on the average income for the three years ending April 5, 1923, and should, therefore, be reduced to £200,572 (the average of nil, nil, and £601,717). It was contended by the Inspector of Taxes on behalf of the Crown: That the words "as directed in Case I" referred to r. 1 (2) of the Rules applicable to Cases I and II as well as to the Rule applicable to Case I, and that this was supported by the Income Tax Act, 1842, in which both these Rules formed part of the first Rule of Case I, and also by s. 26 of the Finance Act, 1924. The commissioners were of opinion that r. 1 (2) of the Rules applicable to Cases I and II must be regarded as being as much a rule of Case I as the Rule applicable to Case I only, and that it was imported into Case V, and, therefore, that the assessment must be made on the income for the year, and not on the average income for the three preceding years. The Court of Appeal held, reversing the decision of ROWLATT, J., that the words "as directed in Case I," in r. 1 of Case V, referred not only to the single Rule applicable to Case I, but also were applicable to the Rules under Cases I and II, and therefore brought in r. 1 (2) of such Rules, which, where the trade is commenced within the year of assessment, directed the computation to be made according to the Rules applicable to Case VI, which enabled the assessment to be made on the full amount of the profits and gains arising in the year of assessment. The Finance Act, 1924, s. 26, which added a new rule after r. 3 of the Rules applicable to Case V of Sched. D, was consistent only with such an interpretation and resolved any ambiguity which might be found in the expression "as directed in Case I." The company appealed.

Maugham, K.C., Latter, K.C., and Bremner for the appellants.

G *The Attorney-General (Sir Douglas Hogg, K.C.) and R. P. Hills* for the respondent.

The House took time for consideration.

Feb. 24. The following opinions were read.

H **LORD BUCKMASTER.**—This case affords a further illustration, if further illustration were required, of the confusion of our law on which the assessment and recovery of income tax depends, but the duty of this House does not extend beyond attempting to call attention to the fact and to point out its consequent hardship on the subject and its cost and trouble to the Crown.

I The appellants are a company incorporated in this country on June 7, 1922, for the purpose of carrying on the business of an investment company, and in August, 1922, they acquired a large holding of shares in an American company called Joseph Benn & Sons. On Dec. 7, 1922, the appellants received a dividend of £601,717 in respect of its holding of the said shares. These are all the material preliminary facts. The law is to be found in the Income Tax Act, 1918. By s. 1 of this statute it is provided that where any Act enacts that income tax shall be charged for any year at any rate the tax at that rate shall be charged for that year in respect of all property described or comprised in the Scheds. A, B, C, D, and E, contained in Sched. I to the statute and in accordance with the Rules applicable thereto. Schedule D states under para. 1 that tax thereunder shall be charged in respect of annual profits or gains arising or accruing to any person residing in the

United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and, under para. 2, that the tax under that schedule shall be charged under certain six Cases, the first of which is "Tax in respect of any trade not contained in any other schedule," and the fifth is "Tax in respect of income arising from possessions out of the United Kingdom." Sets of Rules then follow applicable to the several six Cases. The first of these sets applies only to Case I. The second to Case II, the third to Cases I and II, and so on until we reach the Rules applicable to Case V. The first of these is as follows:

"1. The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I, whether the income has been or will be received in the United Kingdom or not, subject, in the case of income not received in the United Kingdom, to the same deductions and allowances as are provided in r. 1 of the Rules applicable to Case IV, and the provisions of this Act, including those relating to the delivery of statements, shall apply accordingly."

Case I under Sched. D is, as has been pointed out, the tax in respect of any trade not contained in any other schedule, and the Rules applicable to Case I consist, first, of one rule solely applicable thereto and other Rules applicable to both Cases I and II. The rule solely applicable to Case I is as follows:

"The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Sched. A, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on April 5 preceding the year of assessment."

The relevant Rules applicable to Cases I and II are these:

"1.—(1) The tax shall be charged without any other deduction than is by this Act allowed."

(2) Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI."

Rule 2 of Case VI is the only one applicable, and that provides that:

"2. The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the commissioners."

The tangle of these cross-references is extremely difficult to unravel, and it is plain that the Inland Revenue authorities themselves were, in the first instance, baffled by the problem, nor am I clear that even at this moment the Crown is able to define the exact method by which the liability of the subject should be ascertained. This is shown by the following facts. The first assessment made on the appellants in respect of the £601,717 they had received was made as for the year ending April 5, 1923, and the sum taken as the basis of assessment was £859,596, or a quarter of a million more than the company had actually obtained; while for the succeeding year ending April 5, 1924, in respect of this single and same receipt of £601,717 they were assessed in the sum of £1,031,372. The Inland Revenue authorities were not, of course, responsible for the apparent and startling injustice of these assessments; the result was the result of their attempt honestly to understand an obscure Act of Parliament. It is unnecessary to explain the operation by which this conclusion was reached because the Special Commissioners, before

A whom the case came, decided that although the assessment for 1922-3 was correctly made on the basis of the rules applicable, they, in exercise of the power that they possessed, reduced the assessment to £601,717, the actual amount received, and, as regards the assessment for the year 1923-4 they decided that the assessment should be based on the average of the income arising up to April 5, 1923, but that it also should be reduced to the sum of £601,717, that being the amount of the income arising from the investment for a full period of twelve months. The case then came before ROWLATT, J., who decided that there was nothing subject to assessment for the year ending April 5, 1923, and reduced the assessment to £200,572 for the succeeding year. From this judgment the Crown appealed, and the appeal was allowed and the assessments restored as the Special Commissioners found them. The basis of the decision of ROWLATT, J., was that the phrase "as directed in Case I" embraced only the rule that exclusively related to Case I, and did not include the rules that were applicable both to Case I and Case II. The Court of Appeal took the view that the direction under Case V embraced both sets of the rules, or, in other words, that a rule was not the less a rule under Case I because it was also a rule under Case II, and they fortified their judgment by reference to the subsequent Finance Act, 1924, s. 26 of which was in the following terms :

"The following rule shall be added after r. 3 of the Rules applicable to Case V of Sched. D:—'4. Where a person who has been charged with tax in respect of income from a possession out of the United Kingdom proves that the total amount of tax, computed in accordance with r. 1 of the Rules applicable to Cases I and II of Sched. D which was paid in respect of that income for the first three complete years of assessment during which he was the owner of the possession, exceeds the total amount which would have been paid if he had been assessed for each of those years on the actual amount of the income on each year, he shall be entitled to repayment of the excess.' "

From their decision this appeal has been brought.

F The main ground of the appellants' contention was that ROWLATT, J., was right in confining the direction under Case V to the Rule (exclusively) relating to Case I, but they further urged that, even if the other rules were included they could not, according to the true construction of the Act, apply to the circumstances of the present case, and that it was not legitimate to influence that construction by reference to the provisions of the later statute. It is, of course, quite plain that the Act has confused two totally distinct things—the income from an investment and the profits of a trade. It is as though rules were made for the care and regulation of cattle by reference to a schedule which related only to the management of an aquarium. In attempting to solve the difficulties I have not overlooked the cardinal principle relating to Acts that impose taxation on the subject, a principle well known to the common law, and that has not been and ought not to be weakened, viz., that the imposition of a tax must be in plain terms. In the words of LORD BLACKBURN in *Coltneß Iron Co. v. Black* (1) (6 App. Cas. at p. 330) :

"No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him."

I It is in that respect kindred to the creation of a penalty or the establishment of a crime. The subject ought not to be involved in these liabilities by an elaborate process of hair-splitting arguments. In this case, however, the imposition of the tax is quite plain; it is the charge in respect of income arising from possessions out of the United Kingdom. The property in dispute, therefore, is primarily plainly made subject to the tax, and the question is whether the directions given as to how that property is to be computed for the purpose of assessing the tax have resulted in taking away the liability. With regard to the first objection, I thought at first that the phrase "as directed in Case I" might be merely repeating what had been said before; that is to say, that the computation was to take place

on an average of the three preceding years, which is what the Rule (solely) applicable to Case I directs, but to take that view would mean that the words were purely surplusage, and I therefore think that we must look to all the rules under Case I for further directions. Without for the moment regarding what the provisions of these rules may be, I find no means of escaping from the conclusion that the rule that applies also to Case II as well as to Case I is none the less the direction in the case of Case I, and I do not think, in considering this point, it is irrelevant to bear in mind that the Act of 1918 consolidated, though it did not attempt to crystallise, the previous statutes and that the proviso that is now put under the head of Cases I and II was originally part of the Rule under Case I—for convenience and brevity in the consolidation the matter was arranged in the way in which it now stands.

The next difficulty is far more severe. The rules in question have nothing whatever to do with income arising from stocks and shares or rents; they exclusively relate, in the Rule (solely) applicable to Case I, to a trade, and in those applicable to Cases I and II, to a trade, profession, employment or vocation. What, then, is the meaning of requiring the computation to be effected as directed in this manner? I cannot help thinking that for this purpose the receipt of income must be regarded as though it were a receipt from a trade, and that, consequently, in the first place, it must be computed on a fair and just average of the receipts of three years ending either on the day on which a company such as the present would make up its balance-sheet or on April 5 preceding the year of assessment. It is said on behalf of the appellants that the only effect of the rule is to show that the accounts must be made up on April 5 preceding the year of assessment, but if this were the case it was already provided by s. 2 of the statute, and in the Rule that phrase has only its full meaning when it is put as an alternative to the other method of making up the accounts. If, therefore, the other method of making up the accounts may also be brought into consideration, it then becomes more clear that the receipt of income must be homologated with the profits of a trade, and if this step be reached, accepting the view that the Rules applicable to Cases I and II must also be introduced, there seems to me no reason why the computation of a first receipt should not be dealt with in the same way as that which is provided where the trade has been set up within the period of three years. The appellants have pointed out that, even if this be accomplished, the difficulty of knowing what is the equivalent, connected with the receipt of income, to the commencement of the trade is by no means clear. The Crown at one time in the course of the arguments thought it was the date of the acquisition of the investment from which the income was received, and, if this were so, a person or a company holding a block of investments would have to treat each one separately and might be called on to make innumerable different returns. In the present case the difference between acquisition of the property and receipt of the income is immaterial, but my interpretation of the Act is that it is the receipt of the income that must be taken as the equivalent of the setting up of the trade. I am far from professing confidence as to this interpretation of the statute. I feel, as FRY, L.J., once said, that in this maze I have lost my way beyond recall by the guiding voice of my brethren, but I feel that the interpretation that I have given is the only one that can fairly give effect to the tax that is certainly imposed by the statute on the receipt of such moneys. Bearing in mind that this House has decided that no assessment can be made in any year unless the money is received in that year, a contrary construction would involve that, under the provisions of this Act, although it determined that receipts of moneys from foreign possessions should be taxed, a person who only became entitled to receive them at lapses of four years would escape taxation altogether, for, on the appellants' hypothesis, he would not be liable for the first year, and, on the decision of this House, he could not be assessed for the next three, seeing that therein he would receive no money. I have not overlooked the further argument of the appellants that the forms provided for return contain no provision that would embrace a sum such as this received by a

A company for the first time within the first year of its life, but the Attorney-General pointed out similar omissions in other forms where the omitted matter was the clear subject of taxation, and even apart from this I think the mere incompleteness of a prescribed form is an uncertain guide to the construction of the statute to which it applies.

In the view that I have formed, the consideration of the question as to the effect of the subsequent statute does not become material, but the point will be dealt with by other noble and learned Lords and it is, therefore, not desirable that I should abstain from stating my opinion. I do not think that, in the circumstances of this case, the subsequent statute can properly be referred to for the purpose of interpreting the earlier. It is, of course, certain that Parliament can by statute declare the meaning of previous Acts. It would be competent for them to do so even though their declaration offended the plain language of the earlier Act. It would be an unnecessary step to take unless it were intended contrary to the general principles of legislation to make the explanatory Act retrospective, seeing that the subsequent statute could by independent enactment do what was desired. It is also possible that where Acts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual, which is what the courts would desire to do, and it is also possible that, where a statute has created a crime or imposed a penalty, a subsequent Act showing that that crime was intended to have a limited interpretation or the circumstances regarded as narrow in which the penalty attached, would be used for the purpose of giving effect to the well-known principle of construction to which I referred at an earlier stage. But I find myself unable to accept what SARGANT, L.J., said that the principles in certain cases are applicable to the construction of successive Acts of Parliament.

There are the three cases to which he refers: *Skerratt v. Oakley* (2), *Darley v. Martin* (3), *Williamson v. Advocate-General* (4). The first of these was a case where a mistake in the codicil was rectified by reference to the will which if applied to statutes would mean that a later statute might be construed by the help of an earlier, a proposition to which there is no objection. The second was a case of an ambiguous expression in the will held to have one of two possible meanings by virtue of the codicil, and the third was a case of two Scottish testamentary dispositions which were read together and thus made more plain what LORD BROUGHAM thought was plain before. It is important to notice that all these cases deal with testamentary documents. There are several important distinctions between wills and codicils and successive Acts of Parliament. In the first place, however long the will has preceded the codicil, they both operate from the same moment and, by the ordinary rules of construction, are construed together. In an Act of Parliament this is not so. The first Act will operate from its fixed date so that its interpretation becomes at once a matter of necessity and great unfairness may ensue if an interpretation which an Act of Parliament would fairly bear unaided by subsequent statutes, was inferentially changed by other words in a subsequent Act. I find it difficult to assimilate the comparison between private individuals, who are masters of their own estate, and the claims of beneficiaries under their dispositions to the operations of a legislature which apply equally to all His Majesty's subjects.

A.-G. v. Clarkson (5) does not really advance the respondent's argument since there the earlier Act had been the subject of judicial decision and the second Act proceeded on the hypothesis that the decision was correct. As LINDLEY, L.J., said, the later Act "adopts" the construction put upon the earlier and in another sentence he says it "recognises" the construction. I find myself unable to agree with SIR F. H. JEUNE when he says, "the legislature have acted as their own interpreters of the earlier Act." It is the function of the courts to interpret and of the legislature to enact. *Cape Brandy Syndicate v. I.R.Comrs.* (6) ([1921]

2 K.B. at p. 414) follows in effect *A.-G. v. Clarkson* (5), as is seen in the following A
passage from the judgment of LORD STERNDALÉ :

"I think it is clearly established in *A.-G. v. Clarkson* (5) that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceeds upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier."

This is, in my opinion, an accurate expression of the law, but in this case the difficulty is not due to ambiguity but to the application of rules suitable for one purpose to another for which they are wholly unfit. The only possible ambiguity is in considering whether the words "as directed in Case I" are specially limited to the solitary rule to which I have referred or to all Rules applicable to Case I. This, to my mind, is not ambiguous and there is no need to have recourse to the later statute for its interpretation. But for these reasons I think the appeal fails.

VISCOUNT SUMNER.—The appellant company carry on the business of an investment company, but nothing turns on this. They have been assessed as property owners, viz., as shareholders in a company incorporated and carrying on business in the United States, "in respect of income arising from . . . shares . . . in any place out of the United Kingdom" under Sched. D, Case V, r. 1. About seven months after incorporation the appellant company received £601,717 as a dividend on this holding and in respect of this one dividend they have been assessed in the sum of £859,596 for the fiscal year 1922-3 and again in the sum of £1,031,372 for the fiscal year 1923-4, being the assessments originally under appeal. These figures were arrived at by taking ten-sevenths of £601,717, ten months being the length of time from the company's incorporation in 1922 to the end of the fiscal year, and twelve-sevenths for the following fiscal year, which was supposed to be the right method of computation where a trade has been set up and commenced in the year of assessment, owing to the words "according to an average of such a period, being greater or less than one year, as the case may require" within r. 2 of the Rules applicable to Case VI, to which reference is made in r. 1 (2) of the Rules applicable to Cases I and II. The Crown did not maintain the claim for this mode of assessment, but, while still contending that the computation should be made according to r. 2 of the Rules applicable to Case VI, reduced the amounts, on which the assessment was to be made, to £601,717 in each of the two years. It is not necessary to examine the higher assessments further. The lower assessments were arrived at by contending that r. 1 (2) of the Rules applicable to Cases I and II is, by r. 1 of the Rules applicable to Case V, part of the directions for the computation of tax on income arising from shares in a place out of the United Kingdom; that in the case of such shares the date of their acquisition corresponds to, and is impliedly directed to be used by, the words "when the trade has been set up within the said period of three years," and, therefore, that the computation was on £601,717 as the average for one year from the date of acquisition, which is the basis of taxation for the second period, and, on the like sum for the first period, being the full amount arising in that period of assessment. Having succeeded in this revised contention before the Special Commissioners, the Inland Revenue failed before ROWLATT, J., who reduced the assessment to £200,572 for the second year of assessment, 1923-4, when it first became possible to take an average of three years ending in April 5, 1923, within the Rule applicable to Case I, and discharged it in the first year when no such average was possible. His judgment was reversed by the Court of Appeal.

The whole question turns on the words "as directed in Case I" in r. 1 of the Rules applicable to Case V. and, in my opinion, directions relevant to shares in a foreign company are only to be found in the Rule applicable to Case I. Rule 1 of

A the Rules applicable to Cases I and II is no doubt a Rule applicable to Case I, but it is limited to occasions where an average for one year can be computed from the first setting up and commencement of something, which is obviously itself the source of the profits or gains. In its express terms this rule applies to trading profits. The contention is that by analogy it can be applied to foreign shares, which are not in themselves stock-in-trade and the dividends of which are not trading profits. I cannot accept this. The analogy between the date of starting a trade, which is an aggregate of many operations, and the date when an investor buys a stock to hold, is too remote to be applicable, and in any case the Crown does not tax by analogy but by statute, and there is nothing in the Act which says what is here contended for. It is said that singular results and even a loss of tax will occur on the appellants' contention, which cannot have been intended by the legislature, but it is not for us to say, nor do we know, what the legislature may or may not have meant, apart from its words by which we are bound alike in what they say and in what they do not. Words, which impose tax in general terms, may still receive a particular limitation where the computation rules omit the directions appropriate and indispensable to levying the tax in the particular case.

D An independent contention has been raised on the part of the Inland Revenue based on the new rule, which has now been inserted—though not retrospectively—after r. 3 of the Rules applicable to Case V of Sched. D, by s. 26 of the Finance Act, 1924, a provision which, by s. 41, is to be construed together with the Income Tax Acts. The matter is put in two ways: The first is that the provisions of the different Rules, which I have discussed above, are ambiguous and that in interpreting them it is therefore legitimate to see how subsequent legislation in *pari materia* has revealed the legislature's view of their meaning; the second is that taxing Acts, passed from time to time, are analogous to a will and codicils, and that Acts which are directed to be read together are analogous to one long instrument, so that the legislature's mind as to earlier passages may be revealed by considering how it is expressed in later passages. There is some authority for the analogy thus declared to exist, but I need only say that the analogy, if there is one, is not close and the canon of interpretation, if it is sound, does not carry one much further. My answer, however, to the first proposition is, that the rules referred to are not ambiguous. What they say is clear. It is their results (I agree both ways) that seem puzzling and in some cases unexpected, but that only shows that the legislation is somewhat arbitrary, which sometimes cannot be helped, not that, while the words are reasonably capable of two different meanings, there is no reason on the face of the Act why one should be more right than the other. The new rule itself no doubt assumes that in fact there may be cases where, in respect of income from a foreign possession, a person may be charged with tax computed under r. 1 of the Rules applicable to Cases I and II, and it directs in such a case that if the events specified subsequently arise, he shall get relief provided he asks for it within the appointed time. Let it be that this contemplates a legitimate application of the method of computation referred to and is not a mere provision for cases where the charge has been made unjustifiably, for then the money ought to be refunded without waiting for a claim to be made within a limited time. Still the case dealt with is only that of such a computation being applied to foreign possessions, for which r. 2 of the Rules applicable to Case V provides; and not to stocks and shares, which are dealt with in r. 1. Why a distinction should be made I do not know, but made it is, and this, I think, is sufficient ground for saying that the new rule cannot be regarded as imposing a non-natural construction on r. 1. I think the appeal should be allowed, and I move your Lordships accordingly.

LORD ATKINSON.—The facts have been fully stated already. It is unnecessary for me to repeat them further than to the extent needed to make my judgment intelligible. The assessments impeached in this appeal are (i) that for the year ending April 5, 1923, amounting to £859,596, and (ii) that for the year ending April 5, 1924, in the sum of £1,031,372. These two assessments purport to have

been made under and in accordance with the provisions of r. 1 of the Rules applicable to Case V of Sched. D of the Income Tax Act, 1918. That rule runs as follows : A

"The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I, whether the income has been or will be received in the United Kingdom or not, subject, in the case of income not received in the United Kingdom, to the same deductions and allowances as are provided in r. 1 of the Rules applicable to Case IV, and the provisions of this Act, including those relating to the delivery of statements, shall apply accordingly. B

The first difficulty which confronts one in the construction of this rule is that it requires that the tax it imposes in respect of income arising from stocks and shares outside the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, "as directed in Case I," a Case which deals not with the income arising from stocks and shares wherever situated at all, but with income from trade profits and gains derived from trade by those who carry it on. This directing rule, as one may style it, runs thus : C

"The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Sched. A, and shall be computed on the full amount of the balance of the profits and gains upon a fair and just average of three years ending the day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up." D E

It is quite obvious that the provisions touching the making up of the accounts of a trade are wholly inapplicable to the receipt by the appellants of their dividends on foreign securities. The alternative termination of the three years on which the average is to be taken, namely, April 5, preceding the year of assessment, may not be quite so inapplicable. Section 207 of the Income Tax Act, 1918, provides that the statements to be delivered by the persons or bodies bound to deliver them of the amount of the annual value of their profits on which any taxes chargeable are to be framed in accordance with the rules and directions contained in Sched. 5 of this Act. Sub-head 7 of this latter schedule provides that for every person carrying on any trade to be charged under Sched. D the statement is to contain the amount of the profits or gains thereof on a fair and just average of the three preceding years, or of such shorter period as the trade shall have been carried on. F G

It has been contended on behalf of the Crown that in construing r. 1 applicable to Case V, Sched. D, the words "as directed by Case I" should be read as if they ran "as directed by Rules applicable to Cases I and II." This change if justifiable, which I hardly think it is, would not serve the purpose of the Crown, because these latter rules deal only with profits and gains derived from trade, professions, employments or vocations, and provide that where those sources of revenue have been set up and commenced within the period of three years mentioned in reference to which the computation is to be made of the average profits and gains for one year, that year is to run from this same "setting up and commencement." It has been suggested on behalf of the Crown that the purchase of the foreign securities by the appellants may be taken to be the setting up and commencement of the trade, profession, employment or vocation mentioned in the aforesaid rules; to which it is objected by the appellants that the foreign securities might not have been acquired on one occasion but from time to time on unconnected occasions, separated perhaps by considerable intervals of time. It was suggested, as I understood, that this difficulty could be got over by treating the whole of the securities as a bundle all acquired at the same time. I do not think this is a possible mode of construing r. 1 and r. 2. I think they are entirely inapplicable to the taxation of the sources of wealth from which the appellants' income is derived, and the acquisition by the appellants of those sources. When it is remembered that it is H I

A well established that one is bound in construing revenue Acts to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a subject by an Act of Parliament without words in it clearly showing an intention to lay the burden on him, that the words of the statute must be adhered to and that so-called equitable constructions of them are not permissible (*Partington v. A.-G.* (7), *Gilbertson v. Fergusson* (8), *Re Micklethwait* (9), *Tennant v. Smith* (10)), I am, for the reasons I have mentioned, unable to come to the conclusion that the different provisions of Sched. D of the Act of 1918, to which I have referred, clearly impose the burden of income tax on the appellants in respect of the dividends they have received from their foreign securities.

C The Master of the Rolls, as I read his judgment, came to the conclusion that, apart altogether from the alleged curative effect of s. 26 of the Finance Act, 1924, the provisions of the statute of 1918, to which I have referred, were in themselves sufficiently clear, plain and unambiguous to impose, according to established principles, income tax on the sum received by appellants from their foreign possessions. If that be the Master of the Rolls' opinion, I am quite unable to concur with him in it. It has been contended, however, on the part of the Crown that, by s. 26 of the Finance Act, 1924, any mistake and any blunder which might have been committed in passing the provision of the statute of 1918 to which I have referred, or any ambiguity left as to the meaning of the language used, has been completely cured; and by it the provisions of the statute of 1918 have been rendered capable of imposing on the appellants the burden the Crown seek to have imposed on them. LAWRENCE, L.J., rests his decision to a great extent, if not, indeed, altogether, on the effect of this s. 26, while SARGANT, L.J., apparently admits that he has received great assistance from it in solving the ambiguities, and getting over the difficulties of interpretation presented by the provisions of r. 1 applicable to Case V, and also those presented by r. 1 and r. 2 applicable to the same Case. The Master of the Rolls does not apparently take a view so strong as those of his colleagues as to the effect of s. 26 in solving ambiguities, but, without admitting any need of assistance F in the interpretation of the above-mentioned rules and Cases, he finds in this s. 26 a recognition and assertion of views he had already independently reached. It is, under those circumstances, imperatively necessary to examine in detail the provisions of s. 26 and the conditions under which, as established by authority, such a section as this can be held to be capable of affording the help needed.

G The section begins by providing that the rule set out in the section shall be added after r. 3 of the Rules applicable to Case V, Sched. D. The very first of these rules is the one containing the embarrassing direction that "the computation therein mentioned is to be made on an average of three years as directed in Case I." The section does not purport to, of itself, impose a tax on any person in respect of income derived from a possession out of the United Kingdom or to modify such a tax if already imposed. What it does purport to do is this, to H secure redress for a person properly—i.e., lawfully—charged for income tax that he shall, if by the use of the methods mentioned he should be overcharged, get the excess refunded to him. The function of which this section contemplates the discharge by the rules named is the computation of the amount of the tax which the person to whom the income from the foreign possession belongs has to pay, and not the imposition of that tax. SARGANT, L.J., seems to hold that a legislative I interpretation of the statute of 1918 is to be found in this s. 26 of the Act of 1924 and, therefore, the case comes within a well-recognised principle dealing with the construction of statutes, namely, that where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute. Many authorities have been cited by counsel on behalf of the appellants on this point. He referred to MAXWELL ON THE INTERPRETATION OF STATUTES (6th Edn.) 542. In *Dore v. Gray* (11) it was laid down that an Act of Parliament does not alter the law by merely betraying an erroneous opinion of

it; but where it is gathered from a later Act that the legislature attached a certain meaning to certain words in an earlier cognate Act this would be taken as a legislative declaration of its meaning. In *Earl of Shrewsbury v. Scott* (12) COCKBURN, C.J., said (6 C.B.N.S. at p. 180):

"I quite concur in the argument that a mistake as to the state of the law on the part of the legislature in a private Act of Parliament—nay, I may say on the authority of the case of *Ex parte Lloyd* (13), even in a public Act—any legislation founded on such mistake would not have the effect of making that the law which the legislature had erroneously assumed to be so."

In *A.-G. v. Wood* (14) VAUGHAN WILLIAMS, J., in giving judgment is reported to have said ([1897] 2 Q.B. at p. 110):

"I wish to add that I do not think that the fact that s. 14 of the Finance Act, 1896, contains an enactment in the sense of the construction that I am now putting on s. 5 (3) of the Act of 1894 shows that that construction is wrong because, if it were right, the amending Act might be said to be useless. The amending Act may be merely declaratory to clear up doubts, and even if not so intended, the presence of the section in the later Act cannot determine the construction of the earlier."

A.-G. v. Clarkson (5) was also cited on behalf of the appellants. It is an important case. It was, according to the headnote ([1900] 1 Q.B. 156), decided that if property be contingently settled, estate duty is, under s. 5 (1) (a) of the Finance Act, 1894, payable on it before the contemplated contingency arises, but that under s. 14 of the subsequent statute, the Finance Act, 1898, if the contingency does not and cannot ever arise, the duty paid will be repaid, because this s. 14 of the Act of 1898 amounts to an adoption by the legislature of the construction put on s. 5 (1) (a) of the Finance Act, 1894. Section 5 (1) (a) of this latter Act ran as follows:

"Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property, (a) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased."

Section 14 of the Finance Act, 1898, runs thus:

"Where in the case of a death occurring after the commencement of this Act settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid."

LINDLEY, M.R., as he then was, in delivering judgment when referring to this s. 14, said ([1900] 1 Q.B. at p. 164):

"Consider what that means. It affirms in substance the decision in the *A.-G. v. Fairley* (15), and proceeds upon the assumption that it was right. It adopts the construction put by it upon s. 5, and the sections of the Act of 1882 which are incorporated in the Act of 1894, and says in unmistakable language that the duty must be paid before it is known whether the contingency will or will not arise."

There does not appear to me to be any relation between s. 26 of the statute of 1924 and the Income Tax Act, 1898, comparable in closeness between that s. 14 (1) (a) and the Finance Act, 1894. In *Cape Brandy Syndicate v. I.R.Comrs.* (6) the case was also cited with approval. I am quite unable to come to the conclusion at which the learned judges of the Court of Appeal arrived touching the effect of s. 26 of the Act of 1924. I am, therefore, of opinion that the appeal should be allowed with costs.

- A LORD WRENBURY.**—Case I and Case II of Sched. D of the Income Tax Act, 1918, have to do with tax in respect of trade and of professions. Case V has to do with tax in respect of income arising from foreign possessions. The one may be described as tax on earned income—the other as tax on unearned income arising from foreign possessions. The one is tax on a trader—the other is tax on an investor. On this appeal your Lordships are concerned with tax under Case V.
- B** The appellants are an investment company. They were incorporated on June 7, 1922, and in August, 1922, acquired as an investment a large holding of shares in an American company called Joseph Benn & Sons. On Dec. 7, 1922, they received £601,717 as a dividend on these shares. During the financial year 1922–3 they received no further dividend on these shares—nor any other income from possessions out of the United Kingdom. The question to be decided is as to the amount
- C** of the assessment to be made for the financial years 1922–3 and 1923–4.

The relevant Rule in Sched. D is r. 1 of the Rules applicable to Case V. That rule requires that the tax shall be computed on “an average of the three preceding years as directed in Case I.” From the Rule relating to Case I I find that the three years are

- D** “three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade [for this Rule is addressed to the case of trade] have been usually made up or on April 5 preceding the year of assessment.”

The rule to which I have last referred is qualified by r. 1 (2) of the Rules applicable to Cases I and II. We have heard an argument as to whether this qualification is imported as to Case V by the words in the Rules applicable to Case V “three preceding years as directed in Case I.” In my opinion it is, but for the present purpose it is immaterial whether it is or not. And for this reason. The qualification in question is addressed only to the case of a trade, and is governed by the date at which the trade was commenced. The present case is one of investment. There is no provision that in the case of an investment the date of acquisition of

F the investment or any other date shall be taken as the equivalent of the commencement of the trade. Rule 1 (2) of the Rules applicable to Cases I and II has, in my opinion, no application to the case of an investment. This rules out in the case of the investor the introduction of the reference made in that Rule to the Rule applicable to Case VI.

- G** We have heard a further argument as to whether s. 26 of the Finance Act, 1924, is to be regarded as throwing light on the construction of the Act of 1918. In my opinion an Act of 1924 passed on Aug. 1, 1924, which is not expressed to be retrospective, and does not directly or inferentially purport to put a construction on a previous Act, can have no bearing on a question arising on events which happened in 1922, and as to which the last relevant date is April 5, 1924. It results that for the present purpose your Lordships are concerned only with Rules
- H** applicable to Case V and Case I, Rule applicable to Case I. I need not read the last mentioned rule again. Applying its language to the facts of this case it provides that for the financial year 1922–3, the tax shall be computed on the full amount of the profits of the investment on a fair and just average of three years ending on April 5, 1922. The profits must be the profits accruing to the person taxed, they cannot include the profits, if any, accruing to his predecessor in title
- I** as holder of the shares. For the year 1922–3, therefore, I must take three years before April, 1922, and note that the tax-payer received nothing in those three years. He must, therefore, be assessed at nil for the year 1922–3. Then as to the year 1923–4 the taxpayer received £601,717 in December, 1922 (that is to say in one of the three relevant years) and nothing in the other two. He must be assessed, therefore, upon one-third of £601,717 and no more.

I am fully conscious of the fact that if this is the true construction of the Act the following consequence ensues. If A. buys a foreign share say in the financial year 1922–3 and sells it to B. at the end of that year after receiving a dividend on

it he pays no tax. If B., the purchaser from him, follows A's example and sells before the end of the year in which he bought the share he pays no tax, and so with every subsequent holder. But I cannot strain the Act for the purpose of creating a liability to tax which the Act has not imposed by plain or, as I think, by any words. The fact is that by creating the liability of the investor in foreign shares by words of reference to a rule which is addressed to the case of a trade, the Act has become involved in a confusion in which the legislature has not observed that in some circumstances it has let the investor in foreign shares go free. I find myself quite unable to support the assessment made by the Special Commissioners, and upheld by the Court of Appeal, viz.: £601,717 (the full amount of the dividend) for the year 1922-3, and again the full sum of £601,717 for the year 1923-4. This appeal must, in my opinion, be allowed, and those assessments discharged, and there must be substituted an assessment of nil for 1922-3, and £200,572 6s. 8d. for the year 1923-4. The appellants must, I think, have repayment of the costs they have been ordered to pay, and must have their costs here and below.

LORD WARRINGTON.—The question in this case is as to the mode in which the tax on certain income of the appellants representing a dividend of a foreign company ought to be computed under r. 1 of the Rules applicable to Case V of Sched. D of the Income Tax Act, 1918, and turns on the true construction of that Rule. The result of the respondent's contention upheld in the court below is somewhat startling, for under it the appellants have in two successive years of assessment been assessed in the full amount of a dividend received in the first of those years, which is thus taxed twice over. The years of assessment in question are the years 1922-3 and 1923-4.

The appellant company was incorporated in June, 1922, under the Companies (Consolidation) Act, 1908. It carries on business as an investment company. In August, 1922, the company acquired a large interest in John Benn & Sons, a company incorporated in the United States of America. In December, 1922, the company received a dividend of £601,717 on its shares in the American company. It received no further dividend or income from this or any other foreign possession during the year ending April 5, 1923. The Inland Revenue Commissioners, purporting to act under rules hereinafter mentioned, assessed the appellant for the year 1922-3 in respect of the above-mentioned sum at the sum of £859,596, treating the £601,717 as the earnings for seven months out of a business year of ten months, dividing it by seven and multiplying the result by ten. For the year 1923-4, which was a full business year of twelve months, they multiplied one-seventh of the same £601,717 by twelve and assessed the appellant at £1,031,372. The company appealed to the Special Commissioners who reduced the assessment for each year to £601,717, but held that with this variation the assessment should be confirmed. The commissioners stated a Case for the opinion of the court, and by an order of ROWLATT, J., dated Nov. 24, 1926, the assessment was discharged as to the year 1922-3 and reduced to £200,572 as to the year 1923-4. This order was on Feb. 2, 1927, reversed by the Court of Appeal, who restored the assessment made by the Special Commissioners for each of the two years in question.

The question turns on the true construction of r. 1 of the Rules applicable to Case V. It is in the following terms:

"The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I. . . ."

The remainder of the rule is immaterial. The only Rule applicable to Case I, in which a direction as to an average of three years is given, is the following:

"Rule applicable to Case I. The tax shall extend to every trade carried on in the United Kingdom or elsewhere . . . and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of

- A** assessment on which the accounts of the said trade have been usually made up, or on April 5 preceding the year of assessment."
- A similar rule is applicable to Case II, except that the three years are referred to as "ending as in Case I."
- B** So far there is, in my opinion, little difficulty in arriving at the true construction of the r. 1 applicable to Case V. It is dealing with income arising from stocks, &c., and directs that the tax is to be computed on an average of the three preceding years. If the rule had stopped there, there might have been a question what years were meant—were they the preceding years in which a dividend had been received, or were they calendar years, or years of assessment? This question is settled by the words "as directed in Case I." The preceding years are there defined as
- C** ending on one of two alternative days, and, as there is under Case V no trade in question, the second alternative is alone appropriate, and the three preceding years are those ending on April 5 preceding the year of assessment. It is true that applying the rule thus interpreted to the present case, no income having been received in any one of the three years preceding the first of the two years of assessment, the assessment for that year would be nil, but in the next year, inasmuch as in the year immediately preceding there was a sum of £601,717, the assessment would be one-third of that sum, viz., £200,572, the amount fixed by the order of ROWLATT, J., and so on in succeeding years taking into account any further profits received. But the respondent says there is another "direction in Case I" referred to in the rule applicable to Case V, viz., r. 1 (2) of the Rules applicable to Cases I and II:
- E** "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI."
- F** The material rule applicable to Case VI is r. 2:
- "The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the commissioners."
- G** It is on the view that these provisions apply to Case V that the Special Commissioners and the Court of Appeal have proceeded.
- I cannot with all respect adopt their view. I am not affected by the fact that the rule in dispute is applicable to Case II as well as to Case I. What does impress me is that the rule refers only to a trade, profession, employment or vocation and gives directions for computation depending on the time when the trade, &c., was set up or commenced, and there are no directions for making the very considerable
- H** changes necessary if it is to apply to dividends on securities. The commissioners and the Court of Appeal have assumed that the acquisition of the securities is the equivalent date, but this is a mere assumption and not justified by anything in the Act of Parliament. Moreover, if the securities were acquired at different dates there would be extraordinary complications in the application of the rule under Case VI. The same expression as in r. 1 of the Rules under Case V "as directed
- I** in Case I" is used in r. 2 under Case V, under which it would be, if anything, still more difficult so to mould the rule in dispute as to make it workable. Moreover, the rule gives no directions for computation on an average of three years, but on certain other averages substituted in certain events for that of three years.
- A further point was made by the respondent founded on s. 26 of the Finance Act, 1924. It was said that the effect of this section is to declare that the construction of the Income Tax Act for which the Crown now contends is and always has been the true construction. Much reliance was placed on this point by SARGANT, L.J., but with all respect to that learned judge I cannot concur in his view. The section

does not contain any such declaration express or implied. It merely assumes that persons may have paid tax computed in accordance with r. 1 of the Rules applicable to Cases I and II of Sched. D, and gives those persons the relief mentioned in the section. It says nothing about the legality or otherwise of such computation. To read the section as amounting to a retrospective declaration as to the true construction of the previous Act seems to me to give it an effect which it will not bear. For these reasons I am of opinion that this appeal ought to be allowed with costs here and below and the order of ROWLATT, J., restored.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray* for *Jonathan Knowles & Cox*, Bradford;
Solicitor of Inland Revenue.

[Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.]

LONDON COUNTY COUNCIL v. GREENWICH CORPORATION

[CHANCERY DIVISION (Astbury, J.), November 8, December 6, 7, 1928]

[Reported [1929] 1 Ch. 305; 98 L.J.Ch. 49; 140 L.T. 456;
93 J.P. 123; 45 T.L.R. 144; 27 L.G.R. 282]

Burial—Disused burial ground—Prohibition against building—Land set apart for interments—Part never used for interments—Disused Burial Grounds Act, 1884 (47 & 48 Vict., c. 72), s. 3, s. 5.

In 1857 a large plot of land at Greenwich was conveyed to the commissioners of Greenwich Hospital to be used for the purposes of a burial ground for the hospital. A portion of this plot was used for interment. By virtue of the Greenwich Hospital Act, 1865, the plot of land became vested in the Admiralty Commissioners, and on Dec. 31, 1926, they conveyed the whole plot to Greenwich Corporation. The conveyance recited the Admiralty Lands and Works Act, 1864, and the Greenwich Hospital Act, 1865, and that the commissioners had agreed to sell the plot by virtue of the powers conferred on them by those Acts. In the conveyance the plot was divided into four portions, and reserved to the Admiralty in perpetuity the right to use the portion coloured pink on the plan for burial purposes. The corporation covenanted that, subject to such right, they would keep the portion coloured pink and another portion coloured green on the plan as an open space, and would use the portion coloured brown on the plan—which had not been used for interments—only for certain purposes, one of which was “any public service from time to time carried on by virtue of the Maternity and Child Welfare Acts.” The corporation were proceeding to erect on the portion coloured brown buildings for the purpose of a welfare centre. The portion coloured pink on the said plan was still being used for interments. The London County Council, the authority for enforcing the due observance of the Disused Burial Grounds Act, 1884, brought an action for an injunction to restrain the erection, on the ground that the portion coloured brown was a disused burial ground within the meaning of the Act, on which the erection of buildings was prohibited by s. 3. By s. 5 of the Act the prohibition of building did not apply to a burial ground which had been sold or disposed of under the authority of an Act of Parliament.

Held: the brown portion, having formed part of the whole land set apart for interments, although no interments had taken place in it, was a “disused burial ground” within the meaning of s. 3 of the Act of 1884; the Act of Parliament referred to in s. 5 being an Act specifically authorising a sale,

A the brown land was not sold or disposed of under the authority of an Act of Parliament within that section; and, therefore, the council were not entitled to build on the brown land.

Re Ponsford and Newport District School Board (1), [1894] 1 Ch. 454, and *Re Bosworth and Gravesend Corpn.* (2), [1905] 2 K.B. 426, applied. *A.-G. v. London Parochial Charities Trustees* (3), [1896] 1 Ch. 541, distinguished.

B **Notes.** Applied: *Re St. John's, Hampstead*, [1939] P. 281.

As to building on disused burial ground, see 4 HALSBURY'S LAWS (3rd Edn.), 88 et seq.; and for cases see 7 DIGEST 551 et seq.

Cases referred to:

- C** (1) *Re Ponsford and Newport District School Board*, [1894] 1 Ch. 454; 69 L.T. 687; 42 W.R. 154; 38 Sol. Jo. 132, D.C.; affirmed, [1894] 1 Ch. 454; 63 L.J.Ch. 278; 42 W.R. 358; 10 T.L.R. 207; 38 Sol. Jo. 199; 7 R. 622; sub nom. *Ponsford v. Newport District School Board*, 70 L.T. 502, C.A.; 7 Digest 551, 291.
- (2) *Re Bosworth and Gravesend Corpn.*, [1905] 2 K.B. 426; 74 L.J.K.B. 810; 93 L.T. 226; 69 J.P. 337; 54 W.R. 39; 21 T.L.R. 608; 3 L.G.R. 849, C.A.; 7 Digest 552; 292.
- D** (3) *A.-G. v. London Parochial Charities Trustees*, [1896] 1 Ch. 541; 65 L.J.Ch. 242; 74 L.T. 184; 44 W.R. 395; 12 T.L.R. 168; 7 Digest 552, 298.
- (4) *Re Ecclesiastical Comrs. and New City of London Brewery Co.'s Contract*, [1895] 1 Ch. 702; 64 L.J.Ch. 646; 72 L.T. 481; 43 W.R. 457; 11 T.L.R. 296; 13 R. 409; 7 Digest 552, 293.
- E** (5) *Re Howard Street Congregational Chapel, Sheffield*, [1913] 2 Ch. 690; 83 L.J.Ch. 99; 109 L.T. 706; 30 T.L.R. 16; 58 Sol. Jo. 68; 7 Digest 552, 296.
- (6) *Nicholl v. Llantwit Major Parish Council*, [1924] 2 Ch. 214; 93 L.J.Ch. 602; 131 L.T. 634; 68 Sol. Jo. 718; Digest Supp.

F **Witness Action** in which the plaintiffs asked for a declaration that the site on which the council proposed to erect a building for the purposes of a welfare centre was, or formed part of, a disused burial ground within the meaning of the Disused Burial Grounds Act, 1884, as amended by s. 4 of the Open Spaces Act, 1887, and that the erection of a building on the site was unlawful, for an injunction to restrain the defendants from building on the site in question, and for a mandatory injunction to pull down the buildings already erected.

G The following statement of the facts and of the statutes on which the question at issue depended are taken from the judgment of ASTBURY, J.:

It is admitted that the plaintiffs are the authority for preventing the violation, and for enforcing the due observance, of the provisions of the Disused Burial Grounds Act, 1884, within the metropolis, and are authorised to institute, and prosecute all such legal proceedings as may in their opinion be necessary or expedient for preventing the violation by any persons, and for enforcing the due

H observance by all persons, of the provisions of the said Act within the metropolis. The case relates to a plot of land at Greenwich which, in April, 1857, was conveyed to the Commissioners of Greenwich Hospital with the intent that it should be used for the purpose of a burial ground for Greenwich Hospital. The land contained 6 acres 14 perches and was delineated and described in a plan drawn in the margin of the conveyance. The plan in question shows the whole plot

I conveyed coloured green, which consisted of a large rectangular piece of land approached from the highway by a narrower piece, which has served as a roadway entrance. This property, on being purchased, was fenced round by the Greenwich Hospital authorities and used as and described as a cemetery or burial ground, for the purposes of the hospital. Interments took place in it from time to time down to the present time, and the narrow strip that I have referred to was used as a roadway or approach from the highway to that portion of the land which was actually used for interments, and no portion of the large rectangular plot was ever divided up into portions which were used, as distinct from portions which were

not used, for the actual purpose of interment. This land having been vested in the Admiralty Commissioners, in the manner that I will refer to later, was, by a conveyance dated Dec. 31, 1926, conveyed by the commissioners to the mayor, aldermen and councillors of the borough of Greenwich. This conveyance recited the conveyance of 1857, to which I have referred; it recited the Admiralty Lands and Works Act, 1864, to which I will refer later; it recited the Greenwich Hospital Act, 1865, to which I will also refer; and it recited that the lands in question were then vested in the Admiralty in fee simple in possession free from incumbrances; and recited that by virtue of the powers conferred on the Admiralty by the thereinbefore recited Acts, the Admiralty had agreed to sell the land to the corporation of Greenwich free from incumbrances, subject to the reservations and restrictive covenants thereafter contained. A plan was attached to this conveyance which, for the first time, separated or drew a distinction between various parts of the whole plot in question. In that plan the approach or roadway to the cemetery was marked blue; the greater part of the large rectangular piece was coloured green, a smaller portion was coloured pink, and the remaining portion was coloured brown. The conveyance granted and conveyed to the corporation, all that piece or parcel of land situate in the parish of Greenwich containing by admeasurement, 6 acres 14 perches delineated in the plan annexed thereto, and coloured pink, green, brown and blue, which said piece or parcel of land was then used for the purposes of a cemetery and was unconsecrated. In the schedule attached to the conveyance, para. 1 provides that there should be reserved to the Admiralty in perpetuity, the right to use as a burial ground, the portion of the land thereby conveyed which had hitherto been used for burial purposes, and was coloured pink on the plan; the corporation for themselves, their successors and assigns, covenanted with the Admiralty, first, that, subject to the above-mentioned reservation as to the pink land, they would use the portions of the land thereby conveyed coloured pink and green on the plan for the purpose of an open space, and not erect or allow to be erected any building thereon, without the previous consent of the Admiralty; they further covenanted to use the portion of the land coloured brown on the plan which had not yet been used as a burial ground—that is the expression used in the schedule—for one or more of the following purposes only: (i) any public service from time to time carried on by virtue of the Maternity and Child Welfare Acts or Public Health Acts for the time being in force, or under the authority of the Minister of Health; (ii) any public service carried on by authority of the Acts relating to public libraries; and (iii) as an open space. The approach or roadway to the cemetery coloured blue on this plan is to the north of the plot; the west and south portions of the large rectangular plot, including considerably more than half of the whole plot, is coloured green on the plan; to the north of the southerly part of the green plot there is drawn on this plan a narrow rectangular strip which is coloured pink, and a much larger part of the whole, being the remainder of the whole plot, to the north of the pink strip, is coloured brown; and it is on this brown portion that the defendant corporation have commenced the erection of certain welfare centre buildings which this action is brought to prevent. No interment has ever in fact taken place on the portion of this land coloured brown on the last-mentioned plan. The portion of the land coloured green has been used for interment and has never been closed for that purpose. The strip coloured pink is still being used for interment, and under the grant which I have just read, it is proposed that that strip should remain for that purpose, as stated in the document. The welfare centre buildings had been commenced prior to the issue of the writ in this action, and the plaintiffs ask for a mandatory order and a general injunction in respect of building upon the brown portion. The plaintiffs contend that the land coloured brown on the plan is a disused burial ground or part of a disused burial ground within the meaning of the Disused Burial Grounds Act, 1884, as amended by s. 4 of the Open Spaces Act, 1887, and that the blue land is also part of a disused burial ground as aforesaid. Little has been said about the blue land, which is really a roadway or approach;

A and the real question in this action is whether the plaintiffs are entitled to and ought to prevent the erection of buildings on this brown plot. The decision of the issue in this action depends on a number of Acts and authorities, and I will attempt to refer to them shortly, so far as is necessary to explain the legal position, as I believe it to be. Under the Admiralty Lands and Works Act, 1864, which was an Act to make provision respecting the acquisition of lands required by the Admiralty **B** for public services and respecting the use and disposition thereof and the execution of works thereon, after a recital which I shall have to refer to later, it was provided by s. 15 that where any lands purchased or taken by the Admiralty, under this Act, or under any special Act as aforesaid of the present or any future session, appear to the Admiralty to be no longer required to be held by them for the public service, the Admiralty may, with the previous consent of the Lords Commissioners of the **C** Treasury, sell the same, and may, for that purpose, enter into, execute, and do all necessary or proper contracts assurances and things; and by the Greenwich Hospital Act, 1865, which is an Act to provide for the better government of Greenwich Hospital, it was provided in s. 22 that

D "All lands which at the commencement of this Act are by virtue of any Act of Parliament or letters patent, or otherwise, settled on or vested in or held by or in trust for the commissioners of Greenwich Hospital, shall, thenceforth, by virtue of this Act, remain and be settled on and vested in the Admiralty for the time being for such estate or interest as at the commencement of this Act the Commissioners of Greenwich Hospital have therein."

By s. 23:

E "All lands vested in the Admiralty by virtue of this Act shall go to and be held by the Lord High Admiral for the time being, or the commissioners for the time being for executing the office of Lord High Admiral in succession, in trust for Her Majesty her heirs and successors, for the exclusive benefit of Greenwich Hospital, and, subject thereto and to the other provisions of this Act, the same shall be held in the same manner, and with, under, and according to the same powers, restrictions and provisions as lands vested in the **F** Admiralty,"

under the statute of 1864, which I have read. By virtue of these two Acts this property became vested in the Admiralty, and it is under the Act of 1864 that the Admiralty have purported to make the conveyance to the defendant corporation to which I have referred. In the Disused Burial Grounds Act, 1884, s. 3 enacts as **G** follows:

"After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship,"

H and it is under and for the purpose of enforcing that section that this action is brought. Section 5 of the same Act provides as follows:

"Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament."

I The defendants contend that the conveyance by the Admiralty to them in December, 1926, was a sale or disposal under the authority of an Act of Parliament, and that therefore the plaintiffs are not entitled, as against them, to enforce the provisions of s. 3 of the statute. It is now necessary shortly to appreciate what is a burial ground, and a disused burial ground, within the meaning of the statutes and authorities relating to that matter. It is not disputed in this case that the present statutory definition of a burial ground is as follows: "A burial ground shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment"; that is the result of the provisions of the Metropolis Open Spaces Act, 1881, and the Open Spaces Act, 1887. A disused burial ground is defined in the Open Spaces Act, 1887, s. 4, as follows:

"In the Disused Burial Ground Act of 1884, and this Act, the expression 'burial ground' shall have the same meaning as in the Metropolis Open Spaces Act of 1881 as amended by this Act, and the expression 'disused burial ground' shall mean any burial ground which is no longer used for interment whether or not such ground shall have been partially or wholly closed for burials under the provision of any statute or Order in Council";

and there are various authorities which deal with matters arising out of these definitions. Before referring to these, and to the contentions of the plaintiffs and defendants, I will state shortly the effect of the evidence in this case, which is, in substance, contained in certain admissions of fact. One witness only has been called, who has proved that there never has been, and is not now, any physical separation on the ground between what I will describe as the pink land and the brown land, that is, the land so coloured on the plan, in the last conveyance that I have referred to. It is admitted by the admissions of fact, that on Oct. 9, 1856, immediately prior to the conveyance which I have referred to of the following year, the following letter was written from the Home Office, addressed to the secretary of Greenwich Hospital:

"Referring to your letter of the 17th ultimo I am directed by Secretary, Sir George Grey, to inform you that he has received a report from Mr. Grainger, inspector of burial grounds, on the proposed new burial ground for Greenwich Hospital; and I hereby signify to you Sir George Grey's approval as required by 15 and 16 Vict., c. 85 [Burial Act, 1852], of the piece of ground selected by the commissioners nearly adjoining the Lower Woolwich Road and containing six acres of land as shown on the plans enclosed herewith, as the burial ground for the Royal Hospital at Greenwich,"

that, of course, refers to the land with which we are dealing. The conveyance of April 21, 1857, that I have read is admitted. It is admitted that there never has been, at any material time, any fence or other physical boundary dividing the brown land from the green or from the pink, or the pink land from the green. It is further admitted that the whole of the land coloured green, pink, and brown on the plan has at all material times been divided from the land and houses abutting upon it; that means, that the cemetery was fenced in. It is admitted that the portions coloured green and pink have, for many years, been used for the burial of men and boys of the Royal Navy and Merchant Service, and that the whole of this site of six acres and fourteen perches has for many years been known as the Royal Hospital Cemetery, Greenwich.

By the Disused Burial Grounds Act, 1884:

"Section 2. In this Act a 'disused burial ground' shall mean a burial ground in respect of which an Order of Council has been made for the discontinuance of burial therein in furtherance of the said recited Acts. Section 3. After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground except for the purpose of enlarging a church, chapel, meeting-house or other place of worship. Section 5. Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament."

By the Open Spaces Act, 1887:

"Section 4. In the Disused Burial Grounds Act, 1884, and this Act, the expression 'disused burial ground' shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council, and the expression 'building' shall include any temporary or moveable building."

Stafford Cripps, K.C., and A. H. Droop, for the plaintiffs, referred to Re Ponsford and Newport District School Board (1), and Re Bosworth and Gravesend Corpn. (2).

A *Montgomery, K.C., and William Allen*, for the defendants, referred to *Re Ecclesiastical Comrs. and New City of London Brewery Co.'s Contract* (4); *A.-G. v. London Parochial Charities Trustees* (3); *Re Howard Street Congregational Chapel, Sheffield* (5); *Re Ponsford and Newport District School Board* (1); *Re Bosworth and Gravesend Corpn.* (2); and *Nicholl v. Llantwit Major Parish Council* (6).

B
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D **ASTBURY, J.**, stated the facts and statutes as hereinbefore set out and continued: Counsel who appeared for the defendants argued this case on three points. First, they say that the brown land has never been set apart for interments within the meaning of the definition that I have given. Secondly, they say that, under s. 5 of the Disused Burial Grounds Act, 1884, the land in question has been sold and disposed of under the authority of an Act of Parliament, and is not, therefore, bound by the provision of s. 3: and, thirdly, they contend that the brown land is not a disused burial ground, shortly for this reason, that, there being no specified distinction between it and the rest of the plot, and the whole of the plot being a cemetery, and a part being still used for interments, it is a part of a burial ground, as distinct from a disused burial ground, or part of a disused burial ground. That and the other matters I will deal with more fully in a moment.

E With regard to the first question, whether this plot of land, including the brown, became a burial ground by having been set apart for the purpose of interment, it appears to me that there can be no doubt about it. The whole was bought for the purpose of interments; it was fenced round and separated from the surrounding land and houses; it has been for more than half a century used as a cemetery, and on the admissions and on known facts, it seems to me quite hopeless to contend that this plot was not set apart for the purpose of interment within the meaning of the definitions that I have referred to. It therefore was, as a whole, and in every part of it, a burial ground.

F I will now attempt to deal with the argument under s. 5 of the Disused Burial Grounds Act, 1884. Counsel for the defendants say, and in a sense say truly, that this land was sold to the defendant corporation under the authority of an Act of Parliament. Settled land which is sold by a tenant for life is also sold, in a similar sense, under the authority of an Act of Parliament; but it appears to me that that is not the meaning of s. 5 at all. The section is that nothing in the Act contained shall apply, not to any sale by any person entitled under the authority of an Act of Parliament to sell the land in question, but to any burial ground which has been
G sold or disposed of under the authority of an Act of Parliament. In other words, in my judgment, the Act of Parliament referred to in the section must relate to the land and not to the power or authority of the person dealing with the land; otherwise, all sorts of general authority might be called in aid for the purpose of preventing the enforcement of s. 3 of the Act of 1884. Counsel refers, in support of his argument on s. 5, to *A.-G. v. London Parochial Charities Trustees* (3). In
H that case, land forming part of a disused burial ground, building on which, except for the purpose of enlarging places of worship, is prohibited by s. 3 of the Act of 1884, was acquired by the Commissioners of Sewers of the City of London, under the powers of Michael Angelo Taylor's Act, for the purpose of street improvements, and a portion of the land so acquired was afterwards re-sold by the commissioners as surplus land to the defendants, a body of charity trustees who, with the consent
I of the Charity Commissioners, let it for general building purposes. In an action to restrain the defendants from building on it, it was held that it had been sold under the authority of an Act of Parliament within the meaning of s. 5. In that case, however, the land in question was acquired by the Commissioners of Sewers, as well as sold by them, under the authority of Michael Angelo Taylor's Act; and prior to its acquisition an adjudication had to be made under that Act, which enabled the commissioners to buy that specific property; in other words, before this land could come within the operation of the Act as to its acquisition and sale, a particular adjudication had to be made in respect of it. In *STIRLING, J.'s*

judgment he says the sale was made under the provisions of Michael Angelo Taylor's Act, and the effect of these provisions may be thus stated: A

"Certain public bodies within the limits of the bills of mortality and the parishes of St. Pancras and St. Marylebone (among the bodies which are included the Commissioners of Sewers of the City of London) are thereby empowered, for the purpose of improving the streets within their jurisdiction, to adjudge that 'any houses,' hereditaments, &c., 'or any part thereof,' come within the Act." B

The learned judge proceeds: "Such an adjudication has been held to be a necessary preliminary to the taking of any further steps," and the adjudication being made, the bodies in question had power to acquire and powers of sale. Later he says:

"The commissioners derived their power to purchase, and the charity trustees their power to sell, from the statute. Each step was taken under, and in accordance with, the authority conferred by the statute, and from that authority alone the sale derived its validity. I can come to no other conclusion than that the 'land was sold under the authority of an Act of Parliament and that it falls within s. 5.'" C

That authority in no way acquiesces in the proposition that a general power of sale is what is being referred to under s. 5 of the Act we are dealing with. All that it decided was that where a particular piece of land which had been used as a burial ground had, after an adjudication, been specifically acquired and specifically sold under the express provisions of a statute, that was a sale under an Act of Parliament relating to the land, as distinct from the general power and authority of the person making the sale. That view, I think, is borne out in a decision of my own in *Re Howard Street Congregational Chapel, Sheffield* (5). The only question, therefore, remaining under s. 5 is whether the Commissioners of the Admiralty in the present case sold this land under the authority of an Act of Parliament, within the meaning of *A.-G. v. London Parochial Charities Trustees* (3) to which I have referred; or whether they had general powers to sell it irrespective of any particular Act of Parliament. The position in this respect seems to me to be as follows: It is true that in the Admiralty Act, 1864, s. 15 provides that where any land purchased or taken by the Admiralty under this Act or any future Act appears to the Admiralty to be no longer required to be held by them for the public service, the Admiralty may, with the consent of the Lords Commissioners of the Treasury, sell. That looks, at first sight, like an authority to sell land, but s. 27 provides that D

"nothing in this Act shall take away or prejudicially affect any power, right or authority which would or might have been vested in or exercised by the Admiralty if this Act had not been passed." E

Now, if this Act had not been passed the Admiralty would have had, as it always has had, the right and power under the Crown to acquire and sell property generally, and what this statute really is doing is to make provision respecting the rights of disposition which the Admiralty already possessed. The preamble is as follows: F

"Whereas it is expedient to make provision for the acquisition by the Admiralty by Agreement of Lands required for the Public Service: and whereas it is expedient to consolidate into one general Act sundry provisions usually introduced into Special Acts from time to time empowering the Admiralty to purchase particular lands for the Public Service by Agreement or compulsorily, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Special Acts as for ensuring greater uniformity in the provisions themselves; And whereas it is expedient to make provision respecting the use and management of lands held by the Admiralty for the Public Service, and [—and these are the important words—] respecting the disposition thereof when no longer required for the Public Service." G

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- A It appears to me that s. 13 did not give to the Admiralty the right to sell this land as a burial ground, or in fact any other land; what it did do was to provide, with regard to the rights of sale which the Admiralty had before, certain provisions and restrictions as to such disposition, all general rights being safeguarded by s. 27; and I am unable to come to the conclusion that the land in question in the present case was sold under the authority of an Act of Parliament within the meaning of s. 5, or within the meaning of the case of *A.-G. v. London Parochial Charities Trustees* (3) which has been relied on by the defendants.

There is a further Act which has been discussed in this case, which raises a very curious point and state of affairs, viz., the Greenwich Hospital Disused Burial Ground Act, 1925. This statute was passed in the year before the property in the present case was sold by the Admiralty to the defendants. The Act recites:

- C "Whereas by an agreement dated Nov. 24, 1924, made between the Admiralty and the Seamen's Hospital Society, the Admiralty agreed to lease to the said society certain lands, delineated on the plan annexed to the agreement, forming part of the Greenwich Hospital."

That was a lease for ninety-nine years, with the usual building covenants, granted expressly for the purpose of building; and I think that there can be no doubt that that was a disposition, by the Admiralty, of land for the purpose of building. Then the statute goes on:

- E "And whereas a portion of the said land is a disused burial ground within the meaning of the Disused Burial Grounds Act, 1884, as amended by the Open Spaces Act, 1887: And whereas under the terms of the agreement permission was given to the said society, subject to the approval of the Admiralty, to erect on the disused burial ground certain buildings in extension of the Dreadnought Seamen's Hospital at Greenwich."

Then there is this very important recital, which is a statutory recital: "And whereas the object aforesaid cannot be effected without the authority of Parliament"; then it is enacted that,

- F "Subject to the provisions of the agreement with respect to the exhumation and re-interment of human remains and otherwise, nothing in the said Acts shall prevent the erection of buildings"

on any of the leased land. It seems a little strange that, having come to the conclusion that an Act of Parliament was necessary to enable the Admiralty to sell or dispose of part of the burial ground for the purpose of enabling buildings to be erected upon it, the Admiralty in the following year, made the conveyance to the defendants. That conveyance, of course, is perfectly harmless as far as it merely transferred the ownership of this property from the Admiralty to the corporation; the only matter of difficulty arises in the express arrangement referred to in the schedule to the document that on the brown land maternity or welfare centre buildings may be erected. The statute of 1925, quite apart from anything that I have said with regard to the provisions of s. 5 being specific and not general, seems to me to place a great difficulty in the way of the defendants. On the second point, that is, the argument under s. 5, in my judgment the brown land is not a burial ground which has been sold by the Admiralty under the authority of an Act of Parliament.

- I The last point taken by the defendants is that this plot of land is not a disused burial ground, but part of a burial ground that is in use as such. I think that the origin of that argument is to be found in certain expressions of LINDLEY, L.J., in *Re Ponsford and Newport District School Board* (1), where the learned judge referred to the necessity for looking at a burial ground as a whole for the purpose of seeing whether it has been so set apart as such, as distinct from treating it as subdivided into bits for the purpose of seeing whether each bit has been so set apart. I will refer to that again in a moment, but I do not think the lord justice meant in the least what the defendant's counsel have attempted to attribute to him. The

defendants' counsel's argument is this: If you are to look at this plot as a whole, part of it—viz., the pink, is to-day being used as a burial ground and, therefore, the whole is a burial ground, and therefore a part—viz., the brown, is not part of a disused burial ground or in itself a disused burial ground. I think that that is a fallacy. The whole of this plot was one undivided cemetery up to the date of the conveyance in 1926. That conveyance for the first time treated it as being divided into parts which are shown as coloured green, pink and brown on the plans attached to the conveyance, and therefore in 1926 for the first time the brown land was separated from the whole; the pink land was reserved as a burial ground to be used in the future; and the only question which I have to decide is whether the brown land is now a disused burial ground or part of a disused burial ground within the prohibition of s. 3 of the Disused Burial Grounds Act, 1884. A

It is now necessary to refer more in detail to *Re Ponsford and Newport District School Board* (1). In this case, if I may state the facts shortly, there was a cemetery at Newport; interments had taken place in a portion of that cemetery, but there was a piece of it—I think to the north—which is known in that case as the green land, in which no interment had in fact taken place. By an Order in Council in 1878 the whole cemetery was closed for interments, but by a further Order in Council in 1890 that order was varied, and it was ordered that, with the exception of the land coloured green, burials should be discontinued in the cemetery. No interments took place in the green, and an attempt was made to sell it, and the purchasers raised an objection that the sale was bad under s. 3 of the Act of 1884. The only matter which that case was dealing with was a part of a cemetery, i.e., what was therein described as the green land. NORTH, J., came to the conclusion that the green land was a disused burial ground, and that the vendors could not make a title. He said ([1894] 1 Ch. at p. 462): B

"The Metropolitan Open Spaces Act, 1881, s. 1, contains this definition: C

"The term "burial ground" shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800."

It is to be observed that the expression is not 'used for' but 'set apart for' the purpose of interment; and it seems to me that the whole of the land bought by the company was 'set apart for the purposes of interment.' " D

And he came to the conclusion that the green land was included in the burial ground, and that it was a burial ground in consequence, and that not being any longer used for interments and having been separated from the rest, it was a disused burial ground within the meaning of the Act. The learned judge said (*ibid.*): "To my mind the land coloured green is a disused burial ground and the prohibition against building applies." It is very difficult to see the difference between that case and the present. In the Court of Appeal the learned judge's views were affirmed, and the passages in LINDLEY, L.J.'s judgment, which the defendants have relied upon here, really do not affect the point which I have to decide at all; they are all made with reference to whether this was land which has been set apart; and the learned judge says that in considering that question the whole of the land must be regarded and not bit by bit; if the whole is set apart as a cemetery, then it is a burial ground within the meaning of the Act; and it is to be observed in reading the judgments in the Court of Appeal that LINDLEY, L.J., does not in any way differ from the view expressed by NORTH, J., that the green land, that was the green portion of the cemetery, was a disused burial ground in the events which had happened. KAY, L.J., deals with this point rather more fully. He says: E

"This burial ground—the whole of it—was bought by the cemetery company, for the purpose of providing a place of interment for the dead. . . . The unused portion of the ground [that is, the green] has now been divided from the rest of the cemetery by a wall, and the question is whether any building can be erected on that unused portion. . . . Thus, the effect of that is, that the term means any ground which has been at any time set apart for the purpose F

A of interment, whether interments have taken in it or not; because the words in the original Act of 1881 requiring that, to make the ground a 'burial ground' interments must have taken place within it, are expressly repealed. Therefore the term includes any ground set apart for interments, and in which interments have not taken place. . . . Now, we have to apply this state of the law to a particular piece of ground. This piece of ground coloured green on the plan . . . but no burials have ever taken place in it, and therefore it cannot be denied that it is in fact a burial ground which has not been used for burials. But it is said that it never was set apart as a burial ground, and therefore cannot be termed a 'disused burial ground.' The meaning now to be attributed to the term 'disused burial ground' in the Act of 1884—namely, that it includes a piece of land set apart for interments, but in which interments have not taken place—makes the argument absolutely impossible. This ground was set apart as distinctly as any ground could be, though it is ground in which no burials have ever taken place. I cannot escape the conclusion that this ground is within the express words of the Acts of Parliament; that this was ground set apart for interments, although no interments have ever taken place in it; this is, therefore, a 'disused burial ground' within the Act of 1884, and the restriction in the Act of 1884 applies to this ground. Unless that conclusion is the one to be drawn from the words of this Act of 1884, the result would be this: that a piece of ground in the middle of a cemetery, or in any part of a cemetery, in which there may have been no burials, cannot be treated as a 'disused burial ground.' "

E It appears to me that that is a conclusive decision of the Court of Appeal on the very point which I am discussing. Then, in *Re Bosworth and Gravesend Corpn.* (2), it was also pointed out that a separated part of a burial ground may become a "disused burial ground" within the meaning of the Act.

F I think I ought, in justice to the defendants' argument, to refer to a decision, which was relied on by them, by TOMLIN, J., in *Nicholl v. Llantwit Major Parish Council* (6). There the learned judge—if I may say so respectfully I quite agree with him—came to the conclusion that a piece of land, which was bought for the purpose of making it into a cemetery, where nothing had been done except the purchase, and it was found utterly unfit for a burial ground, had not been set apart as a burial ground within the meaning of the Act. But the passage which has been relied on by counsel for the defendants is where the learned judge says ([1924] 2 Ch. at p. 220):

G "I may add that, with reference to the definition of 'disused burial ground' in s. 4 of the Act of 1887, my attention has been called to observations on it in *Re Ponsford and Newport District School Board* (1) and *Re Bosworth and Gravesend Corpn.* (2). The facts in both these cases were entirely different, and it does not seem to me that the particular observations to which I was referred were directed to anything material in the determination of those cases; and for my part I should not be prepared to accept without much more argument the view that the definition of a 'disused burial ground' as 'a burial ground which is no longer used for interments' can include a burial ground which has never been used for interments."

H I do not think that there is anything in *Re Ponsford and Newport District School Board* (1) and *Re Bosworth and Gravesend Corpn.* (2) which suggests that a piece of ground that has never been used as a burial ground, although it was originally intended that it should be, can become a disused burial ground, if it was never a burial ground, and the learned judge is referring to certain passages where it has been held that the words in the Open Spaces Act, 1887, s. 4, "no longer used for interments," may, in an appropriate case, mean land in which no interments have in fact taken place; in other words, that a part of a cemetery in which interments have been taking place for years, although no interment has taken place in the particular part, would be a part no longer used for interments within the meaning

of the Act; and there is nothing that I can find in *Re Ponsford and Newport District School Board* (1), or in *Re Bosworth and Gravesend Corpn.* (2) which can in any way be construed as referring to land which has never ab initio been set apart for interments. A

I have taken a long time in discussing this matter, but it is an important case, and I have come to the conclusion that the plaintiffs are right and are entitled to succeed. B

Solicitors: *Thomas Bullivant; H. B. Sewell & Son.*

[Reported by E. K. CORRIE, F.S.Q., Barrister-at-Law.]

GRANT v. DERWENT

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.),
December 14, 1928] D

[Reported [1929] 1 Ch. 390; 98 L.J.Ch. 70; 140 L.T. 330;
93 J.P. 113; 73 Sol. Jo. 59; 27 L.G.R. 179]

Sewer—Drain—Connection with public sewer—Pipe laid by local authority in privately owned subsoil—Local authority acting at request and expense of owner of drain—Trespass—Liability of owner of drain—Wimbledon Corporation Act, 1914 (4 & 5 Geo. 5, c. clxiv), s. 81, s. 84. E

The plaintiff owned land under which there was a sewer owned by the local authority. The plaintiff laid out a road on the land. Under the Wimbledon Corporation Act, 1914, s. 81, the local authority sanctioned a proposed system of combined drainage of houses which the defendant intended to erect on land abutting the said road. The local authority, at the defendant's request and at his expense, acting under s. 84 of the Act of 1914, connected the drain with the sewer and for this purpose a connecting pipe was run under the roadway, which was a public highway of which the subsoil remained vested in the plaintiff. The plaintiff claimed damages for trespass. F

Held: the local authority were not the agent of the defendant, who had acted lawfully in making his request to them but did not thereby become responsible for the action which the local authority had a duty to take under the Act of 1914, and, therefore, the plaintiff could not succeed. G

Decision of ASTBURY, J., [1928] Ch. 902, affirmed.

Notes. Referred to: *Kelly v. Battershell*, [1949] 2 All E.R. 830.

As to drainage into public sewers, see 30 HALSBURY'S LAWS (2nd Edn.) 18 et seq.; and for cases see 41 DIGEST 42 et seq. H

Cases referred to:

- (1) *Goodson v. Richardson* (1874), 9 Ch.App. 221; 43 L.J.Ch. 790; 30 L.T. 142; 38 J.P. 436; 22 W.R. 337, L.C. & L.J.J.; 26 Digest 326, 588.
- (2) *Tunbridge Wells Corpn. v. Baird*, [1896] A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385; 60 J.P. 788; 12 T.L.R. 372, H.L.; 26 Digest 330, 618. I

Appeal by the plaintiff from an order of ASTBURY, J., reported [1928] Ch. 902.

By a conveyance dated Aug. 11, 1876, certain lands at Wimbledon were conveyed to one Humphreys, who therein covenanted with his vendors (inter alia) not to erect or suffer to be erected on the lands any buildings—exclusive of outbuildings—at a less cost price than £800, or any pair of semi-detached villas at a less cost price than £1,200. Similar covenants had been imposed on the vendors' predecessors in title by a conveyance of Dec. 16, 1852, which included the lands conveyed to Humphreys and other lands. A portion of these other lands were

A conveyed to the plaintiff in this action by a conveyance of Sept. 5, 1905, subject to the covenants in the deed of 1852, which the plaintiff did not covenant to observe. By a conveyance of Sept. 28, 1905, Humphreys' executors and trustees for sale conveyed to the plaintiff Blackacre, which formed part of the lands conveyed to Humphreys subject to the covenant in the conveyance of 1876 which the plaintiff covenanted to perform and to indemnify the executors against them.

B Blackacre lay to the south of a road known as Cottenham Park Road, and included a strip of land running east to a road known as Durham Road, under which strip there was a corporation sewer. Along this strip the plaintiff laid out a street known as Melbury Gardens. In 1926 the corporation of Wimbledon decided to take over Melbury Gardens, and made it up at the expense of the frontagers, but it was not declared to be a public highway repairable by the inhabitants at large under s. 152 of the Public Health Act, 1875, until June 9, 1927. The soil of the road remained vested in the plaintiff, subject to the rights of the Wimbledon Corporation as sewer authority and road authority.

C Whiteacre, which was now vested in the defendant to the action, was conveyed by Humphreys to one James by three conveyances, dated respectively June 28, 1893, Aug. 9, 1893, and Jan. 18, 1895. In each of these conveyances the portions of Whiteacre in question was conveyed, subject to the restrictive covenants in the conveyance of 1876, but James did not, in any conveyance, covenant to observe these covenants. Whiteacre was conveyed to the defendant by the widow of James and the trustees of his will by a conveyance dated Mar. 21, 1927, subject to certain restrictive covenants in the schedule to the conveyance, which the defendant expressly covenanted to observe. These included a covenant as to the minimum cost of buildings to be erected on Whiteacre, similar to the covenant in the conveyance of 1876. The conveyance to the defendant did not expressly mention the conveyance of 1876, but it was referred to in the charges register of the land certificate dated Mar. 22, 1927. Whiteacre abutted on the south side of the Melbury Gardens Road, and on the west side of Durham Road, which was sewered.

F The defendant proposed to erect seventeen houses on Whiteacre, and deposited plans showing that they would be drained by a combined drain. The Wimbledon Corporation, on April 23, 1927, in exercise of their powers under s. 81 of the Wimbledon Corporation Act, 1914, sanctioned this system of drainage, and declared that for the purposes of the Public Health Acts the combined drain should be deemed a drain and not a sewer. The defendant then erected the seventeen houses at a cost, in each case, exceeding the minimum prescribed by the covenant. In April, 1927, the Wimbledon Corporation, at the defendant's request and at his expense, connected the combined drain with the sewer under s. 84 of the Wimbledon Corporation Act, 1914.

G On June 29, 1927, the plaintiff commenced this action against the defendant, alleging that the defendant had broken the restrictive covenant as to the cost of the houses erected by him, and claiming a mandatory injunction and damages, and also claiming damages for trespass on his subsoil in Melbury Gardens by connecting the combined drain with the sewer. The defendant pleaded that the plaintiff was not a direct covenantee, and that, in the absence of a building scheme, which was not pleaded, the plaintiff was not entitled to enforce the covenant, and that, even if he were so entitled, the covenant had not been broken; and that the alleged trespass on the subsoil was a lawful act done by the Wimbledon Corporation under their statutory powers, and that the plaintiff had suffered no damage.

I Wimbledon Corporation Act, 1914, provided:

"Section 81 (1). If it appears to the corporation that two or more houses may be drained more conveniently or advantageously in combination than separately, and a sewer of sufficient size already exists or is about to be constructed within 100 ft. of any part of the premises, the corporation may, when the drains of such houses are first laid, order that such houses be drained by a combined drain to be constructed either by the corporation, if they so decide,

or by the owners, in such manner as the corporation shall direct, and the costs and expenses of such combined drain and the repair and maintenance thereof shall be apportioned between the owners of such houses in such manner as the corporation shall determine, and if such drain shall be constructed by the corporation such costs and expenses may be recovered by the corporation from such owners. (2) Any combined drain constructed in pursuance of this section shall for the purposes of the Public Health Acts be deemed to be a drain and not a sewer. (3) Provided that the corporation shall not exercise the powers conferred by this section in respect of any house plans for the drainage of which shall have been previously approved by the corporation.

Section 83. The corporation may, on the application and at the expense of any person owning or occupying premises abutting or fronting on any street not repairable by the inhabitants at large, wherein a sewer has been laid, lay down, take up, alter, relay, or renew in or along such street such drains as may be requisite or proper for connecting such premises with the sewer, doing as little damage as may be in the execution of the powers hereby granted, and making compensation for any damage which may be done in the execution of such powers, such compensation to be ascertained by and recovered before a court of summary jurisdiction.

Section 84. If the owner or occupier of any premises desires that the sewer or drain from such premises shall be made to communicate with any sewer of the corporation, such communication shall be made by the corporation upon the cost or estimated cost of making the communication being paid to the corporation, or the payment thereof to them being secured to their satisfaction, and the corporation may execute all works necessary for the purpose."

ASTBURY, J., dismissed the action. The plaintiff's appeal, the subject of this report, was restricted to the claim in respect of trespass.

E. J. Naldrett, K.C., and G. D. Johnston for the plaintiff.

F. K. Archer, K.C., and Randolph Glen for the defendant.

LORD HANWORTH, M.R.—This appeal fails in limine. The action tried before ASTBURY, J., was brought with regard to many matters which are not, however, the subjects of this appeal. The only question decided in the action from which this is an appeal was whether the plaintiff was entitled to recover damages from the defendant for trespass to the subsoil of a road the ownership of the soil of which belonged to the plaintiff. The plaintiff is the owner of property at Wimbledon under a conveyance dated Sept. 28, 1905, underneath a strip of which was a sewer laid down by the local board. The plaintiff, after he had purchased, laid out a road known as Melbury Gardens along this strip of his land. On Mar. 21, 1927, the land on the south side of Melbury Gardens was conveyed to the defendant. The sewer in Melbury Gardens was used for the drainage of the houses abutting on Melbury Gardens. On the south the defendant built houses which were detached, but all in a row. On April 23, 1927, the Wimbledon Corporation made an order directing that these seventeen houses built by the defendant should be drained by a combined drain and that the drain should be deemed to be a drain and not a sewer. In consequence of that order the combined drainage was carried out by the defendant. On April 23, 1927, on the request of the defendant and at his expense, the Wimbledon Corporation connected the combined drain with the sewer in Melbury Gardens, and for that purpose a connecting pipe was run through the roadway—Melbury Gardens—the soil of which belonged to the plaintiff. For many years after the plaintiff laid out the road known as Melbury Gardens the road was a public highway with the sewer under it, but in 1926 the Wimbledon Corporation decided to take the road over, though it was not formally declared a public road repairable by the inhabitants at large, under s. 152 of the Public Health Act, 1875, until June 9, 1927. On June 29, 1927, the plaintiff commenced this action.

A What is said by the plaintiff is this: "You have connected up your drain with the sewer, but in so doing you have trespassed on my subsoil. You had no right to do that, and that connection is a standing trespass upon my subsoil." The defendant replies: "I did not do it; I never committed any trespass. What was done was done by the Wimbledon Corporation." The reply is made to that that the local authority did the actual work, but they did it at the request of and as agents for the defendant.

B It seems to me that a very curious question is raised by that; a question whether the defendant can be made responsible for work which he did not do, and which was done by the Wimbledon Corporation under their powers as a local authority. The first question therefore is: How came this connection to be put in? Our attention has been called to several sections of certain Acts. By s. 21 of the Public Health Act, 1875, there is a power given to owners of property to cause their drains to empty into the sewer controlled by a local authority on complying with certain requirements. Therefore, supposing a sewer ran contiguous to land of the defendant, he could, after giving notice, and after complying with certain regulations, cause his drains from these seventeen houses to run into the local authority's sewer. He also had a power under s. 18 (1) of the Public Health Acts Amendment Act, 1890, which directs that:

E "Where the owner or occupier of any premises is entitled to cause any sewer or drain from those premises to communicate with any sewer of the local authority, the local authority shall, if requested to do so by such owner or occupier, and upon the cost thereof being paid in advance to the local authority, themselves make the communication and execute all works necessary for that purpose."

Whereas, therefore, under s. 21 of the Act of 1875 a right had been given to an owner to connect up with the sewer of the local authority, now, under this section of the Public Health Act, 1890, power has been given to local authorities to do the work themselves, and it is laid down that the local authority shall—not may—if requested to do so, themselves make the necessary or desired connection. Then we come to s. 81 of the Wimbledon Corporation Act, 1914. That was a section intended to secure the advantage of a combined system of drainage and under that section the order for the carrying out of the necessary work was made. [His Lordship read s. 81, and continued:] Section 83 provides that the corporation may on the application and at the expense of any person owning or occupying premises abutting or fronting on any street not repairable by the inhabitants at large, wherein a sewer has been laid, lay down, take up, alter, relay or renew in, across or along such street, such drains as may be requisite or proper for connecting such premises with the sewer, doing as little damage as may be, and then there is a provision for compensation for any damage done. Finally there is s. 84, which I need not read, because it is practically in *pari materia* with s. 18 of the Act of 1890.

H The defendant made a request to the local authority under s. 84 to make the desired connection, and he was to be responsible for the cost of the work. The work was done, the expenditure came to a considerable sum, but the defendant has paid that sum to the Wimbledon Corporation. The plaintiff, in bringing this action, says to the defendant, "You set in motion this local authority; you insisted that this connection should be made, you also paid the cost of doing it, and therefore you are directly responsible for this trespass on my subsoil; you ordered it and you cannot say that the corporation were not your agents, and you are all the more responsible because you have actually paid for it, and thereby ratified it." In my opinion, the plaintiff's case so stated breaks down, as there is, I think, no connection between the defendant and the admitted trespass. I think it is certainly clear, and established by *Goodson v. Richardson* (1), that the plaintiff can, in respect of his rights in the soil of this road though they are not unlimited because the upper surface is dedicated to the public, prevent any person interfering with the soil by the laying in it of drainage pipes, per LORD SELBORNE (9 Ch. App.

at p. 223), and LORD HALSBURY says what is practically the same thing in *Tunbridge Wells Corpn. v. Baird* (2) ([1896] A.C. at p. 438). But the real question here is—has the plaintiff established the liability of the defendant for what has been done? In my opinion, the defendant was quite within his rights in serving the local authority with notice to do this work, acting either under s. 18 of the Act of 1890, or under s. 84 of the Wimbledon Corporation Act. What in fact did the defendant do? He said to the local authority, "Make this connection." They said, "Yes, if you pay us," and he did pay them. On that it cannot, in my opinion, be said that he committed any trespass. I think that what he did was to say to the Wimbledon Corporation, "You know what your statutory powers are. I want you to make this connection. I want you to do what is necessary in order to make the connection in a proper way." I myself am unable to see that he ordered this local authority to do anything wrong, or that he ordered them to take any violent or illegal steps in order to make the connection. It all comes to this—that the defendant asked the local authority to do things which it was their business to do, and which they had power to do under the Acts to which I have referred.

It is then argued that even if the defendant had done nothing, even if he had done nothing more than ask the local authority to do the work, yet as he had adopted the work and the acts of the local authority, he had thereby ratified the act of the corporation and could not escape liability for the trespass. In my view that contention breaks down. The Wimbledon Corporation clearly acted under s. 18 of the Act of 1890, or possibly under s. 84 of their own Act, but in either case it is the local authority who do the work and are responsible for it. Section 18 expressly says that they "themselves" shall make the connection, and the whole tone of the section makes it clear that the local authority, though entitled to be recouped for their outlay, do the work themselves only, as the local authority responsible for the health of the district, and not in any way so as to make them the servants of the defendant, or his agents, so as to enable anyone to make him responsible on the ground that he has ratified their action. I think he is in no way responsible, and the fact that there may have been some trespass to the subsoil of the plaintiff's land does not involve the defendant in any responsibility for acts not done by him, but done by the local authority under their statutory powers. In my judgment the appeal fails, and the defendant has not been shown to be answerable in any way for any trespass committed.

LAWRENCE, L.J.—I agree that this appeal fails. The plaintiff claims damages for trespass to the subsoil of his land. Like the learned judge in the court below, I entirely fail to see how the plaintiff can have sustained a farthing's worth of damages. But apart from the question of damages I am of opinion that the appeal fails on the ground that the plaintiff has not succeeded in showing that there has been any trespass on the part of the defendant. The Wimbledon Corporation under s. 81 of its local Act of 1914 made an order on the defendant for a combined drainage scheme for the seventeen houses then recently erected by him in Melbury Gardens and directed the manner in which such drainage should be carried out on his land. The defendant, having no option, obeyed, and, having constructed the drains on his own land in accordance with such order applied to the corporation to make the necessary connection with the corporation's sewer in Melbury Gardens. The corporation had not at that time actually taken over Melbury Gardens which was then a street not repairable by the inhabitants at large. Under s. 83 of the Act of 1914 it would appear that the corporation had ample power to lay down the connecting link between the defendant's drain and the sewer in order to make the necessary connection with that sewer, and if in exercising its powers it had done any damage to the plaintiff's land he would presumably have had a claim for compensation against the corporation. The road—Melbury Gardens—has now been formally taken over by the corporation, and having regard to the fact that at the date of the alleged trespass the corporation was making up the road with a view to its being taken over I am not surprised that the corporation never thought

A that the plaintiff could have any claim for compensation and therefore did not ask the defendant for an indemnity. If the corporation has exceeded its statutory powers in continuing the defendant's drain and making the connection with the sewer it may technically have committed a trespass. But there is no question of any trespass having been committed by the defendant. The corporation has the responsibility and duty of seeing that there is a proper drainage system in its district, and under the general Act of 1890 and under the local Act of 1914 it had the power and (on the application of the defendant) the duty to make this connection. The corporation was not the agent of the defendant to make the connection, and the defendant, when once he had set the corporation in motion, had no power to control it, nor to say in what manner or under what powers the connection should be made. I abstain from saying anything further about the powers and rights of the corporation because it is not a party to this action, and possibly there may be further litigation in which it is joined as a party. It is enough for the purpose of this appeal to say that the plaintiff has entirely failed to prove that the defendant has committed any trespass on the subsoil of Melbury Gardens.

D **RUSSELL, L.J.**—The only cause of action with which we are concerned is the trespass, and it is admitted that the defendant himself never committed any trespass at all. All he did was to request the local authority to exercise their power, and to connect up these drains. That the local authority have power to do so is clear, under the Act of 1890 and their own Act of 1914. One or other Act gives them the power, and it seems to me that it is not necessary for us to go very closely into those powers. It is said that in exercising them the local authority have committed a trespass. But the defendant never asked them to commit a trespass. All he asked them to do was to make the connection. He could not control their actions. If they committed any trespass, and I am not at all sure that they did, it is quite clear that they did not do so at the instance of the defendant. I think the claim wholly fails.

Appeal dismissed.

F Solicitors: *Vivash, Robinson & Co.; Taylor, Willcocks & Co.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re COLLINS. TOWERS v. COLLINS

[CHANCERY DIVISION (Maugham, J.), November 1, 1928]

[Reported [1929] 1 Ch. 201; 98 L.J.Ch. 47; 140 L.T. 228;
72 Sol. Jo. 779]

Settled Land—Trust for sale—Land held in undivided shares vested in possession—Entirety of land vested in trustees or personal representatives—Land left to widow for life, to be divided at her death—Death of widow in 1923—Land not yet divided on Jan. 1, 1926—Continuance of purposes of trust—Law of Property Act, 1925 (15 Geo. 5, c. 20), Sched. I, Part IV, 1 (1) (b)—Wills Act, 1837 (1 Vict., c. 26), s. 31.

A testator made his will in 1896, appointed his widow trustee and executrix, and devised to her all his real and personal property on condition that the children were properly cared for and the property kept in good repair. He directed that at her death the property was to be equally divided between the children. He died in 1917 leaving real estate and three children by his first wife. By his second wife, who survived him, he had three more children. The widow died in 1923, and by her will appointed the plaintiff her executrix.

Held: the real estate was held by the plaintiff on the statutory trusts by virtue of Sched. 1, Part IV, s. 1 (1) (b), of the Law of Property Act, 1925, because the direction to divide it at the death of the widow involved that "the purposes of the trust [imposed by the testator's will] might continue beyond the life of the tenant for life" within the meaning of the Wills Act, 1837, s. 31; the whole legal estate had vested in the widow on the testator's death, and had vested in the plaintiff on the widow's death, on trust for the six children in equal shares; and so on Jan. 1, 1926, "the entirety of the land [was] vested in trustees or personal representatives . . . in trust for persons entitled in undivided shares."

Notes. As to the transitional provisions of the 1925 property Acts, see 27 HALSBURY'S LAWS (2nd Edn.) 619-637; and for cases on land held in undivided shares see 40 DIGEST (Repl.) 858-863. For the Law of Property Act, 1925, and the Wills Act, 1837, see 20 and 26 HALSBURY'S STATUTES (2nd Edn.) 427 and 1326 respectively.

Case referred to:

- (1) *Re Dawson's Settled Estates*, ante p. 472; [1928] Ch. 421; 97 L.J.Ch. 343; 139 L.T. 94; 40 Digest (Repl.) 858, 3334.

Adjourned Summons.

By his will made in 1896, the testator, after appointing his wife trustee and executrix thereof, gave, devised and bequeathed to her on trust for her use and benefit the whole of his real and personal estate on condition that the children were properly cared for and the property kept in good repair, and at her decease the property was to be equally divided among his children. He died in 1917. He was twice married: (i) to Emily Chalton, who died in 1881, by whom he had three children, who were defendants, and (ii) to the trustee and executrix of his said will, C. E. Collins, by whom he also had three children, the plaintiff and two defendants. His property consisted of twelve freehold houses at Gillingham, Kent. After his death the widow continued to reside in one of the houses and received the rents. She died in April, 1923, leaving a will, of which the plaintiff was executrix. Differences having arisen as to the sale of the property, and the expediency of appointing new trustees, this summons was taken out by the plaintiff, asking whether in the events which had happened the property was now vested in the plaintiff as the legal personal representative of the testator on the statutory trusts for sale by virtue of Sched. I, Part IV, of the Law of Property Act, 1925, or whether it vested in the defendant, the Public Trustee, on the statutory trusts, or how otherwise the same was vested.

A C. E. Harman, for the plaintiff, referred to *Re Dawson's Settled Estates* (1).
Buckmaster for the defendants.

MAUGHAM, J., stated the facts and continued: It seems to me that the matter is determined by s. 31 of the Wills Act, 1837. The section provides

B "that where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee and the beneficial interests in such real estate or in the surplus rents and profits thereof shall not be given to any person for life or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or the whole legal estate which the testator had power to dispose of by will in such real estate and not an estate determinable when the purposes of the trust shall be satisfied."

D In the present case after the death of the tenant for life the will directed that it should be equally divided among his children. That did not involve a trust for sale, but I think it is impossible to come to the conclusion that the direction to divide does not involve that the purposes of the trust may continue beyond the life of the tenant for life. Accordingly, I think that the whole legal estate was vested in Mrs. Collins, and that if she had appointed other persons as trustees they would have had certain trusts to perform. In the event I am bound to hold that the plaintiff as executrix of the last surviving trustee was, under Sched. I, Part IV, s. 1, of the Law of Property Act, 1925, the person in whom the property was vested in trust for the six children in undivided shares. Accordingly that section applies, and under sub.-s. (1) (b) the land must be held by her on the statutory trusts. The matter can stand over for a short time to see if the parties can agree on an appointment of new trustees.

E [The matter was mentioned to the court on a later day, when it was stated that the beneficiaries, all of whom were of full age, had agreed on a division of the property.]

F Solicitors: Berryman, for Wallace, Watson & Flint, Chatham; Strong & Co.

[Reported by A. W. CHASTER, ESQ., Barrister-at-Law.]

Re GAUL AND HOULSTON'S CONTRACT

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), June 6, 1928]

[Reported [1928] Ch. 689; 97 L.J.Ch. 362; 139 L.T. 473]

Settled Land—Land “charged in consideration of marriage with payment of capital sum”—Land not held on trust for sale—*Settled Land Act, 1925* (15 Geo. 5, c. 18), ss. 1 (1) (v.), 2—*Law of Property Act, 1925* (15 Geo. 5, c. 20), s. 36 (i).

“Settled land” in s. 36 (1) of the Law of Property Act, 1925, which provides that “where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale,” means “settled land” as defined by s. 1 and s. 2 of the Settled Land Act, 1925.

Re Ryder and Steadman's Contract (1), [1927] 2 Ch. 62, distinguished.

On Dec. 31, 1925, certain land belonged beneficially to joint tenants in fee simple, subject only to a charge for £1,000 created in consideration of marriage by a deed made in 1869.

Held: on Dec. 31, 1925, the land was “charged . . . in consideration of marriage . . . with the payment . . . of [a] capital sum” within the meaning of s. 1 (1) (v) of the Settled Land Act, 1925; it was, therefore, then “settled land,” and so was not subjected by s. 36 (1) of the Law of Property Act, 1925, to a trust for sale.

Notes. As to the transitional provisions of the 1925 Property Acts, see 27 HALSBURY'S LAWS (2nd Edn.) 619–637; and for cases see 40 DIGEST (Repl.) 790–794. For the Settled Land Act, 1925, and the Law of Property Act, 1925, see 23 and 20 HALSBURY'S STATUTES (2nd Edn.) 12 and 427 respectively.

Case referred to:

- (1) *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62; 96 L.J.Ch. 388; 137 L.T. 281; 43 T.L.R. 578; 71 Sol. Jo. 451, C.A.; 40 Digest (Repl.) 847, 3235.

Appeal by vendors from a decision of CLAUSON, J., given on Jan. 19, 1928, and reported 139 L.T. 473, that the land to be sold was not subject to a trust for sale under s. 36 (1) of the Law of Property Act, 1925, since it was settled land at the commencement of the operation of that Act, namely, on Jan. 1, 1926, and that therefore the vendors could not make a good title to the land.

Under the will of a testator who died in 1888 certain freehold property belonged beneficially on Dec. 31, 1925, to F. W. Cory, a person of unsound mind not so found, and Jane A. Cory as joint tenants in fee simple subject only to a charge for £1,000, created in consideration of marriage by deed made in 1869 and since lost. It was not known whether this was a mere equitable charge, or a charge giving the chargees a legal estate. By deed dated Nov. 16, 1926, Jane A. Cory purported to appoint the vendors trustees of the property for the purposes of the statutory trusts. This deed recited that the statutory trusts had arisen under “the transitional provisions for subjecting land, held in undivided shares, to trusts for sale.” By a contract dated May 10, 1927, by which the vendors agreed to sell part of the property to the purchaser, it was provided inter alia that a recital, in a deed made on the same day as the 1869 charge, that the property was conveyed to the chargees “their executors administrators and assigns,” should be accepted as conclusive evidence of the contents of the 1869 charge. The purchaser objected to the vendors' title and took out a vendor and purchaser summons, contending that on Dec. 31, 1925, the property was “settled land” and so exempted from the statutory trusts for sale imposed on land “(not being settled land) held in trust for any persons as joint tenants” by s. 36 (1) of the Law of Property Act, 1925.

A CLAUSON, J., accepted this contention, and accordingly held that the vendors could not make title. The vendors appealed.

*A. F. Topham, K.C., and McMullan for the vendors.
Arnold Jolly for the purchaser.*

B LORD HANWORTH, M.R.—We have to thank counsel on both sides for assisting us in what has always, under these Acts, involved a very considerable and difficult question. The question that we have to decide is a narrow one, namely, What is the effect and meaning of s. 36 (1) of the Law of Property Act, 1925? CLAUSON, J., has stated the facts, and has stated the way in which the problem arises, and I agree with the judgment he has reached, and the reasoning on which it is based. The question is, whether s. 36 (1) applies to the vendors who have
C to make out a good title for sale to their purchaser. Section 36 (1) opens with the words:

“Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale.”

D I need not read any more because those are the operative words of the section; but in the very first line there is an exception from the operation of the clause by the words in brackets, namely, “not being settled land.” At the outset then, when it is suggested that s. 36 (1) is applicable, one has to ask oneself, Is this land in question settled land or is it not settled land? The definition of “settled land” is
E to be obtained from the definition section of the same Act, s. 205, which provides that in that Act, unless the context otherwise requires, the following expressions have the meanings thereby assigned to them, and, by sub-s. (1) cl. (xxvi), of that section “settled land” has the same meaning as in the Settled Land Act, 1925. By the Settled Land Act, 1925, s. 2:

F “Land which is or is deemed to be the subject of a settlement is for the purposes of this Act settled land, and is in relation to the settlement referred to in this Act as the settled land.”

And by s. 1 (1) (v), any instrument under which after the commencement of the Act land stands

G “charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual or periodical sums for the portions, advancement, maintenance or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same . . . creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as
H the settlement, as the case requires.”

With those interpretations as they stand, taken simpliciter, counsel for the vendors is compelled to admit that the land here in question is settled land. I do not put the responsibility of that upon him, but, on the facts which are not in question, it appears that if we take the definition of settled land from s. 205 of the Law of Property Act, which refers to the other section which I have read, then
I the land in question here is settled land. That being so, I think the argument of counsel for the purchaser that s. 36 (1) does not apply, which was the view accepted by CLAUSON, J., stands good. It is indicated at an early point in the section that s. 36 (1) does not apply to settled land, and that “settled land” has been interpreted and in that sense identified by s. 205 of the same Act of Parliament. That being so, s. 36 (1) does not apply. CLAUSON, J., has ruled that

“s. 36 applies, as I read it, necessarily to a period after the coming into force of the Act, that is to a period after Dec. 31, 1925, and accordingly there is no

context to interfere with the meaning given to the expression 'settled land' by s. 205 (1), cl. (xxvi), of the Law of Property Act, 1925." A

I agree with that view. It appears to me that the operation of s. 36 begins from Jan. 1, 1926. It is at that time that one has to consider the meaning of "not being settled land." I cannot think that one is entitled to go behind the date at which s. 36 came into operation in order to find a definition of "settled land."

The argument that is presented to us as the alternative to that view is this: s. 36 B provides that in certain cases the legal estate shall be held on trust for sale "in like manner as if the persons beneficially entitled were tenants in common," and if one endeavours to discover what is the particular trust for sale which is indicated "in like manner as if the persons beneficially entitled," one has a supposititious case which you have to resolve and explain by reference to s. 34, and one is further entitled, when one looks at the whole of the purpose of s. 34, to see that it is pur- C porting to make something which was known under a different category before the passing of the Act, deemed to be something which is otherwise after the passing of the Act, and one gets in that way the transition from the old law to the new law, and one is thus entitled to look at s. 39, which contains certain transi- D tional provisions. If then one is entitled to look at the transitional provisions, one finds under s. 39 (4) that one is directed to Sched. I, Part IV, and then one finds a distinction drawn between the law as it applied before the commencement of the Act and the law afterwards, and one gets the interpretation which we gave in *Re Ryder and Steadman's Contract* (1) as to the meaning of the words "not being settled land."

I followed the argument. It is very attractive from many points of view, and it may be that that solution may offer a safeguard against many of the difficulties E that may arise, but in construing the Law of Property Act, I am not prepared to go beyond the necessary step which is involved in the case before me. I see so many difficulties which may arise that I think the wisest course is to limit each judgment to the point which has to be decided in the case. Ultimately a solution to many of the problems at present distant and overhanging, so to speak, will be no doubt obtained, but for the present purpose it appears to me unnecessary to say F more than that I agree with CLAUSON, J.'s judgment, because I hold that the exception, "not being settled land" in s. 36 (1) is sufficient, and no doubt is intended, by virtue of the interpretation section, to exclude the land which is the subject-matter of this contract. For this reason it appears to me that the appeal must be dismissed.

I will only add one word more, and that is that I feel the greatest hesitation and G difficulty in taking some words which were suggested might be made available from s. 207 and applying them to the body of the Act. Those words, which are to be found in s. 207 (a), at the last part of it, after the words of the proviso, are

"But, subject as aforesaid, this Act shall, except where otherwise expressly provided, apply to and in respect of instruments whether made or coming into operation before or after such commencement." H

My own instinct at the present moment is to say that those words must be left in their context which relates to repeals and to the preservation of certain rights and privileges or liabilities, and the like, which are saved by the proviso, which keeps alive s. 39 of the Interpretation Act, 1889. I feel it is very difficult to take those words from that repeal section and use them for the purpose of the inter- I pretation of a section in the general body of the Act.

LAWRENCE, L.J.—I agree. The main point to be decided in this case is the true meaning of the words "settled land" in s. 36 (1) of the Law of Property Act, 1925. The land in question here was land which was vested in joint tenants subject to an overriding charge or mortgage, but it is assumed for the purposes of this case that the legal estate was vested in the persons who owned the equity of redemption. The argument in support of the vendor's contention is this: that the words "settled land" there have reference to the state of facts existing immediately

A before the Act was passed. Counsel for the vendor has not permitted himself to say that they also apply to the state of facts brought about by the passing of the Act itself, though he was constrained to assume that s. 36 applied both to property which was held in joint tenancy at the date of the passing of the Act, and to that which came under its provisions by reason of a conveyance or limitation made after the Act came into force.

B The question here really is whether the definition of "settled land" contained in s. 205 (1) (xxvi) applies, or whether the context in which the words are found is such that some different meaning must be given to them. Section 205 (1) provides:

"in this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say"

C—then the meaning assigned by the Act itself to the words "settled land" is contained in sub-s. (1), cl. (xxvi), which in turn refers you to ss. 1 and 2 of the Settled Land Act, 1925. The result of this is that this Act must be read as if ss. 1 and 2 of the Settled Land Act, 1925, were put into this Act in extenso. Is there here anything in the context of s. 36 which requires the words "settled land" to have any other meaning than the Act itself says they are to bear? In my judgment there is not. The words can be given effect to sensibly and properly by reading them as defined by the Act. In *Re Ryder and Steadman's Contract* (1), on the contrary, the context required the words "settled land" to have a meaning different to the definition in the Act. But that was so because the fourth part of the first Schedule giving the transitional provisions with respect to land held by tenants in common, expressly dealt with the state of things which existed immediately prior to the passing of the Act, and, as was pointed out by the Master of the Rolls and SARGANT, L.J., in that case, to have held there that "settled land" means what it was intended to mean by the Settled Land Act which came into operation simultaneously with the passing of the Law of Property Act, would be to create a kind of mongrel definition, and it would be inconsistent with the meaning obviously intended having regard to the transitional nature of the section. There is nothing of that kind to be found in s. 36. It is a plain case of words being used which the Act defined, and I agree with CLAUSON, J., that from the moment of time when the Act came into force, that is to say after Dec. 31, 1925, the land in question here was "settled land" within the meaning of s. 36 (1) and that accordingly that land came within the exception as "not being settled land" with the result that s. 36 (1) does not apply at all to the land in question. I agree that the appeal fails and ought to be dismissed.

G **RUSSELL, L.J.**—At the relevant point of time, namely, the opening of Jan. 1, 1926, this land stood thus: it was vested in fee in two gentlemen of the name of Cory as joint tenants subject to a charge for £1,000, and the question is whether in those circumstances the case falls or does not fall within s. 36 (1) of the Law of Property Act, 1925.

H To bring the land within s. 36 (1) it must be shown that it was not, when the Law of Property Act, 1925, commenced to operate, "settled land" within the meaning of that Act. The meaning of "settled land" in the Act is stated in s. 205 (1), cl. (xxvi), to be the same as in the Settled Land Act, 1925. That means one has to refer to s. 2 of the Settled Land Act, which provides that

I "land which is or is deemed to be the subject of a settlement is for the purposes of this Act settled land, and is in relation to the settlement referred to in this Act as the settled land."

For the purpose of ascertaining what is the settlement one looks at s. 1, and that includes, by sub-s. (1) (v), the case where the land is

"charged, whether voluntarily or in consideration of marriage . . . with the payment . . . of any capital sum."

Therefore the position is that at the date when the Law of Property Act, 1925, commenced to operate this land was settled land within the meaning of the Act.

It is a question of the true construction of s. 36, and in his judgment CLAUSON, J., A
uses this language:

"In my opinion the section is reasonably plain and may be paraphrased as follows: 'Where at any particular moment after the coming into force of this Act—that is, after Dec. 31, 1925—a legal estate stands beneficially limited to two persons as joint tenants, but is not at that moment settled land, the legal estate is held on trust for sale.'"

Then the learned judge continues:

"At any moment of time after Dec. 31, 1925, the land here in question was settled land by reason of the operation upon it of s. 1 (1), cl. (v.), and s. 2 of the Act of 1925 [meaning thereby the Settled Land Act of that date] and it appears to me to follow that accordingly the land was and is within the exception, and was not and is not by this s. 36 (1) subjected to a trust for sale."

With every word of that I agree. The whole point turns on whether "settled land" in that section means "settled land" under the old law or under the new law, and in my opinion, there being no context to prove or induce one to take the view that it means settled land under the old law, the natural meaning of the section must prevail, and the matter must be judged by reference to the point of time at which the section in question is in fact operating. I agree that the appeal should be dismissed.

Solicitors: *Johnson, Peacock, Hepworth & Chowne*, for *Bennitt & Grazebrook*, Birmingham; *Milner & Bickford* for *E. Wyn Edwards*, Oswestry.

[Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.]

LEVENE v. INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Viscount Cave, L.C., Viscount Sumner, Lord Atkinson, Lord Buckmaster and Lord Warrington), January 26, 27, March 9, 1928]

[Reported [1928] A.C. 217; 97 L.J.K.B. 377; 139 L.T. 1;
44 T.L.R. 374; 72 Sol. Jo. 270; 13 Tax Cas. 486]

Income Tax—Residence in United Kingdom—British subject living most of year abroad—No permanent abode—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 46 (1), Sched. C, General Rules, r. 2 (d).

In 1919, the taxpayer, a British subject, who lived in London, formed the intention to "live abroad," and he surrendered the lease of his house, sold his furniture, and, in Dec., 1919, went abroad until July, 1920, when he and his wife returned to England. In subsequent years he was abroad except for the following periods: July 10, 1920, to Nov. 24, 1920; July 2, 1921, to Nov. 27, 1921; April 9, 1922, to Nov. 19, 1922 (with an interruption of some eight weeks from June to September, 1922, spent abroad); and in 1923 and 1924 periods similar to that in 1922 were spent in England. During these years the taxpayer had no fixed abode, but lived in hotels, although he tried to find a flat in Monaco, finally succeeding in finding one there in 1925. Both the taxpayer and his wife had been advised to live in the south of France for health reasons, and to avoid England during the winter months. They came to England during the relevant years to seek medical advice and to visit relatives, and to attend religious festivals. The taxpayer was assessed to income tax in respect of dividends from securities of British possessions and from war loan for the four years 1921–1925, but claimed exemption on the grounds that (as regards dividends from securities of British possessions) he

A was not "resident" in the United Kingdom within the meaning of r. 2 (d) of the General Rules applicable to Sched. C. of the Income Tax Act, 1918, and (as regards dividends from war loan) he was not "ordinarily resident" in the United Kingdom within the meaning of s. 46 (1) of the Act of 1918, during the relevant years. On appeal, the special commissioners confirmed the assessments.

B **Held:** there was evidence on which the commissioners could properly conclude that the taxpayer was both resident and ordinarily resident in the United Kingdom within r. 2 (d) of the General Rules applicable to Sched. C, and s. 4 (d) respectively, during the relevant years, and, therefore, their finding could not be disturbed.

Decision of the Court of Appeal, [1927] 2 K.B. 38, affirmed.

C **Notes.** The Income Tax Act, 1918, s. 46 (1), and Sched. C, General Rules, r. 2 (d), were replaced respectively by the Income Tax Act, 1952, s. 195 (1) and s. 120 (1).

Distinguishing: *I.R.Comrs. v. Lysaght*, ante, p. 575. Considered: *R. v. St. Marylebone Income Tax Comrs., Ex parte Schlesinger* (1928), 13 Tax Cas. 746; *Fry v. Burma Corpn.*, [1930] 1 K.B. 249; *I.R.Comrs. v. Combe* (1932), 17 Tax Cas. 405; *Hopkins v. Hopkins*, [1950] 2 All E.R. 1035. Referred to: *Duckworth v. Lowe*, [1937] 2 All E.R. 418; *Re Mackenzie*, [1940] 4 All E.R. 310; *Lord Inchiquin v. I.R.Comrs.* (1948), 31 Tax Cas. 125; *Re Adoption Application No. 52/1951*, [1951] 2 All E.R. 931; *Lowry v. Lowry*, [1952] 2 All E.R. 61; *Stransky v. Stransky*, [1954] 2 All E.R. 536.

E As to residence and ordinary residence, see 20 HALSBURY'S LAWS (3rd Edn.) 392 et seq.; and for cases see 28 DIGEST 24 et seq.

Cases referred to:

- (1) *Re Young* (1875), 1 Tax Cas. 57, 28 Digest 24, *e*.
- (2) *Rogers v. Inland Revenue* (1879), 1 Tax Cas. 225; Digest Supp.
- (3) *Inland Revenue v. Cadwalader* (1904), 7 F. (Ct. of Sess.) 146; 42 Sc.L.R. 117; 12 S.L.T. 449; sub nom. *Cooper v. Cadwalader*, 5 Tax Cas. 101; 28 Digest 24, *g*.
- (4) *Loewenstein v. De Salis* (1926), 10 Tax Cas. 424; 161 L.T. Jo. 235; 28 Digest 24, 129.
- (5) *Reid v. Inland Revenue* (1926), 10 Tax Cas. 673; 1926, S.C. 589; Digest Supp.

G **Appeal** from the decision of the Court of Appeal (Lord Hanworth, M.R., and Sargant and Lawrence, L.JJ.), reported [1927] 2 K.B. 38, on a Case stated by the Special Commissioners of Income Tax.

The facts appear from the opinion of VISCOUNT CAVE, L.C. The Court of Appeal held, affirming the decision of ROWLATT, J., that the appellant was rightly assessed to income tax for the years in question as being both "resident" and "ordinarily resident" in the United Kingdom.

H *Maugham, K.C.*, and *J. Nissim* for the appellant.

The Attorney-General (Sir Douglas Hogg, K.C.), *the Solicitor-General (Sir Thomas Inskip, K.C.)* and *R. P. Hills* for the respondents.

The House took time for consideration.

March 9. The following opinions were read.

I **VISCOUNT CAVE, L.C.**—The appellant, Mr. L. N. Levene, has been assessed to income tax on his dividends from securities of British possessions and from war loan for the tax year 1921–22 and the succeeding three tax years, and has claimed to be excused from such tax, i.e., from tax on the dividends from the securities of British possessions on the ground that during the years in question he was not "resident" in the United Kingdom within the meaning of r. 2 (d) of the General Rules applicable to Sched. C of the Act, and from tax on the dividends on war loan on the ground that during the same years he was not "ordinarily resident" in the United Kingdom within the meaning of s. 46 (1) of the Income Tax Act, 1918. On

appeal to the Special Commissioners under the Finance Act, 1924, s. 27, those commissioners disallowed the appellant's claim to exemption and confirmed the assessment, subject to a Case which they stated for the opinion of the High Court; and on the argument of the Case the decision of the commissioners was affirmed by ROWLATT, J., and afterwards by the Court of Appeal. Mr. Levene has now appealed to this House.

From the Case stated by the special commissioners it appears that the appellant is a British subject, and formerly lived in a house in Curzon Street, London, of which he held a lease, until March, 1918, when he decided to break up his establishment and (to use his own expression) to "live abroad"; that he then sold his furniture and surrendered the lease of his house, and until December, 1919, continued to live in the United Kingdom, in hotels. In December, 1919, he went abroad and did not return until July 10, 1920, since when he has been in the United Kingdom for the following periods:

	Weeks
1920—July 10 to Nov. 24	19
1921—July 2 to Nov. 27	21
1922—April 9 to June 18, Sept. 10 to Nov. 19	20
1923—April 12 to June 27, Sept. 10 to Nov. 15	20
1924—April 10 to July 1, Sept. 10 to Nov. 23	22

During the remainder of these five years he was staying at Monaco and at various places in France. From March, 1918, until January, 1925, the appellant had no fixed place of abode, but stayed in hotels, whether in this country or abroad. In the course of the years 1922, 1923, and 1924 he made endeavours to find a suitable flat in Monaco, but the negotiations came to nothing since none of the premises inspected were suitable, until in January, 1925, the appellant took a lease of a flat in Park Palace, Monte Carlo, for nine years, for which he paid a premium of 130,000 francs, and he lived there with his wife until he came to England for the purposes of the appeal to the commissioners. Both he and his wife have indifferent health, and have been advised to live in the South of France and avoid the United Kingdom in the winter months. One of the reasons for their visits to England was to obtain medical advice. They also came to visit their relatives in England, and (on one occasion) to make arrangements for the care of a brother of the appellant who is mentally afflicted. Other reasons for his coming to England annually were to take part in certain Jewish religious observances, to visit the graves of his parents, who are buried at Southampton, and to deal with his income tax affairs.

After setting out the above facts and the contentions of the parties, the commissioners gave their decision in the following terms:

"The appellant is a British subject and until March, 1918, he was a householder in London. He then surrendered the lease of his house and sold his furniture, and from March, 1918, until January, 1925, he did not occupy any fixed place of residence, but lived in hotels, whether in this country or abroad. He was admittedly resident and ordinarily resident in the United Kingdom until December, 1919. He then went abroad, and in each subsequent year he has spent between seven and eight months abroad and between four and five months in the United Kingdom. We are satisfied upon the evidence that when he left the United Kingdom in December, 1919, he had formed the intention, which he has consistently carried out ever since, of living abroad for the greater part of the year, but of returning to this country each year and remaining here for considerable periods but not for a period equal in the whole to six months in any year. The questions for decision are whether he was entitled to exemption from income tax on war loan interest under the Income Tax Act, 1918, s. 46, as a person not ordinarily resident in the United Kingdom, and on interest on securities of British Possessions under r. 2 (d) of the General Rules applicable to Sched. C, as a person not resident in the United

A Kingdom, and the years under review are 1921-22, 1922-23, 1923-24 and 1924-25. These are in our opinion questions of degree, and taking into consideration all the facts put before us in regard to the appellant's past and present life, the regularity and length of his visits here, his ties with this country, and his freedom from attachments abroad, we have come to the conclusion that at least until January, 1925, when the appellant took a lease of a flat in Monte Carlo, he continued to be resident in the United Kingdom. B The claims for the years in question therefore fail."

C It is obvious that the conclusions of the commissioners above quoted are so worded as not to be mere inferences in law from the facts found in the earlier part of the Case, but to be themselves substantive findings of fact; and accordingly under the well-established rule those findings cannot be disturbed by the courts unless there was no evidence to support them. But before dealing with that question I think it desirable to say something about a matter which was much discussed during the argument, viz., the meaning of the word "reside" and the expression "ordinarily reside" as used in the Income Tax Act.

D The word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning
"to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place."

E No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word "reside." In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus, a master mariner who had his home at Glasgow where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea: *Re Young* (1); *Rogers v. Inland Revenue* (2). Similarly a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here—although if he is the owner of foreign possessions or securities falling within Case IV or V of Sched. D, then if he has actually been in the United Kingdom for a period equal in the whole to six months in any year of assessment he may be charged with tax under r. 2 of the Miscellaneous Rules applicable to Sched. D. But a man may reside in more than one place. Just as a man may have two homes—one in London and the other in the country—so he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country. Thus, in *Cooper v. Cadwalader* (3) an American resident in New York who had taken a house in Scotland which was at any time available for his occupation, was held to be resident there, although in fact he had only occupied the house for two months during the year; and to the same effect is *Loewenstein v. De Salis* (4). The above cases are comparatively simple, but more difficult questions arise when the person sought to be charged has no home or establishment in any country, but lives his life in hotels or at the houses of his friends. If such a man spends the whole of the year in hotels in the United Kingdom, then he is held to reside in this country; for it is not necessary for that purpose that he should continue to live in one place in this country but only that he should reside in the United Kingdom. But probably the most difficult case is that of a wanderer who, having no home in any country, spends a part only of his time in hotels in the United Kingdom and the remaining and greater part of his time in hotels abroad. In such cases the question is one of fact and of degree, and must be determined on all the circumstances of the case: *Reid v. Inland Revenue* (5). If for instance such a man is a foreigner who has never

resided in this country, there may be great difficulty in holding that he is resident here. But if he is a British subject the commissioners are entitled to take into account all the facts of the case, including facts such as those which are referred to in the final paragraph above quoted from the Case Stated in this instance. Further, the case may be different, and in such a case regard must be had to r. 3 of the General Rules applicable to all the schedules of the Income Tax Act, which provides that every British subject whose ordinary residence has been in the United Kingdom shall be assessed and charged to tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad. A B

Turning to the facts of this case, I think it clear that the appellant falls within the category last described. He is a British subject and formerly resided in England. Early in 1918 he formed the project of living abroad and thereupon broke up his establishment in this country; but in fact he continued to reside here in hotels until the end of 1919. He then went abroad from time to time, but continued to live in hotels either here or in France and he did not actually find a home abroad until January, 1925, when he took a lease of a flat at Monte Carlo. The result is that during the period from the end of 1919 until January, 1925, he went much abroad, partly for the sake of his own and his wife's health, partly no doubt to search for a house or flat, and partly (as may be inferred from the finding of the commissioners) in the hope of escaping liability to the English income tax; but none of these purposes was more than a temporary purpose, and he regularly returned to England for the greater part of the summer months, though for less than one half of each year. On these facts I think that it was plainly open to the commissioners to find that during the years in question he was resident in the United Kingdom, and I think it probable that r. 3 above quoted applied to him. C D E

It remains to be considered whether during the period in question the appellant "ordinarily resided" in the United Kingdom for the purposes of s. 46 of the Act, and I think that there was material on which the commissioners could answer this question in the affirmative. The suggestion that in order to determine whether a man ordinarily resides in this country one must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance. The expression "ordinary residence" is found in the Income Tax Act, 1806, and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word "residence" as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here. On this point also, as on the other, I think that the finding of the commissioners cannot be disturbed. F G H

For these reasons I am of opinion that this appeal fails and I move your Lordships that it be dismissed with costs.

VISCOUNT SUMNER.—Early in 1918 Mr. Levene, a British subject, formed the intention to "live abroad." He sold his house in Mayfair, sold such furniture as was not in settlement, and then lived in hotels in England for the best part of two years. I will assume that but for passport difficulties and the condition of his wife's health, he would have gone abroad sooner. He left England in December, 1919. Accordingly on April 6, 1920, at the beginning of the five years of charge now in question, he was, in the words of r. 3 of the general rules, "a British subject, whose ordinary residence has been in the United Kingdom," and so he remained chargeable to tax notwithstanding, if he had left the United Kingdom for the purpose only of occasional residence abroad. Was that the only purpose of his leaving so far as residence is concerned? I

- A** The special commissioners found that it was, and I think it is clear that they had evidence before them on which they could so find. His only declaration was that he meant to live abroad, not saying whether it was to be an occasional or a constant, a part-time or a whole-time sojourn. He was advised by his doctor to seek a better climate, which is consistent with returning to England when English weather mends. He had gone out of business in England and had broken up his establishment, but he still had in England business interests connected with his income tax assessments, and ties of filial piety and religious observance, for his father was buried at Southampton and he was himself a member of the English community of Jews. What he actually did was to come back to England after an absence of about seven months, and he remained for nearly five. In the meantime he had not set up an establishment abroad but had lived in hotels.
- B**
- C** This, however, was only what he had done in England from March, 1918, to December, 1919. I think there was ample evidence before the commissioners to show that a man who left England to live abroad as he had been living here, and when warm weather came returned to his native country and to his permanent associations, and in 1919 "left the United Kingdom for the purpose of occasional residence only." If so, he remained chargeable.
- D** So much for the year of charge 1920-21. In the following years he was a bird of passage of almost mechanical regularity. No material change occurred in his way of life, for his inquiries for a permanent flat came to nothing until so late as not to affect his life and residence for the period in question. It is suggested that the commissioners misdirected themselves in point of law, because they took into account, with regard to the earlier years, conduct which only occurred subsequently. I agree that the taxpayer's chargeability in each year of charge constitutes a separate issue, even though several years are included in one appeal, but I do not think any error of law is committed if the facts applicable to the whole of the time are found in one continuous story. Light may be thrown on the purpose with which the first departure from the United Kingdom took place, by looking at his proceedings in a series of subsequent years. They go to show method and system, and so remove doubt which might be entertained if the years were examined in isolation from one another. The evidence as a whole disclosed that Mr. Levene continued to go to and fro during the years in question, leaving at the beginning of winter and coming back in summer, his home thus remaining as before. He changed his sky but not his home. On this I see no error in law in saying of each year that his purpose in leaving the United Kingdom was occasional residence abroad only. The occasion was the approach of an English winter, and when with the promise of summer here that occasion passed away, back came Mr. Levene to attend to the calls of interest, of friendship, and of piety. For these reasons I think it unnecessary to express, in regard to Mr. Levene's case, any opinion on the question of the tests of residence which are material for income tax purposes or on the meaning of "temporary" in this connection, in cases where a
- G**
- H** person, not within r. 3, comes from abroad to the United Kingdom and remains for a longer or shorter time, but not permanently. Of the other conclusions of the commissioners I say nothing except that, in my opinion, they in no way impair the soundness of their conclusion on r. 3.

I wish, however, to point out the position in which Mr. Levene and others like him now find themselves. It is trite law that his Majesty's subjects are free, if they can, to make their own arrangements so that their cases may fall outside the scope of the taxing Acts. They incur no legal penalties, and, strictly speaking, no moral censure if, having considered the lines drawn by the legislature for the imposition of taxes, they make it their business to walk outside them. It seems to follow from this and from other general considerations that the subject ought to be told in statutory and plain terms when he is chargeable and when he is not. The words "resident in the United Kingdom," ordinarily," or otherwise, and the words "leaving the United Kingdom for the purpose only of occasional residence abroad," simple as they look, guide the subject remarkably little as to the limits

within which he must pay and beyond which he is free. This is the more likely to be a subject of grievance and to provoke a sense of injustice when, as is now the case, the facility of communications, the fluid and restless character of social habits, and the pressure of taxation have made these intricate and doubtful questions of residence important and urgent in a manner undreamt of by Mr. Pitt, Mr. Addington, or even Sir Robert Peel. The legislature has, however, left the language of the Acts substantially as it was in their days, nor can I confidently say that the decided cases have always illuminated matters. In substance persons are chargeable or exempt, as the case may be, according as they are deemed by this body of commissioners or that to be resident or the reverse, whatever "resident" may mean in the particular circumstances of each case. The tribunal thus provided is neither bound by the findings of other similar tribunals in other cases, nor is it open to review so long as it commits no palpable error of law, and the legislature practically transfers to it the function of imposing taxes on individuals, since it empowers them in terms so general that no one can be certainly advised in advance whether he must pay or can escape payment. The way of taxpayers is hard, and the legislature does not go out of its way to make it any easier. If it had been possible in this case to apply the principle that a taxing statute must impose a charge in clear terms or fail, since it is to be construed *contra proferentem*, our duty would have been plain, but since the words are plain and it is only their application that is haphazard and beyond all forecast, Mr. Levene has no remedy in your Lordships' House.

So far as it is permissible to express an opinion on the facts, I think that for the purpose of taxing his Colonial and Indian securities Mr. Levene was at all material times resident in the United Kingdom and, for the purpose of taxing his holding in war loan, it could not be said of him that he was not ordinarily resident here. Accordingly in my judgment his appeal fails.

LORD WARRINGTON.—The appellant in this case claims relief from income tax for the financial years ending respectively on April 5, 1921, April 5, 1922, April 5, 1923, April 5, 1924, and April 5, 1925. His claim falls under two heads: (i) In respect of income payable in the United Kingdom on securities of British possessions; and (ii) in respect of income of British war loan.

The claim under the first head is based upon r. 2 (d) of the Rules applicable to Sched. C.

"No tax shall be chargeable in respect of the interest or dividends on any securities of . . . a British possession which are payable in the United Kingdom, where it is proved to the satisfaction of the Commissioners of Inland Revenue that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom."

The claim under the second head is based on s. 46 (1) of the Income Tax Act, 1918:

"Where the Treasury have, before the commencement of this Act, issued or may thereafter issue any securities which they have power to issue for the purpose of raising any money or any loan with a condition that the interest thereon shall not be liable to tax or super tax so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom, the interest of securities issued with such a condition shall be exempt accordingly."

War loan stock was issued under the condition mentioned in the section.

In order therefore to support his claims it was incumbent on the appellant to prove that in the one case he was not resident, and that in the other he was not ordinarily resident in the United Kingdom.

His claims having been rejected by the Inland Revenue Commissioners, he appealed to the Special Commissioners for Income Tax. They expressed their decision in the following terms:

A "These (viz., the questions they had to decide) are in our opinion questions of degree, and taking into consideration all the facts put before us in regard to the appellant's past and present habits of life, the regularity and length of his visits here, his ties with this country, and his freedom from attachments abroad, we have come to the conclusion that at least until January, 1925, when the appellant took a lease of a flat in Monte Carlo, he continued to be
B resident in the United Kingdom."

It will be observed that they do not in express terms state that he continued to be ordinarily resident here, but, from the terms in which they state the questions they had to decide, it is clear that the decision was intended to cover both cases. At the request of the appellant the commissioners stated a Case for the opinion
C of the High Court. The case came before ROWLATT, J., on July 23, 1926, who affirmed the decision of the commissioners and dismissed the appeal. An appeal to the Court of Appeal was dismissed by an order dated March 16, 1927.

It is not quite clear whether the commissioners intended their decision to be a finding of fact or a conclusion of law. If it were the former there is at least ground for saying that it was not open to appeal, but as the case was argued in both
D courts below and in this House on its merits, I think I ought to state shortly my reasons for thinking the decision was correct.

The appellant is a British subject. Down to March, 1918, he had a permanent home in London. In that month he sold his furniture and in April he surrendered the lease of his house. He continued, however, to live in England in various hotels until December, 1919. So far there is no question that he was both
E resident and ordinarily resident in the United Kingdom. He is married but has no children. His family ties are in this country, his wife having five sisters and he himself six brothers and sisters residing here. Apparently under medical advice to the effect that he and his wife should live in the South of France and avoid the United Kingdom in the winter months, he and his wife in December, 1919, went abroad. They returned to this country on July 10, 1920. From that
F day until Nov. 24, 1920, they remained in England. They then again went abroad until July 2, 1921, when they returned here and stayed until Nov. 27. They then went abroad. On April 9, 1922, they returned to England where they stayed until June 18. They were abroad until Sept. 10. From that day until Nov. 19 they stayed here. They then went abroad and remained there until April 12, 1923. On that day they returned and stayed in this country until June 27. They then
G went abroad, returning on Sept. 10 and staying here until Nov. 15. They were abroad from that day till April 10, 1924, when they returned here and stayed until July 1. From that day until Sept. 10 they were abroad. They then returned and stayed until Nov. 23 when they again went abroad. In no year of assessment did their stay here extend to six calendar months. While abroad they had no settled home, but lived at hotels at Monaco and at various places in France. In England
H also they lived in hotels. The appellant states that he intended throughout to live abroad, but his intention does not appear to have been of a very pressing character, for, though he made in the course of the years 1922 to 1924 endeavours to find a suitable flat he did not succeed until January, 1925. Since he gave up his house in 1918 he has had no intention of again taking a house or flat in the United Kingdom. He stated to the commissioners various reasons for his visits to
I England—to obtain medical advice—to visit relatives—to take part in certain Jewish observances—to visit the graves of his parents—to deal with his income-tax affairs. These being the facts the question is whether the commissioners, the King's Bench Division, and the Court of Appeal were wrong in the conclusion at which they respectively arrived.

I do not attempt to give any definition of the word "resident." In my opinion, it has no technical or special meaning for the purposes of the Income Tax Act. "Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is, in my opinion, impossible to restrict its connotation to its

duration. A member of this House may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered. In the present case, taking the several years of assessment in succession, in that ending April 5, 1921, there is no substantial difference between the nature of his residence abroad and that of his residence here except that the former was for a longer period. He did in fact, what many wealthy people do at the present time, he spent the winter and spring, and in this particular instance the early summer, abroad and the rest of the summer and the autumn here, again going abroad for the winter. In the year ending April 5, 1922, there was no substantial change, but in those ending April 5, 1923, and April 5, 1924, we find a change to this extent, that he now returns to this country in April, goes abroad for the usual summer holiday and returns to this country till the winter season comes round again. I will assume that, for the purpose of determining whether in any year he is ordinarily resident, the usual ordering of his life must be judged by what he does in that and preceding years only, still in the first year the circumstances show that the stay in England was as much in the ordinary course as his previous residence, and in subsequent years he developed habits of periodical changes of abode each one of which may be said to be in accordance with the usual ordering of his life.

I have not thought it necessary to rest my opinion on r. 3 of the General Rules applicable to all Schedules, but it is difficult to see any answer to the case of the respondent under it. The appellant is a British subject, his ordinary residence was unquestionably in the United Kingdom until December, 1919, and I fail to see that his subsequent departure from the United Kingdom in any of the years in question was otherwise than for the purpose of occasional residence abroad. Rule 2 of the Miscellaneous Rules applicable to Sched. D has no direct application to this case which is under Sched. C, and I do not see that it throws any light on the two questions which here arise for decision. In conclusion, I desire, as far as I am concerned, to leave open the question whether the appellant's position has been altered by the acquisition in January, 1925, of a flat in Monte Carlo as his settled residence there. On the whole I am of opinion that the appeal fails and ought to be dismissed with costs.

LORD ATKINSON and **LORD BUCKMASTER** concurred.

Appeal dismissed.

Solicitors: *M. A. Jacobs; Solicitor of Inland Revenue.*

[*Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.*]

A

VIGON v. VIGON AND KUTTNER

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bateson, J.), December 21, 1928]

[Reported [1929] P. 157; 98 L.J.P. 63; 140 L.T. 407; 45 T.L.R. 182;
27 L.G.R. 147]

B

Divorce—Custody—Jurisdiction of Divorce Court—Rescission or variation of magistrate's order—Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27)—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49).

C

On a summons under the Guardianship of Infants Acts at a magistrate's court the mother of an infant child was granted an order for custody, and her husband was ordered to pay 20s. a week for maintenance. Subsequently the husband petitioned for the dissolution of his marriage on the ground of his wife's adultery and was granted a decree. On the husband's application in the divorce proceedings for an order for the custody of the child the wife contended that the Divorce Court had no jurisdiction to rescind or vary the subsisting order made by the magistrate.

D

Held: the court had jurisdiction to make an order for custody.

E

Notes. In this case BATESON, J., held that the Divorce Court had jurisdiction to make an order for custody despite the existing order of the magistrate made under the Guardianship of Infants Acts. The Court of Appeal refrained from deciding this point. None of the judgments, however, makes clear what would have been the effect of an effective Divorce Court custody order, had one been made, on the magistrate's order. BATESON, J., seems to imply that the Divorce Court would vary the magistrate's order, but envisages a conflict between an order of one court as to custody and of the other as to guardianship. The Court of Appeal, however, both in this case and in *R. v. Middlesex Justices, Ex parte Bond*, [1933] All E.R.Rep. 394 (where, however, the divorce proceedings were instituted before the magistrate's order was made), have refrained from deciding this question too, but in the latter case LORD HEWART, C.J., said in the King's Bench Divisional Court (49 T.L.R. at p. 20) that the Divorce Court had an overriding jurisdiction.

F

Section 193 (1) of the Judicature Act, 1928, has been repealed and is now replaced by the Matrimonial Causes Act, 1950, s. 26 (1), as extended by the Matrimonial Proceedings (Children) Act, 1958. The differences between s. 193 (1) and the current statutes are not, however, material to the questions considered in this case.

G

Referred to: *R. v. Middlesex Justices, Ex parte Bond*, [1933] All E.R.Rep. 394.

As to the overriding power of the Divorce Court, see 12 HALSBURY'S LAWS (3rd Edn.) 393; and for cases see 27 DIGEST (Repl.) 554. For the Guardianship of Infants Acts, 1886 and 1925, and the Matrimonial Causes Act, 1950, see 12 and 29 HALSBURY'S STATUTES (2nd Edn.) 942 and 954, and 388 respectively.

H

Cases referred to:

I

- (1) *Re Thain, Thain v. Taylor*, [1926] Ch. 676; 95 L.J.Ch. 292; 135 L.T. 99; 70 Sol. Jo. 634, C.A.; Digest Supp.
- (2) *Manders v. Manders* (1890), 63 L.T. 627; 7 T.L.R. 149; 27 Digest (Repl.) 668, 6320.
- (3) *Barraclough v. Brown*, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249, H.L.; 16 Digest 115, 147.

Application for custody, by a husband petitioner, after decree nisi of divorce on the ground of his wife's adultery, of the child of the marriage, a boy, born in April, 1926.

Before the husband's petition was filed, Mr. Bingley, the magistrate at Marylebone Police Court, had made an order for custody under the Guardianship of Infants Acts, in favour of the wife.

By the Guardianship of Infants Act, 1886 :

"Section 5. The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the cost of the mother and the liability of the father for the same or otherwise as to costs as it may think just.

Section 6. In England the High Court of Justice, in any division thereof . . . may, in their discretion on being satisfied that it is for the welfare of the infant remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in the place of the guardian so removed.

Section 13. Nothing in this Act contained shall restrict or affect the jurisdiction of the High Court of Justice in England."

By the Guardianship of Infants Act, 1925 :

"Section 3 (4). Any order so made (under s. 5 of the 1886 Act as to the custody of an infant) may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order."

By the Supreme Court of Judicature (Consolidation) Act, 1925 :

"Section 193 (1). In any proceedings for divorce or nullity of marriage or judicial separation the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

Counsel for the wife submitted that the magistrate's order ousted the jurisdiction of the Divorce Court, and the application was adjourned into open court.

H. D. Grazebrook, for the husband, referred to the Guardianship of Infants Act, 1886, s. 16, s. 13, *Re Thain*, *Thain v. Taylor* (1), *Manders v. Manders* (2).

S. R. Sidebottom for the wife. There is no power in this court to rescind the magistrate's order unless by way of appeal. If the husband acts on any contrary order obtained in the Divorce Court he will risk making himself liable to the penalties under the Guardianship of Infants Act, 1925. Section 7 (1) of the 1925 Act gives jurisdiction to a court of summary jurisdiction, and the same court which makes the order must vary it. He referred to *Barraclough v. Brown* (3).

BATESON, J.—I think I can vary the order under s. 5 of the 1886 Act, but I do not want to do so until the magistrate has had an opportunity of varying his own order. It would only be common courtesy to do this. The order for custody will not be drawn up for a month, during which time the fact that I have found the wife guilty of adultery can be brought to the knowledge of the magistrate. He can be informed that in my opinion the proper order is one granting custody to the husband. If the magistrate's order deals with custody and does not touch guardianship, it follows that an application to me under the Guardianship of Infants Acts may produce the result of my making an order which gives the husband the guardianship while the magistrate's order giving the wife custody still stands. The magistrate may decide that it is better to deal with the whole matter by one order, whether it is made by the court or by the magistrate. The child will remain with the wife meanwhile unless within the month the magistrate otherwise orders.

On Jan. 14, 1929, Mr. Bingley, the magistrate, was asked at Marylebone Police Court by the husband to rescind his order for custody, on the grounds that the wife

A had been found guilty of adultery and was not a fit and proper person to have the custody of the child, and that he (the husband) had been granted an order for custody in the Divorce Court. The magistrate stated his reasons for granting the wife custody in the first place, and declined to vary that order. The Guardianship of Infants Acts, he said, did not say that he must rescind the order because the wife was subsequently divorced.

B

The wife then appealed to the Court of Appeal against the order of BATESON, J. This appeal was heard on April 18 and 19, 1929, and is reported [1929] P. 245. The Court of Appeal set aside the order of BATESON, J. LORD HANWORTH, M.R. (LAWRENCE and SANKEY, L.JJ., agreeing), said that the right course was to allow the appeal, to set aside BATESON, J.'s order, which, being dependent for its realisation on an event which had not happened, namely the magistrate's reversal of his own order, was an inchoate order, and to allow a renewal of the application to BATESON, J., who could then consider the question in the light of the facts revealed after he made his order. If he then made an order against the husband and objection was taken to his jurisdiction, it would be possible to appeal to the Court of Appeal on the question as to jurisdiction.

D

The husband, accordingly, renewed his application for custody to BATESON, J., and this application was heard on July 31, 1929. Meanwhile the decree nisi had been made absolute.

Grazebrook for the husband.

Sidebottom for the wife.

E

Fresh affidavit evidence was read with regard to the treatment of the child in his mother's care.

BATESON, J.—In this case I leave the custody of the child where it is. I think a child three years old ought to remain with the mother in the circumstances and in view of the probation officer's evidence, provided that the father is given proper access. I am of the same opinion as to the jurisdiction of this court, but I have altered my view now that I have fresh material since I made my order that was set aside by the Court of Appeal. On the whole of the circumstances as I now know them, I think that the magistrate was right and I was wrong.

F

Application dismissed with costs.

G

Solicitors: *Romain & Romain; H. E. Greville.*

[Reported by WILLIAM LATEY, Esq., Barrister-at-Law.]

GRAY AND OTHERS *v.* PERPETUAL TRUSTEE CO., LTD. AND ANOTHER

[PRIVY COUNCIL (Lord Hailsham, L.C., Viscount Haldane, Lord Buckmaster, Lord Wrenbury and Lord Warrington), May 11, 14, 15, June 12, 1928]

[Reported [1928] A.C. 391; 97 L.J.P.C. 85; 139 L.T. 469;
44 T.L.R. 654]

Australia—Mutual wills—Husband and wife—Surviving wife taking benefit of husband's will—Wife subsequently making different will—Election—Approval and reprobation.

Will—Mutual wills—Husband and wife—Similar interests given by each will—Proof of mutual agreement not to revoke or modify will of either without other's assent—No specific agreement to that effect—Acceptance by wife of benefits under husband's will—Subsequent revocation by wife of her will.

The mere fact that a husband and a wife simultaneously make mutual wills giving each other similar interests and giving similar interests to their issue is not evidence of an agreement that neither will revoke or modify his or her own will without the assent of the other: *Dufour v. Pereira* (1) (1769), 1 Dick. 419, and *Lord Walpole v. Lord Orford* (2) (1797), 3 Ves. 402, explained. *Re Oldham, Hadwen v. Myles* (3), [1925] Ch. 75, approved.

Under a post-nuptial settlement made in 1879 the wife had a life interest in the settled fund, a power of appointment with the consent of the husband during his life, and an unrestricted general power of appointment of the fund after her husband's death. The husband had a power in default of appointment by the wife to appoint the fund subject to her life interest. In 1914 the husband and wife made simultaneous mutual wills, each containing dispositions of his or her own property in favour of the other. The wife by her will expressly refrained from exercising, but did not expressly extinguish, her power of appointment; the husband by his will exercised his power of appointment, but there was no express agreement by husband and wife that neither would revoke or modify his or her will without the assent of the other. The husband died in 1915, and the wife took her benefits under his will. In 1923 the wife made a new will whereby she "devised and bequeathed all her real and personal estate" to her daughter. The wife died later in 1923.

Held: the 1923 will of the wife was an effective exercise of her power of appointment because there had been no agreement by her not to revoke or modify her 1914 will, and because there was nothing in the language of the husband's will which either put her to her election or put her in the position of seeking at the same time to approbate and to reprobate its provisions.

Notes. As to contracts relating to wills, and as to joint and mutual wills, see 34 HALSBURY'S LAWS (2nd Edn.) 15-19; and for cases see 44 DIGEST 178-181. As to election, see 14 *ibid.* (3rd Edn.) 588-598; and for cases see 20 DIGEST 403-448. As to the extinguishment and suspension of powers, see 25 *ibid.* (2nd Edn.) 588 et seq.

Cases referred to:

- (1) *Dufour v. Pereira* (1769), 1 Dick. 419; 21 E.R. 332, L.C.; 44 Digest 181, 105.
- (2) *Lord Walpole v. Lord Orford* (1797), 3 Ves. 402; 30 E.R. 1076, L.C.; 44 Digest 178, 75.
- (3) *Re Oldham, Hadwen v. Myles*, [1925] Ch. 75; 94 L.J.Ch. 148; 132 L.T. 658; 69 Sol. Jo. 193; 44 Digest 182, 109.

Appeal by special leave from a judgment of the High Court of Australia (ISAACS, HIGGINS and STARKE, JJ.; KNOX, C.J., and RICH, J., dissenting), dated Aug. 22.

A 1927 (and reported 39 C.L.R. 473), reversing a judgment of the Supreme Court of New South Wales (HARVEY, C.J., in Equity), dated Oct. 29, 1926.

The facts, which are summarised in the headnote, are fully stated in the judgment. These proceedings were commenced by the Perpetual Trustee Company, Ltd., the first respondent to this appeal, as sole trustee of the 1879 post-nuptial settlement made by the deceased husband. The grandchildren entitled under the exercise of the husband's power of appointment by his 1914 will now appealed to the Privy Council against the decision of the High Court of Australia, on appeal from the Supreme Court of New South Wales, in favour of the second respondent to this appeal, the daughter entitled under the 1923 will of the wife.

B *Macmillan, K.C.*, and *A. C. Nesbitt* for the appellants.

C *W. A. Greene, K.C.*, and *Louis Gluckstein* for the second respondent.

Their Lordships took time for consideration.

June 12. The considered opinion of their Lordships was delivered by

VISCOUNT HALDANE.—In this case the question is whether the appellants are entitled to the reversal of a judgment of the High Court of Australia, delivered by a majority on appeal from a decision of the Supreme Court of New South Wales (HARVEY, Chief Judge in Equity), which was reversed by the High Court. The High Court held that Mrs. Hargrave, the testatrix in this case, was entitled to revoke her will of Oct. 29, 1914, and to make a different will of July 18, 1923. It was further held that the latter will was a good execution of a general power of appointment contained in a settlement dated Jan. 25, 1879, and made between her and her husband, Lawrence Hargrave, who predeceased her. This settlement was a post-nuptial one, consisting entirely of the husband's property. That was vested in a trustee (i) upon trust for such persons and purposes as the wife should, with the consent of her husband during his life and afterwards at her own discretion, by deed or will appoint. The wife had thus, in case of her surviving her husband, an unrestricted general power of appointment; (ii) upon trust for the wife for life, and after her death and in default of appointment by her; (iii) upon trust for such persons and purposes as her husband should by deed or will appoint, and in default and subject thereto; (iv) on trust for the husband for life and after his death; (v) on trust for the child or children of the marriage of Mr. and Mrs. Hargrave absolutely, with an ultimate trust in default of children for husband in fee.

G The trusts of this settlement are stated above in outline. The wording is quite clear. The main trust, stated more precisely, was for such ends, intents and purposes as Mrs. Hargrave should at any time or from time to time, with the consent of her husband during his life, and after his decease at or in her uncontrolled discretion, notwithstanding any future coverture, by deed or deeds or by will appoint, and in default of and until and subject to any and every such appointment, upon trust during her life for her separate use, and after her decease and in default of and subject to any and every such appointment by her as aforesaid, upon such trusts as the husband should by deed or will appoint, and subject to such appointment by him as aforesaid for him during his life and after his death for the children of the marriage absolutely, and in default of such children for the husband absolutely. No appointment by deed was made, but on Oct. 29, 1914, the husband and wife both made wills, and these were contemporaneous. By the husband's will he left all his property, including all his "estates, real and personal," over which he had a power of appointment by virtue of the settlement of Jan. 25, 1879, to trustees for sale, conversion and investment, and to pay the income to his wife, Margaret Hargrave, for her life, and after her death to pay such income until the death of the last of his children equally between his surviving children and the issue surviving them of those that were dead, and after the death of the last of his children, the trustees were to distribute the trust funds among all the grandchildren then living per capita and not per stirpes. It must be borne in mind that the husband's power under the settlement was subordinate to that of

the wife, which had been made paramount. The will of the wife, made on the same date, was in some points different. She appointed the respondent company to be her trustee and executor. She expressly refrained from exercising the power of appointment vested in her by the settlement of 1879. She left all her real and personal estate (excluding what she could appoint under the general power just referred to, which she had declared her intention not to exercise) to her trustee upon trust for conversion and investment, and to pay the income to her husband for his life, and then to her children surviving her (with representation), and after the death of the last of her children to distribute the corpus among her grandchildren then living per capita, with substitution of the issue of any of them who had died before the period of distribution leaving issue. A B

It is clear that the general power remained intact in her, although she had not exercised it, subject, of course, to any questions to which its subsequent exercise by her might give rise. So far there was no complication. In 1915 she made a codicil leaving two annuities to be paid by her trustee out of what she had vested in the trustee by her will. In July, 1915, her husband died, and thenceforward Mrs. Hargrave took the benefits conferred on her by his will. On Sept. 15, 1919, Mrs. Hargrave made another will, in which she again expressed an intention not to exercise the general power given to her by the settlement of 1879, but gave out of her own estate annuities, including one of £250 a year, to her daughter Margaret, the present respondent. For the rest this new will did not interfere materially with the provisions of the will of 1914. But on July 18, 1923, Mrs. Hargrave made a further will, which did interfere with these provisions completely. She had moved to London, and when there by this new will she "devised and bequeathed all her real and personal estate" to her daughter the respondent, Margaret Hudson, absolutely, and appointed her the sole executrix. Mrs. Hargrave died in October, 1923, and letters of administration with the will annexed were granted at Sydney to the respondent company. There is no doubt that the terms of this final will were such as to amount to an exercise of the general power conferred on Mrs. Hargrave by the settlement of 1879. It is not in controversy that, although no intention to include the exercise of the power was expressed in this will, it must be taken to have been exercised under the general words of disposition by virtue of either s. 23 of the Wills, Probate and Administration Act of New South Wales, or by virtue of s. 27 of the English Wills Act, if she was domiciled at her death in England. On this assumption the will disposes of property comprised in the settlement, amounting to over £12,000. C D E F

Their Lordships have to decide two questions which have been brought before them. The first is whether the simultaneous wills of Mr. and Mrs. Hargrave were mutual wills made under such circumstances that neither the husband nor the wife could revoke or modify them without the assent of the other. The second question is whether a case of election has arisen. As to the first question, it is necessary to turn to the evidence of the circumstances under which the wills of 1914 were made. The evidence is somewhat meagre. But it appears that by September, 1914, the respondent company had been appointed sole trustee of the settlement of 1879, and that Mr. and Mrs. Hargrave went to the office of the company to express their desire that their disposable property should go in the same way among their children and grandchildren. They had then four children and two grandchildren. Mr. Bennett, an official of the respondent company, gave evidence that on Sept. 22, 1914, Mr. and Mrs. Hargrave came to the office of the respondent company and discussed how they should make their wills so that the property disposed of should go among their children after their deaths. Mr. Bennett had no exact recollection of what passed, but he thought that something was said by Mr. Hargrave to the effect that if he made a will leaving everything to Mrs. Hargrave for life, with remainder to the children for life, and then to their children, would she not do the same, and that she said she would. Mr. Douglas, another official of the company, gave evidence to much the same effect, adding that it was arranged that the husband should make an appointment of the funds G H I

A In the settlement, and that his wife should by her will negative any intention on her part to exercise her power. This last provision appears to be the result of a belief in the minds of the parties that the non-exercise by the wife of her power might effect a saving of death duty.

B The Chief Judge in Equity (HARVEY, J.), who tried the case, was of opinion that it could not be said that the evidence established that there was an actual bargain between the husband and the wife that they should make wills in identical terms, in the sense that each refused to make a will unless the other agreed to do so. On this point of fact KNOX, C.J., on the appeal to the High Court, agreed with him, although he felt constrained by the authorities to dismiss the appeal. ISAACS, J., however, took a different view and held that the arrangement made amounted to an actual agreement. He was in favour of allowing the appeal, but on different grounds. C HIGGINS, J., held that there was no agreement to make the wills irrevocable, and was for allowing the appeal. RICH, J., held that, as the wife when she succeeded had bound herself in equity to give effect to her husband's appointment and not to exercise her own power, a ground which did not depend on the mere effect at law of the establishment of a contract such as HARVEY, J., had discussed, but on equitable interests which he thought had arisen, the appeal D should be dismissed. STARKE, J., thought that the husband and wife were not making stipulations binding either in law or in equity, but were only settling the division of their property in the measure which seemed fair to them at the moment. He was, therefore, in favour of allowing the appeal.

E HARVEY, J., had decided for the appellants on the ground that although no binding contract was proved, still it was established by authority that where mutual wills are made by two persons as the result of some understanding or arrangement between them, this was enough, although it might not amount to a binding contract in law, to give rise to equities. Their Lordships are in agreement with HARVEY, J., and the other learned judges in Australia who have held that no binding contract was established by the evidence. What they have to consider is the proposition as to the effect in equity laid down by HARVEY, J., as stated.

F There was a particular authority which was relied on by the appellants for the proposition that if two persons simultaneously make wills to the same effect, and in that sense mutually, a second will made by one of them after succeeding to the other's estate under the originally made will, is precluded from being treated as effective to interfere in equity with the existing disposition. This authority was the well-known case, *Dufour v. Pereira* (1), decided by LORD CAMDEN in 1769. The G decision has been fully discussed in a book of authority, HARGRAVE'S JURIDICAL ARGUMENTS (Vol. 2, p. 304). The volume last named contains a very full account by the learned editor of a discussion of the case in its early stages by LORD LOUGHBOROUGH, who in 1797 finally decided the very question in *Lord Walpole v. Lord Orford* (2). In *Dufour v. Pereira* (1) the conclusion reached was that if there was in point of fact an agreement come to that the wills should not be revoked H after the death of one of the parties without mutual consent, they were binding. That they were mutual wills to the same effect was at least treated as a relevant circumstance, to be taken into account in determining whether there was such an agreement. But the mere simultaneity of the wills and the similarity of their terms do not appear, taken by themselves, to have been looked on as more than some evidence of an agreement not to revoke. The agreement, which does not I restrain the legal right to revoke, was the foundation of the right in equity which might emerge, although it was a fact which had in itself to be established by evidence, and in such cases the whole of the evidence must be looked at. It was upon this ground that LORD LOUGHBOROUGH, in the later case of *Lord Walpole v. Lord Orford* (2), dismissed the claim founded on the principle of LORD CAMDEN'S judgment, holding that no sufficiently definite agreement had been proved.

The most recent judgment on the effect of mutual wills made by husband and wife, without independent evidence of any contract, is that of ASTBURY, J., in *Re Oldham, Hadwen v. Myles* (3). That learned judge subjected the authorities to a

careful examination, and came to the conclusion that the mere fact that two wills were made in identical terms does not of necessity imply any agreement beyond that so to make them. In the case before him he found that there was not sufficient evidence of any further agreement, and that there was nothing in the authorities referred to in the argument that constrained him to decide otherwise. Their Lordships agree with the view taken by ASTBURY, J. The case before them is one in which the evidence of an agreement, apart from that of making the wills in question, is so lacking that they are unable to come to the conclusion that an agreement to constitute equitable interests has been shown to have been made. As they have already said, the mere fact of making wills mutually is not, at least by the law of England, evidence of such an agreement having been come to. And without such a definite agreement there can no more be a trust in equity than a right to damages at law. A B C

This disposes of the first of the contentions which were put forward at the Bar for the appellants. The second contention was that Mrs. Hargrave was put to her election either to take under her husband's will, or to reject it if she desired to retain the general power of appointment, and that having elected to take under his will, she could not afterwards create new interests under the power which could prevail in equity. This contention is, in the opinion of their Lordships, untenable. They are unable to find language in the husband's will which either puts the wife to her election, or puts her in the position of seeking at the same time to approbate and to reprobate its provisions. The husband's will disposed of his own property and also purported to exercise his own power of appointment under the settlement. But under the settlement his power was subordinate to the paramount power of the wife, who was enabled to override everything. This paramount power the wife expressly refrains from exercising in her will of 1914. But not the less she abstained from extinguishing it, and confines the operation of her will to her own property. Their Lordships therefore find no reason for holding that she was in any way precluded from exercising her general power subsequently, or for doubting that in law she must be taken to have done so by her final will of 1923. This being so, there is no inconsistency, and there is no room for any question of election arising. D E F

For these reasons they will humbly advise His Majesty that the appeal should be dismissed. They are always reluctant to give unsuccessful appellants their costs. But in this case the questions which have arisen are so obviously the result of the obscure and unusual procedure of the husband and wife in relation to the settlement of 1879 that they think that the costs of all parties as between solicitor and client should be paid out of the settled funds. G

Appeal dismissed.

Solicitors: *Light & Fulton; Bartlett & Gluckstein.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A Re R. AND H. HALL, LTD., AND W. H. PIM (JUNIOR) & CO.'S
ARBITRATION

[HOUSE OF LORDS (Viscount Haldane, Viscount Dunedin, Lord Shaw, Lord Phillimore and Lord Blanesburgh), November 21, 24, 28, 1927, March 2, 1928]

B [Reported 139 L.T. 50; 33 Com. Cas. 324; 30 Ll.L.Rep. 159]

Contract—Breach—Damages—Measure—Foreseeable consequence of breach—Sale of goods—Loss of profit on re-sale—Damages payable by buyer for breach of contract of re-sale—Provisions as to re-sale in main contract—Knowledge of parties of even chance of re-sale.

C By a written contract in the standard London Corn Trade Association form made between members of the association on Nov. 3, 1925, the sellers sold an unspecified cargo of Australian wheat at a fixed price. The contract provided that notice of appropriation to the contract of a specific cargo in a specific ship should be given within a specified time and also contained express provisions as to what should be done in various circumstances if the cargo should be re-sold one or more times before delivery. Both buyers and sellers knew at the time the contract was made that there was an even chance that the buyers would re-sell the cargo before delivery and not retain it themselves, but the buyers gave the sellers no express notification of any intention to re-sell. The market rose and on Nov. 21, 1925, the buyers, by a contract in the same form, re-sold the cargo at an enhanced price to a sub-buyer, who subsequently re-sold, the market having risen further, at a still higher price. On Feb. 10, 1926, the sellers gave the buyers notice of appropriation of a specific cargo to the contract, and the buyers immediately gave a similar notice to the sub-buyers. The market then fell and on Mar. 22, 1926, when the nominated ship arrived, the sellers failed to deliver. In an action by the buyers for damages for this admitted breach of contract the sellers contended that the damages should be limited to the difference between the price ruling on Nov. 3, the date of the contract, and the market price on Mar. 22.

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G **Held:** the damages recoverable by the buyers should not be so limited, but included both the buyers' own loss of profit on the re-sale and the damages for which they would be liable for their breach of the contract of re-sale, because such damages must reasonably be supposed to have been in the contemplation of the parties at the time the contract was made since the contract itself expressly provided for re-sales before delivery, and because the parties knew that it was not unlikely that such re-sale would occur.

Hadley v. Baxendale (1) (1854), 9 Exch. 341, and *Hammond & Co. v. Bussey* (2) (1887), 20 Q.B.D. 79, explained and applied.

Decision of the Court of Appeal (1927), 137 L.T. 585, reversed.

H **Notes.** Considered: *Patrick v. Russo-British Grain Export Co., Ltd.*, [1927] 2 K.B. 535; *Finlay & Co., Ltd. v. N.V. Kwik Hoo Tong Handel Maatschappij*, ante, p. 110; *The Arpad* (1934), 50 T.L.R. 505. Referred to: *The York*, [1929] P. 178; *Foscolo Mango & Co., Ltd. v. Stag Line, Ltd.*, [1931] 2 K.B. 48.

As to damages for breach of a contract of sale of goods where the goods have been re-sold by the buyer, see 29 HALSBURY'S LAWS (2nd Edn.) 195-197, 205-207; **I** and for cases see 39 DIGEST 674-677, 684.

Cases referred to:

- (1) *Hadley v. Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, 99.
- (2) *Hammond & Co. v. Bussey* (1887), 20 Q.B.D. 79; 57 L.J.Q.B. 58; 4 T.L.R. 95, C.A.; 39 Digest 476, 995.
- (3) *Grébert-Borgnis v. Nugent* (1885), 15 Q.B.D. 85; 54 L.J.Q.B. 511; 1 T.L.R. 434, C.A.; 39 Digest 669, 2569.

Appeal from a decision of the Court of Appeal (LORD HEWART, C.J., BANKES and A SCRUTTON, L.JJ.), reported 137 L.T. 585, on a Special Case.

On Nov. 3, 1925, R. and H. Hall, Ltd., the buyers, bought from W. H. Pim (Junior) & Co., Ltd., the sellers, on c.i.f. terms an unascertained cargo of 7,000 tons of Australian wheat at 51s. 9d. per quarter. Condition 1 of the contract provided that "Notice of appropriation with ship's name shall be given within ten days from date of bill of lading, and by each other seller within the ten days, or in due course if received by him after that time . . . and shall be passed on by each other seller to his buyer in due course on receipt." The eighth condition was for arbitration, and included the words: "But when buyer claims arbitration . . . he shall, if he is the last buyer, appoint his arbitrator and give notice of such appointment to his seller not later than ten running days after final discharge of shipment, but if he is an intermediate buyer, then in due course after receiving notice from his buyer. If the claim is for condition, the seller, if he is the shipper, his house or representative or agent in Europe, shall appoint and instruct his arbitrator, within three business days after receipt of buyer's nomination; and if he is an intermediate seller, then in due course after receipt of nomination from his seller." Further, the strike clause provided with regard to notices by cable naming the ports that "all such notices shall be passed on in due course." The contract further provided that the latest date for the appropriation of a specific cargo to the contract should be Feb. 10, 1926, and that provisional invoices should be sent to the buyers within seven days of the arrival of shipping documents in Europe. The market rose and on Nov. 21, 1925, the buyers, by a contract in identical form and with the same appropriation provision, re-sold the wheat to a sub-buyer, Williams, at 56s. 9d. a quarter. The market rose further and by another contract in identical form made on Nov. 25, 1925, the sellers (who were actually agents and who acted for one principal in concluding the contract of Nov. 3 and for a different principal in concluding the Nov. 25 contract) bought the wheat back from the sub-buyer at 59s. 3d. a quarter. The market continued to rise until January, 1926, when it began to fall, and on Jan. 29 the sellers bought from Rank a cargo of wheat then on board the *S.S. Indianic* at 60s. a quarter. At the same time the sellers, having by letters dated Jan. 27, 1926, procured both the buyers and the sub-buyer to agree that the identical cargo was the subject of all three contracts [viz., those of Nov. 5, Nov. 21, and Nov. 25], gave notice to the buyers appropriating the *Indianic* cargo to the Nov. 5 contract. The buyers gave a similar notice to the sub-buyer. The sellers then re-sold the cargo on the *S.S. Indianic* to Rank at 59s. 11½d. a quarter, but nevertheless on Feb. 26 they sent the buyers a provisional invoice in respect of this cargo. The *S.S. Indianic* arrived in England on Mar. 22, 1926, but the sellers, having re-sold the cargo, were unable to tender the shipping documents or procure delivery of the cargo to the buyers. The market price had by then fallen to 53s. 9d. per quarter. The buyers claimed damages for breach of contract, and the claim was referred to arbitration.

The sellers admitted the breach, but they contended that the only damages recoverable by the buyers was the 2s. a quarter difference between the contract price and the market price on the date of the ship's arrival in this country. The purchasers, however, claimed the 5s. a quarter difference between the contract price and the price at which they re-sold, together with a declaration that they were also entitled to recover all sums which might become payable by them in consequence of their failure to deliver to their sub-buyers. The arbitrators awarded, subject to the opinion of the court on a Special Case, that the buyers could only recover as damages the 2s. a quarter difference between the contract price and the market price when the ship arrived. The Court of Appeal held, that having regard to the finding of the arbitrators, there were no materials on which the court could find that, at the date of the making of the contract, the parties contemplated that the cargo would be re-sold before delivery. The only inference that the court could draw was that the buyers possibly—not probably—

A might not use the grain, but might re-sell it. There was nothing in the contract itself nor in the circumstances to justify the court in departing from the ordinary rule as to damages. In the circumstances, therefore, the buyers were not entitled to the extended damages measured by the profit which they would have made on the re-sale as well as all damages which they might be called on to pay by reason of their inability to deliver to sub-purchasers, but the damages payable must be

B limited to the difference [2s. a quarter] between contract price and the market price at the date of the breach. The buyers appealed.

Sir John Simon, K.C., A. T. Miller, K.C., and C. W. Lilley for the buyers.

Rayner Goddard, K.C., and D. B. Somervell for the sellers.

The House took time for consideration.

C Mar. 2, 1928. The following opinions were read.

VISCOUNT HALDANE.—On one point this case has given me some anxiety. Not about the principle of law applicable, for I think that it is clear, but about the proper inference as to the facts to which to apply it. After study of the contract I have come to the conclusion that it is contained in the document of

D Nov. 3, 1925, and must be taken to have been entered into on that date although, on the face of it, this contract relates to a cargo of Australian wheat; this is to be shipped in a first-class vessel of a certain qualification, from a port in Australia as per bills of lading to be dated at specified future dates, the load being also specified, as well as the use of the shipping documents. The conditions which are incorporated into the contract are those of the London Corn Trade Association.

E They provide for notice of appropriation, including ship's name, bills of lading, and of approximate quantity loaded. These particulars are to be given by the shipper within a limited time, and by each other seller within a similarly limited time. A valid notice of appropriation shall not be withdrawn, but if the vessel is named in the contract no notice of appropriation is to be deemed to be necessary. Provisional invoice based on bill-of-lading weight, with ship's name and

F date of bill or bills of lading, are to be sent by the shipper to his buyer within seven days after date of arrival in Europe, and by other sellers to their buyers respectively in due course after receipt. There are then provisions for arbitration in accordance with the practice of the London Corn Trade Association.

I have come to the conclusion that the contract is one not merely for the sale of corn in bulk, but for the sale of the cargo of an individual ship which is either

G specifically identified or is to be so identified. This contract was effectively made on Nov. 3, 1925, and what took place between the parties a little later neither adds anything to its binding character nor detracts from that character. I think further that the contract and the conditions which it incorporates show that it was contemplated that the cargo might be passed on by way of sub-sale if the buyer did not choose to keep it for himself, and that the seller in such a case

H contracted to put the buyer in a position to fulfil his sub-contracts if he entered into them. They were regarded by the terms of the original contract as sub-contracts which the original buyer was to be in a position to enter into, with stipulations which bound the original seller to enable the original buyer to fulfil them. Whether the latter was likely to enter into such sub-contracts and pass the cargo down a chain of re-sales is not material. It is enough that the contract

I contemplated by its terms that he should have the right to do so if he chose. This being the case, there has been an admitted breach. The original seller has failed to deliver at the due date, and the buyer has been left open to claims from his sub-buyers based on the contracts made with them in reliance on the clauses in the document of Nov. 3.

In these circumstances I am of opinion that the measure of damages is clear. It is not merely the amount of damage, measured by loss in the market, which arises in the usual course of business from the breach. It extends whenever the special circumstances require this, to such possible damages as may reasonably

be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. This is in accordance with what is called the second branch of the rule in *Hadley v. Baxendale* (1), a rule which is fully explained by LORD ESHER, M.R., in *Hammond & Co. v. Bussey* (2). He points out that the principle is not to be confined to a sub-contract already actually made at the date of the original contract, but applies also to the case of a sub-contract which will probably be made. There is no doubt that the law is correctly explained in *Hammond & Co. v. Bussey* (2), and I am of opinion that the case before me depends on a question of construction which comes directly within it and must be answered in accordance with the buyers' contention.

I find myself unable to take the view which prevailed in the Court of Appeal, where the judgment of ROWLATT, J., was reversed. I do not think that the real question is one of probability or of circumstances foreseen by the seller. It is to my mind a pure question of the terms of the contract itself, and I am of opinion that these terms provided for the case of re-sale. Whether such a re-sale was likely or not does not matter, if, as I think, the buyers stipulated for power to make it being provided. I, therefore, think that the judgment of the Court of Appeal ought to be reversed and that of ROWLATT, J., restored, and that the respondent sellers should pay to the appellant buyers their costs in this House and the courts below.

VISCOUNT DUNEDIN.—There is, I believe, a general agreement that the law as to the calculation of damages due for breach of a contract is settled by *Hadley v. Baxendale* (1), as explained in *Hammond & Co. v. Bussey* (2). The difficulty lies in the application to the facts of each case.

I take, in their order, the three points which FRY, L.J., in *Hammond's Case* (2), said must be determined before the final question is put. First, what are the damages which actually resulted from the breach? Undoubtedly, loss of profit and also—though I shall revert to this—damages which the buyer would have to pay to his sub-buyer Williams. Secondly, was the contract made under any special circumstances, and, if so, what? And thirdly, what, at the time of the making of the contract, was the common knowledge of the parties?

I take these two together. This was the sale not of wheat, but of a cargo of wheat, and the particular cargo was, according to the terms of the bargain, to be identified by nomination before a certain date. It was well known to both parties that it was a common practice in the trade to re-sell cargoes whilst still afloat, and the contract itself, apart from common knowledge, shows this distinctly by the provisions of condition 1, which were quoted by the noble Lord who preceded me. Then there is the correspondence as to the actual appropriation of the *Indianic*. I do not use this correspondence as explaining the contract itself, which was of date in November previous, but I do use it as an additional proof, if proof were needed, of the perfect familiarity of the seller with the practice of successive re-sales of cargo afloat, or, as it is termed, of a "string of contracts." The seller necessarily knew that as soon as he nominated a cargo, the delivery of that cargo, and of no other, could alone satisfy the contract.

In the light of these facts, I put to myself the crucial question as expressed by FRY, L.J., who is therein repeating what had already been said by LORD ESHER, M.R.:

"What may the court reasonably suppose to have been in the contemplation of the parties as the probable result of breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?"

Be it observed that it is for the court to decide the question; not for the jury or, as in a case like the present, for the arbitrator, although it is in the province of the jury, or arbitrator, to find any actual fact which will help the court to arrive at the supposition. In following FRY, L.J., as to the matter to be considered

A before the final question is put, I do exactly what the learned Chief Justice did in this case. He, however, proceeds as follows: He quotes the finding of the arbitrators:

"The arbitrators are unable to find that it was in the contemplation of the parties or ought to have been in the contemplation of [the seller] at that time that the cargo would be re-sold or was likely to be re-sold before delivery; in fact, the chances of its being re-sold as a cargo and of its being taken delivery of by [the buyer] were about equal."

And then continues:

"In other words, as I understand the meaning of that finding of fact, not only do the arbitrators say that on the materials before them they could not find that a re-sale was within contemplation of the parties, and, therefore, possibly damages from breach of subsequent contracts within the scope of the measure of damage, but they actually state as a fact that the chances of this cargo being re-sold or of its not being re-sold were equal, and, therefore, that it is idle to speak of a likelihood or of a probability of a re-sale."

On this I have two observations to make. The arbitrator's findings that they are unable to find, &c., must be read in the light of what was just said before the passage quoted, namely:

"It was not suggested on behalf of the buyers that they had at the time of the transaction of Nov. 3, 1925, expressly notified the sellers of any intention on their part to re-sell the cargo and in the circumstances . . ."

If more were meant, it was usurping the province of the court. And further—
and here, I think, is the key to the learned judge's decision—after setting out that they state as a fact that the chances of the cargo being re-sold, or not being re-sold, were about equal, he adds words which they do not use, "and therefore that it is idle to speak of the likelihood or the probability of a re-sale." With deference to the learned judge, it is here that I part company with him. I do not think that "probability," as it is used in *Hammond & Co. v. Bussey* (2), means that the chances are all in favour of the event whatever its happening. To make a thing probable, it is enough, in my view, that there is an even chance of its happening. That is the criterion I apply, and in view of the fact, which I have said above, I think there was here in the contemplation of parties the probability of a re-sale. And if that was so the results of a breach on the part of the first seller, as the sale was of a named cargo, meant inevitably default on the part of the first buyer. I think, therefore, that there was material on which ROWLATT, J., could come to the conclusion he did.

The result of the default which did ensue was twofold. The buyer lost his profit, but also he had to pay damages to his sub-buyer. It is argued that although there may be liability for the first item, there could not be for the second. ROWLATT, J., held that the two were inseparable. The Court of Appeal did not have to consider the point. In my opinion the one is the corollary of the other. There is a case in which the two items are allowed, viz., *Grébert-Borgnis v. Nugent* (3). It may be distinguished from this case in respect that BRETT, M.R., distinctly states that the intention to make a special contract had been communicated to the first seller, but, in my opinion, that must be taken along with the considered opinion which the same learned judge, LORD ESHER, M.R., gave in *Hammond & Co. v. Bussey* (2). If what the court holds to have been in contemplation of the parties is tantamount to actual knowledge, then I think the reasoning of the former case applies to this. It was stated that this opened an interminable vista of successive contracts and successive damages. That is not so. There is a practical check in two ways. The contracts must have been entered into before the time of delivery, and they must be contracts in accordance with the market, not extravagant and unusual bargains. This last point is well settled in decided cases. I am, therefore, of opinion that the appeal should be allowed and that the judgment of ROWLATT, J., should be restored.

LORD SHAW.—I agree with both of my noble and learned friends who have preceded me. But I wish specially to say that I think the main difficulty in this case is removed by the terms of the contract itself. By that contract, which is dated Nov. 8, 1925, the sellers sold to the buyers a cargo of Australian wheat to be carried from Australia per a ship to be named. The ship was duly and timeously named, and the contract was thus complete, and the subject of the sale thus identified was shipped for London on a c.i.f. contract. The form of contract was the form of the London Corn Trade Association, of which the buyers and the sellers are members. The sellers broke this contract of sale by failing to make a tender of documents and to deliver. The question of the case is, What is the measure of damages for this breach? Between the date of the contract and the date when delivery could have been given but was refused in London a period of several months elapsed. During that period the buyers sold to a sub-buyer at an enhanced price. Thereafter the sub-buyer again sold at a price still further enhanced. The market was a rising market. It is not suggested that these prices were out of the ordinary course of business. Had this been so, different considerations might quite well have arisen. This, however, is the very common case of specific goods sold for an appointed future delivery, the market between the dates of sale and delivery being a fluctuating market. When refusal to deliver occurred, it is unquestionable that the original buyer and all subsequent buyers were unable to do business for want of the cargo. The position, accordingly, is that buyer number 1 lost his own profit, so did buyer number 2. Further, number 2, being also unable to complete the sale made by him, is confronted with a claim for damages for which he asks to be relieved by number 1. In short, although the string in this case is not very long, there is a short string of contracts the subject of all of which was the specific cargo. Its delivery would have made the whole transactions work out smoothly and in order. Its non-delivery raises a series of losses all of which accumulate upon the head of buyer number 1.

The question is: Is the seller of the goods, in view of the terms of this contract for sale and delivery of a cargo of wheat or of the nature of the case which the facts disclose, entitled to plead that the measure of damages is simply the difference in price of a similar class and quantity of wheat in London on the date of the breach as compared with the sale price of the cargo contracted for? Or is the seller in breach liable for the losses incurred as between the buyer and the sub-purchasers from him, as described? It is manifest that the former measure would result in the original buyer being cast in losses of profit and in respect of claims for loss of profits for which he would not be adequately recouped. I do not think that this would be according to law. My principal reason is that I think that the two parties had actually provided for the very case of sub-sales, which has caused these extra losses. I think it right to cite the condition. [His Lordship read the conditions which are printed at p. 764 ante, and italicised them as there printed.] It appears to me to be out of the question under such a contract to maintain that the parties did not merely contemplate, but actually provide for the case of intermediate transactions taking place and, indeed, for the carrying forward of the obligations to meet such successive transactions. It may be mentioned that the sub-contracts in the present case, that is the contracts between the original buyer and subsequent buyers from him, were all in the same form, carrying forward the transaction in a similar way, applying, in short, the same London Corn Trade Association rules.

The case, therefore, is that the non-performance of this contract must be plainly known beforehand by both parties to be a non-performance of a contract in which intermediate sales may in the custom of business take place. I am of opinion that in such circumstances the damages due from a person in breach of such a contract ought to be measured so as to cover the losses occurring to the original contracting party by reason of not only his individual claims, but of the claims which he is required to meet in consequence of his inability in turn to hand over the shipping

A documents or deliver the cargo as contracted. I do not assent to the view which would prevent this result because it is not established that the original contractor and buyer cannot be said to have considered all such damage probable. To what extent in a contract of goods for future delivery the extent of damages is in contemplation of parties is always extremely doubtful. The main business fact is that they are thinking of the contract being performed, and not of its being not performed. But with regard to the latter, if their contract shows that there were instances or stages which made ensuing losses or damage a not unlikely result of the breach of the contract, then all such results must be reckoned to be within not only the scope of the contract, but the contemplation of parties as to its breach. Losses may result, of which there are instances in the case books, in which, for instance, the carrier delaying the supply of machinery could not be responsible for the loss of profits of the mill of which it was a part. [*Hadley v. Baxendale* (1).] But, on the other hand, if trade losses occur under a contract which points to a series of people dealing in the specific goods sold and entitled by contract to receive those goods, then it is in no way unreasonable to charge the seller declining to deliver the goods with the losses which have occurred to the string of dealers which the nature of the contract and of the case provided for supplying in turn.

D The present instance naturally fits in to the oft-quoted dicta in *Hadley v. Baxendale* (1). It appears to me that a sensible rule clearly covers the loss not only of the original buyer's profit which he has been prevented from earning, but also the loss sustained by him in being saddled with the claims of those to whom he had, in a contemplated course of trade, disposed of the goods. I think that *Hadley v. Baxendale* (1) as a decision results in such a rule. Nor do I think much is to be gained by an ultra analysis which divides ALDERSON, B.'s well-known sentence into two portions which are to be reckoned as necessarily and always two distinct and different cases. The sentence is this (9 Exch. at p. 354):

E

F "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

G These two things, arising naturally from or the probable result of the breach, need not be antithetically treated: they may run into each other and, indeed, be one. I think, for instance, that in this case, where the string of sales was to the knowledge of the breaker of the contract within the very scope of the conditions of his bargain, it was fairly and reasonably to be expected, not only, to use the language of the judgment, as "arising naturally, that is according to the usual course of things, from such breach," but also "such as may reasonably be supposed to have been in the contemplation of the parties at the time they made this bargain as the reasonable result of the breach of it." What has happened was not only a natural result—that damages might accumulate all along the line—but further, that that very damage was a reasonable contemplation of both the parties as the probable, by which I think is truly meant the not unlikely, result of the breach of the bargain.

I Your Lordships who have preceded me have referred to LORD ESHER's judgment in *Hammond & Co. v. Bussey* (2), and in elucidating the passage from *Hadley v. Baxendale* (1) which I have just cited, LORD ESHER says this (20 Q.B.D. at p. 89):

"In any case, it seems to me clear that the rule would apply to the case of a sub-contract which within the knowledge of the defendant was in the ordinary course of business sure to be made."

Again I would venture to read that as a sub-contract which, in the ordinary course of business, was not unlikely to be made, because I am quite sure that, speaking beforehand with regard to a speculation in goods for future delivery, it could

hardly be ever postulated that interim transfer and sale was a sure thing. It was one of the chances of the business, and it may have been a not unlikely thing, but it humbly appears to me to be sufficient in law that the chance of a not unlikely thing in the course of a business in a particular article for future delivery should be one of those chances which must be reckoned to have been within the contemplation of parties when sub-contracts or transfers were the matter of express agreement between them. The whole case may be said to be summed up in LORD ESHER's view (*ibid.* at p. 89):

"We must say, using our knowledge of business and affairs, what may reasonably be supposed to have been in the contemplation of the parties as the result of a breach of the contract under the circumstances."

In allusion to the judgment of the noble and learned Lord Chief Justice in this case, I would observe that I do not think that in such a contract people come to contemplate with any exactitude the particular probable results which would follow from a breach; say, that there would be a probable chance of re-selling at a profit or that the chance of that would be even with their not selling at a profit. What the parties to a contract such as this do is not to estimate that the chances will be one way or the other or will have this amount of probability or the other, but simply to contemplate that trade chances are not unlikely to occur, and to make a contract to cover such chances if any. In the present case it is established that the seller had not only (i) contracted in full view of intermediate sales being possibly made on a rising and profitable market but further (ii) was actually aware before he refused delivery that such sales had been made; (iii) Shortly before delivery was due the market had fallen, and he was aware of that also. To permit him to measure the damages applicable to a special article or a special cargo by the rate thus fallen would be to put a premium on breach of contract and be of the worst example.

LORD PHILLIMORE.—I concur. The rules of law as to the measure of damages may be conveniently stated as follows. Whether the action be one of tort or of contract, the defendant against whom judgment passes must pay all damages which naturally flow from his wrong action or his breach of contract. To these, in the case of breach of contract, the law superadds in appropriate cases those damages which, though they do not always or even usually flow from the breach of contract, are, at the time of making the contract, recognised by the parties as those which in the particular case may result from a failure. These are called damages in the contemplation of the parties, not because the parties contemplate a breach of contract, but because they recognise that a breach or failure is possible, and they reckon that these damages may flow from that breach. I designedly use the word "may." There may be cases where the word to be used might be "will," but there are also cases, and more common cases, where the word to use is "may."

If a seller of an article or a carrier who undertakes to deliver is informed that the purchaser or the future receiver can or will apply the article in one way only, the only special damages to which he would be liable in case of failure are those damages which would arise because the article is not there to meet that particular form of application. But if he knows that it could be applied in any one of two or three or more several ways, it may well be a term of his agreement that he undertakes to be responsible for the damages which flow from the article being ultimately destined for use in any one of these ways. It is all a question of contract. He may know that a particular use is, or particular uses are, intended, and yet he may decline to make himself responsible for any special damage arising from his failure. Notice will not do of itself, nor will knowledge. But if the tribunal which tries the case comes to the conclusion that he contracted to sell or to carry on terms that he should be responsible for damage which might accrue from his failure to provide for any one of certain objects, then he must be held liable. He

A has contracted on those terms, and there is an end of it. One caution I would add—it is not what the parties may contemplate or may have contemplated, but what the parties do contemplate or have contemplated as that which may happen.

When these principles come to be applied to the present case, it seems to me clear that in accordance with the very elaborate form of this contract, the sellers of this cargo of Australian wheat to be shipped within a particular period knew **B** that the buyers to whom they sold it might well sell it over again and make a profit on the re-sale, and that the sub-purchasers from them might sell it for a third time and make a further profit, and that indeed the string—to use the expression which we find in this case—might even continue further. This being so, the sellers must be taken to have consented to this state of things and thereby to have made themselves liable to pay to the buyers their profit on a re-sale. I think also that **C** they must be taken to have known that the buyers would be in a like position with regard to those to whom they had sold, and therefore be in addition entitled to protection from the sellers to the extent of this further liability. That decides the case. It is true that the cargo was originally not identified and might be a cargo of Australian wheat loaded on any ship capable of carrying the amount (7,000 tons) and sailing within the prescribed period. But it was part of the condition of sale **D** that by a particular date long before its arrival in this country, the cargo on board a particular ship should be designated; and though it is quite true that the sellers might have designated the *Indianic*, and the buyers might have had two or more such cargoes and might have designated some other ship to their buyers, it is also true that they might have designated this ship, as in fact they did. They were given permission to designate this ship, and consequently to identify the cargo **E** which they were going to get from the sellers with a cargo which they were going to sell over to their sub-buyers, as in fact they did.

It is, I think, desirable that we should express our opinions on the general question, because if it should be the case that we are putting a construction on these corn contracts which those who deal on the Corn Exchange did not anticipate, and if the somewhat heavy liabilities which we are thereby imposing have not been **F** intended to be created, there will be an opportunity to revise the form of contract. However, I could decide this case quite well on the special circumstances which it discloses. The letters sent by the brokers on behalf of the sellers on Jan. 27 to the buyers and to the sub-buyers who purchased from them, viz., Christopher Williams & Co., invited the recipients to agree that there was an identity of the cargo sold to the buyers with the cargo re-sold to the sub-buyers. As the arbit- **G** rators find:

“The object of this agreement was to secure that the cargo which (as provided by cl. 1 of the conditions on the back of the contract) would eventually be appropriated to the contract between [the sellers] and [the buyers] would be passed on by each buyer to his seller throughout the series.”

H No doubt, as SCRUTTON, L.J., observes, the only way in which the profit can be secured in such a case as this is to treat the several parties as on a string, each dealing in turn with a specific piece of property. It is, perhaps, unfortunate that the learned Lord Justice thought himself precluded by the form of the procedure from deciding the case on this ground. I see nothing in the way of form to prevent our so deciding. This is not an action but a reference to a commercial arbitration, **I** and there is nothing in the papers to show that the whole question of the relations between the parties was not open to the arbitrators. Indeed, the way in which they state the third of the buyers' contentions shows that this point was before them. Whether one calls it a working-out of the principal contract or a subsidiary contract made by the parties with a knowledge of the effect which it would have upon the first contract, does not seem to matter. Whatever may have been the motive of the sellers when they caused their brokers to write the letters of Jan. 27 they must abide by the consequences. They cannot complain if the identification has turned against them. I think that this appeal should succeed.

LORD BLANESBURGH.—The contract of Nov. 3, 1925, is on a printed form prepared by the London Corn Trade Association for use amongst its members. It is a form adaptable by appropriate variation of terms, not only to contracts for the sale of cargoes of wheat "for shipment," but also to contracts for the sale of such cargoes "on passage." Primarily, no doubt, the form is applicable to cargoes "for shipment"—to cargoes, that is to say, which, in the contract, only identified by description, are to be made specific by subsequent appropriation. But it is fitted also to define the terms of a contract where the cargo in question is specific at its date—where, for example, the carrying vessel is actually named, it being in that case provided by condition 1 that "no appropriation shall be deemed to be necessary." But be the contract of the one type or of the other it will be a contract for the sale of a cargo of wheat made specific before, and in most cases long before the due date of delivery. Under both types of contract the seller, by the conditions, may be in breach by failing either duly to furnish provisional invoices of the cargo by that time specific or to make a due tender of documents when the date of delivery arrives. But under a contract of the first type—that is to say, under such a contract as that of Nov. 3, 1925—the seller may further be in breach under condition 1 by failing to give notice of appropriation within the limits of time in that behalf prescribed. And this additional opportunity for breach is in the present case important. It lay at the root of, and probably induced, the strange procedure adopted by the sellers in January and February, 1926, on the result of which the issue between the parties to this appeal may properly and, as I think, very wholesomely be made to turn.

It is clear on the correspondence that the sellers in January, 1926, for reasons which unfortunately were opposed to any consideration for the then situation of the buyers, did determine that under their contract of Nov. 3 there was to be no delivery, and that their buyers were to be left content with payment of compensation for its breach. The sellers were at that time in full knowledge of the buyers' sub-contract with Williams, and, had their determination just referred to been consistent with any regard for the buyers' position thereunder, their course would have been clear. They would simply have intimated to the buyers that it was not their intention to appropriate any cargo to their own contract. Had they done so, the difficulties to the buyers created by the course the sellers actually took would never have emerged, because the buyers, being on such an intimation admittedly entitled to receive from the sellers by way of compensation the difference between the contract price and the then current market price of a cargo of wheat of the contract description, could, without further expense, have secured their profit under their sub-contract with Williams, not yet specific, by themselves going into the market and acquiring, for example, from Rank, who we know had one available, a cargo suitable for appropriation to its service. In these circumstances the question which I now desire to pose is whether the sellers, as a result of the alternative procedure which for highly interested reasons they then adopted, have succeeded in depriving the buyers of any right to that profit as an item in the compensation now exigible, when the fact is that, as the direct result of the sellers' final breach, that profit is now lost to the buyers.

The position of the sellers in January, 1926, is made very clear on the contracts and correspondence exhibited to the special case. If the conclusions and inferences properly deducible therefrom bear hardly on them they have only themselves to thank for that result. They were invited by the arbitrators to make any supplementary explanations they thought fit. They refused the invitation. They were content to be judged on the materials then available to the tribunal. And they must take the consequences of their reticence. By the contract of Nov. 3, 1925 (which I will now call contract A), the sellers on behalf of principals had, presumably in anticipation of a falling market, agreed with the buyers to sell the quantity of wheat in question for 52s. 3d. a quarter. On Nov. 21 the buyers by contract, which I will now call contract B, sub-sold the wheat to Williams for 56s. 9d. a quarter. On Nov. 25, by contract which I will now call C, the sellers

A on behalf of a second set of principals purchased the cargo from Williams at 59s. 3d. a quarter. The three contracts A, B, and C, except as to dates, names of parties and prices, are identical in form. Under each, the latest date of appropriation is Feb. 10, 1926. By the end of January the rising market of November had become a falling market. But on Jan. 29 it was still as high as 60s. a quarter. At that date accordingly the sellers' principals under contract A stood to be heavy
B losers because the last date for appropriation was near. On the other hand, if, before the delivery date, the market fell, as it was then rightly anticipated that it would, the sellers' second set of principals—buyers under contract C—stood to have paid much more for their wheat than they need have done. Accordingly, if the speculative interests, in temporary eclipse, of both sets of principals were to be accommodated it was desirable—in the interests of the A principals—if I may so
C describe them—that on a falling market their date of breach should be postponed as long as possible; while in the interests of the C principals it was desirable that while they should be left with their right to compensation intact for any failure by their sellers to tender documents under contract C it should be made impossible for these sellers to tender any documents which they as buyers could be required to accept. The action of the respondent sellers then taken was calculated to sub-
D serve both these desirable ends.

First, in order that the failure by the sellers to tender documents under contract A might automatically involve a similar failure on the part of the sellers under contract C, it was necessary that the three contracts A, B, and C should by agreement with the buyers and Williams be brought upon a string. This agree-
E ment the sellers asked for and obtained. Next, in order that there should be no breach by themselves of contract A on Feb. 10, it was necessary that an intimation of the appropriation of some cargo to its service should before that date be made. This was made possible by the purchase from Rank, on Jan. 29, of the *Indianic* cargo and the immediate intimation of its appropriation to the contract. But, thirdly, it being necessary that the sellers' A principals should not finally be chargeable with the purchase price of that cargo—for it was bought at the still high
F price of 60s. a quarter and their selling price was 52s. 3d. only—and it being equally necessary in the interests of the sellers' C principals that the documents of the cargo, so appropriated, should not be available for tender under contract C, the *Indianic* cargo having served its purpose of appropriation was at once re-sold by the sellers to Rank at 59s. 11½d. a quarter, with the result that the sellers' A
G principals having obtained the benefit of appropriation at a cost of ½d. a quarter, the *Indianic* cargo disappears into space. But not entirely so. Under contract A provisional invoices had to be sent to the buyers within seven days after arrival of shipping documents in Europe. Accordingly, presumably in order that there might not by default in this regard be any accelerated breach of contract A, the sellers on Feb. 26, 1926, sent to the buyers' brokers a provisional invoice of the cargo per *Indianic* although long before that date—on Jan. 29 to be precise—the sellers had
H ceased to have any interest whatever in that cargo.

Thus were the desired ends achieved. And fortune favoured the sellers' enterprise. The market did fall. The sellers' only apparent breach of contract A was in their failure to tender documents. If they are right in their contention as to the proper measure of the damages they must pay—and that contention has been upheld by the Court of Appeal—these damages have been reduced to a minimum.
I Further, a good tender of documents under contract C was never made. The sellers' own default, as was anticipated, made such a tender impossible. The result therefore speaks for itself so far as their C principals are concerned. No other conclusion than that it was the intended result is, I think, on the correspondence, possible. That the purchase from Rank of the *Indianic* cargo, its appropriation to contract A, its immediate re-sale to Rank, the service of the entirely unreal provisional invoice, were all intended to sub-serve the purposes indicated I cannot, in the absence of any other explanation, doubt. Any doubt I might otherwise have felt is surely resolved by the sellers' reply on Mar. 24, 1926, to a

letter from the buyers' solicitors asking why the *Indianic* documents had not been tendered. "The documents," they say, "were not tendered because they were never available under your clients' contract."

I am myself by no means satisfied that there was in this case any proper appropriation intimated within the true intent and meaning of the contract. I am quite satisfied that there was none within what I may call the honour of the contract. I have the gravest doubt also whether the so-called provisional invoice was, in view of the ownership of the *Indianic* cargo at its date, a provisional invoice within the meaning of contract A at all. Moreover, in view of the later action of the sellers and of their contention in these proceedings as to the proper measure of the damages they must pay, I am quite at a loss to understand how the sellers, in pressing the sub-buyer Williams to come upon the string, could telegraph to him on Jan. 29, as they did, "Prospect missing profit if you don't confirm definitely." But I will assume in favour of the sellers that they were entirely within their rights in all that they did in January and February, and that the only question is whether as a result of their action then they have escaped all liability in respect of the buyers' loss of profit on their sub-contract and have reduced the damages payable by them under contract A to the sum of 2s. a quarter. In my opinion they have not. Contract A imposed on the sellers the obligation to make the wheat cargo specific by appropriation on or before Feb. 10, but it left them free to compound with their buyers for breach in that respect by paying instead the difference between the contract price of the wheat and its then market price. On Jan. 29 the sellers, confronted with that alternative and in full knowledge of the buyers' sub-contract whose fortunes had at their own instance and request been definitely linked with those of contract A, elected for their own interested reasons to notify and did notify for contract A an appropriated cargo. With reference to such a situation I have myself no difficulty in holding that it must be taken to have been within contemplation at the contract date "assuming the parties to have applied their minds to the contingency," as Fry, L.J., puts it in *Hammond & Co. v. Bussey* (2), that in the event of default by the sellers subsequently to tender documents their liability to their buyers in damages would be in exact correspondence with what it would have been if the contract had been specific all through and if to the knowledge of the sellers the sub-contract had at the date of that contract then existed or been in contemplation. That in such a case the loss of profit in the sub-contract brought about by the seller's breach of the main contract is recoverable by the buyer in his damages cannot be doubted. Equally, to my mind, must it be taken to have been within the contemplation of the parties that such loss was recoverable in the circumstances of this case. As I read SCRUTTON, L.J.'s judgment he would have reached the same conclusion but for his view that the sellers' special default here involved the breach of a contract made at the time of appropriation and was not a breach of the original contract with which alone this arbitration is concerned. The special breach referred to may have been all that, but it was, I think, much more, as I have endeavoured to show. It was a default by the sellers in the carrying out of the original contract in such circumstance that for its full consequences it was within the contemplation of the parties to that contract that the party in default should be liable. Accordingly, with my noble friend LORD PHILLIMORE, I am of the opinion that this case may be decided on its special facts, and I am the more ready so to decide it because it is, in my judgment, wholesome that it should be made to appear that the action of the sellers in this matter has failed of its purpose. But I am in entire agreement also with the rest of your Lordships who have reached the same conclusion on the more general view of the case. I have nothing to add to the observations already made on that aspect of it. On both grounds my opinion is that the order of the Court of Appeal should be discharged and that of ROWLATT, J., be restored.

Appeal allowed.

Solicitors: Thomas Coope & Co.; *Conard*, Chance & Co.

[Reported by E. J. M. CHAPLIN, ESQ., Barrister-at-Law.]



